

# Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR

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Derogation clauses within human rights instruments are designed to limit the suspension of rights in times of emergency. This paper analyses the jurisprudence of the European Court of Human Rights (ECtHR) on derogation orders and the literature explaining the lack of a derogation clause in the African Charter on Human and Peoples Rights. Through this, it then develops a critical analysis on the concept of sovereignty in derogation orders, and how this affects the operation of international human rights organisations.

## Introduction

The European Convention on Human Rights (ECHR) contains a seemingly powerful derogation clause under Article 15 that allows states to suspend rights during a ‘time of war or other public emergency threatening the life of the nation.’ At the same time it limits the rights states can suspend - suspension of the prohibition on torture and slavery are forbidden – and sets up a seemingly rigorous procedure that allows the European Court of Human Rights (ECtHR) to scrutinise the restrictions on rights imposed by state parties under a derogation order. Authors critical of the Charter have cited the absence of a derogation clause from the ACHPR as evidence of its weak protection of human rights.<sup>1</sup>

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In fact both the functioning derogation regime under Article 15 of the ECHR and the lack of a derogation clause in the ACHPR highlight the problematic position international human rights organisations find themselves in relation to any investigation of a member state that has enacted emergency powers in its own jurisdiction. Emergency powers represent one of the most important aspects of sovereignty and for a supranational court to attempt to control the exercise of emergency powers potentially brings them into direct conflict with member states at a time of crisis. Both the ECHR and ACHPR suffer from this problem and the inclusion of a derogation clause in the former and the exclusion of a derogation clause in the latter is, as this paper argues, a reflection of differing conceptions of sovereignty within both instruments. In both cases, these differing conceptions of sovereignty go to the heart of why states agreed to be bound by a supranational human rights organisation. Firstly this paper analyses the theory of a derogation clause before going on to look at how the interplay between such a provision and conceptions of sovereignty impact a state's decision to join a supranational organisation. In the second and third sections of this paper, a comparative analysis of Article 15 of the ECHR and the literature surrounding the absence of a derogation clause in ACHPR is undertaken. A critical account is given of the operation of derogation clauses under Article 15 of the ECHR as much of the promise of a derogation clause is lacking in ECtHR's jurisprudence on Article 15. Yet in spite of this, it is shown that absence of a derogation clause along the lines of Article 15 within the ACHPR is broadly symptomatic of wider weakness with the Charter.

## The Theory behind Derogations

Derogation orders are rights limiting instruments that states can utilise in an emergency but unlike other qualification and limitation

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<sup>1</sup> For a discussion of the literature in this area see Obiora Chinedu Okafor, *The African Human Rights System: Activist Forces and International Institutions* (CUP, 2007) 63-75.

mechanisms contained in human rights treaties they are based on the facts of the stated emergency. There are two basic theoretical approaches to the categorisation of emergency powers.<sup>2</sup> Firstly there are the powers which impose a legislative mechanism to control and manage an emergency. For example the US Federal Government nationalised key industries during the Korean War when it appeared that production would be threatened by industrial action but the US Supreme Court ruled the action unconstitutional for bypassing legislative procedures set up to govern such actions.<sup>3</sup> Secondly, there are powers that create autonomous spheres of action separate to or beyond the law - the constitution of the fourth republic in France permitted the president to assume total, unfettered executive power in times of emergency.<sup>4</sup>

Derogations are closer to the first category in that they specifically legalise what would normally be illegal under a human rights treaty or constitutional system. Any violations of human rights that result from legislation passed under a derogation order are treated as the products of an emergency and only justified in so far as they are a response to that emergency. This differentiates them from treaty reservations or clawback clauses; the state would never have the power granted to it under a derogation clause, *but for* the presence of an emergency. They are also temporary and limited to a particular space and unlike clawback clauses and general limitations within international treaties, are not automatically applicable to all individuals in society.<sup>5</sup>

The presumption by all of these constraints is that a supranational body exists that can review the implementation of a derogation order and monitor substantive restrictions of rights made under the au-

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<sup>2</sup> Mark Neocleous, 'The problem with Normality: Taking Exception to 'Permanent Emergency'' (2006) 31 *Alternatives: Global, Local Political* 191.

<sup>3</sup> See *Youngstown Sheet and Tube Co. v Sawyer* 343 US 579 (1952).

<sup>4</sup> See Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1038.

<sup>5</sup> For a detailed differentiation between clawback and derogation clauses see Ebow Bondzie-Simpson, 'A Critique of the African Charter on Human and Peoples Rights' (1988) 31 *Harvard Law Journal* 643, 660.

thority of a derogation order. Some human rights instruments that have intentionally weak institutions contain derogation clauses that essentially only exist on paper. For example the Arab Charter on Human Rights, contains an emergency derogation clause which requires any restrictions on rights to be non-discriminatory and limited by the exigencies of the situation in manner similar to that of Article 15 of the ECHR.<sup>6</sup> However, the derogation clause in the Arab Charter only requires state parties to notify the Secretary General of the Arab League that a derogation from the Arab Charter has been made and does not refer to any scrutiny processes of the substance or procedure of any derogation order filed by state parties. Additionally absent an Arab Court of Human Rights it is unlikely that such a scrutiny process could meaningfully occur. Grossman in a study of the Declaration of States of Emergency under Article 27 of the American Charter on Human Rights noted that whilst scrutiny by the Inter-American Human Rights Commission of derogations had 'in some cases, curtailed gross and systematic violations of essential human rights' institutional reinforcement was required as 'international law cannot guarantee its own efficacy.'<sup>7</sup>

There are three basic arguments in favour of the proposition that derogation orders are rights protecting instruments. Firstly there is a general acknowledgement, common to a large number of constitutional or treaty based human rights systems, that the document should not turn into a 'suicide pact' due to interpretational inflexibility. This is a common theme in US constitutional jurisprudence where it is acknowledged that the executive branch may in times of war or national emergency grant itself exceptional powers.<sup>8</sup> In theory rights should be balanced in these systems and protected in a manner that accounts for changing circumstances, this balancing act in turn strengthens the power of a human rights instrument which

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<sup>6</sup> Article 4, Arab Charter on Human Rights 2004.

<sup>7</sup> Claudio Grossman, 'A Framework for the Examination of States of Emergency under the American Convention on Human Rights' (1986) 1 American University International Law Review Policy 35.

<sup>8</sup> For US supreme court cases with arguments to this effect see *Haig v Agee* 453 US 280 (1981) and *Kennedy v Mendoza-Martinez* 372 US 144, 160 (1963).

guarantees those rights. This has led critics to argue that the absence of a derogation clause in the ACHPR weakens the entire system as states facing an emergency are unlikely to seek the guidance of the African Human Rights Commission if they know that the Commission cannot recognise and accommodate their need to enter into a state of exception.<sup>9</sup>

Secondly there is an inherent circularity in any enunciation of positive rights, as the uses of certain rights, such as freedom of speech, can entail the restriction or destruction of the rights of others, as is often the case with hate speech. For example, Article 17 of the ECHR and Article 5 of the ICCPR prohibit the use of rights contained within both instruments to undermine or destroy the rights and freedoms of others.<sup>10</sup> What Article 17 of the ECHR attempts to do is acknowledge the need for limitations on the exercise of certain rights because of the negative impact that they can have upon the realisation of human rights for the whole of society.<sup>11</sup> Derogation powers under Article 15 are based on a similar principle. Respecting everyone's right to liberty equally when the state is under threat from military insurgencies or terrorist groups may weaken the liberty and security of the entire population. Thus a limited derogation order, in relation to the powers of arrest and detention, may be necessary in order to safeguard the entire community's right to liberty in the longer term. In this respect a derogation provision can help facilitate the realisation of rights to the entire community and preserve human rights in times of crisis.

Finally the application of emergency powers has sometimes led states to create alegal zones of operation where their actions are outside the law, rendering them neither 'legal' nor 'illegal.' These 'zones' are often created in response to a crisis defined by the state and the process of creating such zones can act as an affirmation of the sovereign's

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<sup>9</sup> See Charles Robinson Mandlenkosi Dlamini, 'Towards a regional protection of human rights in Africa: The African Charter of Human and Peoples Rights' (1991) 24 *Comparative and International Law Journal of Southern Africa* 189.

<sup>10</sup> See *Norwood v United Kingdom* (2004) 40 EHRR SE 111.

<sup>11</sup> *W.P. and Others v. Poland* Case No. 35222/04 (EHHR, 20 February 2007).

absolute power in relation to law making. This can however lead to governance in the state of 'exception' and as Agamben warned this can make states of exception permanent.<sup>12</sup> This means that derogation provisions are ultimately sovereignty limiting instruments as they check the power of a state to perpetually enhance their power in response to an emergency. Additionally regional human rights organisations, by operating at a supranational level; expressly override an individual sovereign's capacity as lawmaker both by ascribing norms of the rule of law that a state is expected to follow and by scrutinising the temporal and spatial reach of states of emergency that limit human rights.

It is this final reason that is often the most difficult for a supranational court to tackle as it explicitly involves reviewing the exercise of powers that in some ways defines the very notion of sovereignty itself. Schmitt in his 1922 work defined the sovereign as 'he who decides on the state of exception' inexorably intertwining the concept of declaring an emergency and the protection of sovereignty.<sup>13</sup> Agamben outlining the history of states of exception notes that it is 'important not to forget that the modern state of exception is a creation of the democratic state' and not a creature of absolutism.<sup>14</sup> Agamben's account is important as it focuses on the democratic nature of sovereignty in modern western states noting that in 'the state of exception has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government.'<sup>15</sup> Gross in an analysis of different legal models of emergency powers notes that one common trend among the different models of emergency powers is an attempt to separate states of

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<sup>12</sup>For an analysis see Stephen Humphreys, 'Legalizing lawlessness: on Giorgio Agamben's State of Exception' (2006) 17 *European Journal of International Law* 677.

<sup>13</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, University of Chicago Press, 2005) 5, 12.

<sup>14</sup> Giorgio Agamben, *State of Exception* (K Attell tr, University of Chicago Press, 2005) 5.

<sup>15</sup> *ibid* 14.

emergency from states of normalcy.<sup>16</sup> This makes emergency powers a vital component of the juridical identity of a sovereign power.

Arguments about sovereignty generally loom large in any explanation about why states enter into human rights regimes. Realist international relations theory posits that as states act in their own interests, their decision to enter into organisations is based on a reciprocal trade off in anticipation of other benefits from membership of an international organisation.<sup>17</sup> This theory is difficult to balance with the idea of derogation clauses, as the management of emergency powers at the supranational level is in many respects an inherent interference with sovereign powers at the national level. Therefore there is often a strong pressure for derogation clauses to accommodate the needs of states in order to preserve the implicit bargain states enter into when entering international organisations.

Realist explanations about why states agree to international human rights treaties have come in for some criticism and some scholars argue, in response to realist arguments, that states accede to international human rights organisations due to, what are termed 'ideational factors'. This is a process which Risse and Sikkink describe as 'liberal states using human rights norms to shape their identities as liberal states and then perceive adherence to those norms as 'identifying [a state] as a member of the community of liberal states.'<sup>18</sup> The desire to identify with liberal norms can, as Gross and Ní Aoláin argue, lead states to follow the 'notification and proclamation procedures' required by international human rights instruments but at the same time be prepared to deviate substantially from 'envisioned interna-

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<sup>16</sup> Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 *Yale Law Journal* 1011.

<sup>17</sup> The theoretical literature on realist theories is outlined by Neumayer who notes that the theory is weak as the considerations compelling state compliance are relatively weak. See Eric Neumayer, 'Do International Human Rights Treaties Improve respect for Human Rights?' (2005) 49 *Journal of Conflict Resolution* 925.

<sup>18</sup> Thomas Risse and Kathryn Sikkink, 'The socialization of international human rights norms into domestic practices' in Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (CUP, 1999) 8.

tional legal parameters.’<sup>19</sup> States are able to adopt these seeming double standards, Gross and Ní Aoláin note, in the knowledge that international organisations will be unwilling to explore the question of whether a state is justified in declaring a state of emergency in the first place, thus weakening the overall level of scrutiny around the exercise of derogation orders.

Ideational theories acknowledge the political realities of the way states act but in a similar manner to institutional theories of international relations, which focus on the framework and performance of institutions, tend to ignore the political dimensions of international organisations.<sup>20</sup> Institutional theorists tend to see organisations as passive agents that emerge through the course of international politics. For example Harold Koh in seeking to explain why nations cooperate with international human rights regimes noted that successful regimes are dependent on ‘transnational legal processes’ which occur once nations begin to interact and a ‘complex process... of international legal norms’ start to seep into different political processes.<sup>21</sup> However this interpretation downplays the political capacity of international organisations themselves which is in part acquired through their juridical actions, such as ruling on applications from individuals that states violated their human rights.<sup>22</sup> The extent to which states are willing to delegate their sovereignty to an international organisation, especially in the highly contentious area of derogation orders during a time of emergency, is to some extent dependent upon the acknowledgement of this political dimension of international organisations and the understanding that they may have to be subject to the authority of that organisation. This lies at the heart of

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<sup>19</sup> Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and in Practice* (CUP, 2006) 311.

<sup>20</sup> Kenneth W Abbott and Duncan Snidal, ‘Why States Act through Formal International Organizations’ (1998) 42 *The Journal of Conflict Resolution* 3.

<sup>21</sup> Harold Koh, ‘Transnational Legal Processes’ (1996) 75 *Nebraska Law Review* 181.

<sup>22</sup> See Laurence R Helfer, ‘Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean backlash against Human Rights regimes’ (2002) 102 *Columbia Law Review* 1832; Judith Goldstein and others, ‘Introduction: Legalization and World Politics’ (2000) 54 *International Organization* 385.

the politics of human rights: as Lefort argues as rights are applied and unfold they are dependent ‘upon a debate’ as to their ‘foundations and as to the legitimacy of what has been established.’<sup>23</sup> This applies both to the substance of rights and the mechanisms by which rights are protected.

Whilst derogation powers hold out the promise of being able to check the powers of states and prevent human rights abuses, in reality they are dependent on strong supranational institutional structures which in turn are dependent on states being willing to bestow strong legal frameworks to such organisations. This form of delegation is only possible when it is considered politically legitimate for a sovereign state to do so. What will be illustrated in the next two sections is how the presence or absence of a provision allowing state parties to derogate in times of emergency is a reflection of wider assumptions about sovereignty that states have when signing up to a human rights instrument.

### **Article 15 of the ECHR: Origins, Elements and Critique**

The ECHR is what Helfer and others term a legalised human rights regime, in that the ECtHR has the power to judicially review pieces of domestic legislation from its member states when an applicant claims that the legislation in question violates their human rights under the ECHR.<sup>24</sup> The reason states agreed to be bound by such a powerful organisational structure in part stems from the experience of Europe in the immediate aftermath of World War Two, where the majority of states had either escaped from Fascist rule or were at risk of Communist takeover and therefore when the ECHR was opened for signature in December 1950 many states were willing to be bound by a mechanism that had the potential to guarantee the per-

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<sup>23</sup> Claude Lefort, *Democracy and Political Theory* (David Macy tr, Polity Press, 1988) 40.

<sup>24</sup> Helfer (n 22).

petuation of liberal democracy.<sup>25</sup> This in part explains the willingness of states delegates when drafting the ECHR to include mechanisms that were specifically designed to check the potential erosion of liberal democracy and the growth totalitarianism, even though these mechanisms limited the operation of sovereign power. In a speech to the Consultative Assembly of the Council of Europe in 1949 the French Minister of Information Pierre-Henri Teitgen warned that ‘democracies do not become Nazi countries in one day’ but rather the totalitarianism crept in gradually as constitutional levers were progressively weakened making it ‘necessary to intervene before it is too late.’<sup>26</sup>

This meant that the ECtHR was envisioned specifically as an interventionist institution although the precise remit and powers of the Court was the subject of fierce debate among state delegates during the drafting process.<sup>27</sup> During the drafting process of the ECHR a derogation clause was first proposed by the delegate from the United Kingdom in February 1950 and whilst the original text was modified during subsequent sessions of drafting, the original components are much the same as they are today.<sup>28</sup> What is striking from an analysis of the *Travaux Préparatoires* is just how fleeting references to public emergencies are and how limited the discussion of the principle of derogation orders was in the preparatory commission and the consultative assembly on the drafting of the ECHR. There were strong references to the prevention of totalitarianism throughout the speeches of ministers from the Council of Europe and eventual agreement on the powers of the ECtHR was secured on the understanding that interference with state sovereignty by the Court would

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<sup>25</sup> See Andrew Moravcsik ‘The Origins of Human Rights Regimes Democratic Delegation in Postwar Europe’ (2000) 54 *International Organization* 217, 231.

<sup>26</sup> John Graham Merrills and Arthur Henry Robertson, *Human Rights in Europe: A study of the European Convention on Human Rights* (Manchester University Press, 1996) 4.

<sup>27</sup> Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP, 2010) 70.

<sup>28</sup> See *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights Volume III Committee of Experts 2 February – 10 March 1950* (Martinus Nijhoff, 1976).

be limited to instances where states had broken ‘fundamental, essential and restricted undertakings.’<sup>29</sup> Therefore the intention behind Article 15 can be inferred as being broadly to preserve human rights under a liberal democratic (or anti-totalitarian) political framework and to check the tendency of states to eradicate or eliminate rights in response to a public emergency.

The first substantive requirement for a derogation under Article 15 is that the state seeking a derogation order is in a ‘time of war’ or facing a ‘public emergency threatening the life of the nation.’<sup>30</sup> Dijk *et al.* note that the first part of this requirement - that the nation is ‘in a time of war’ - is relatively uncontroversial and no cases have been brought on this point.<sup>31</sup> Under Article 4 of the ICCPR war is not included as a ground for a derogation order because it was argued that as the UN was established with the object of preventing war, it would be wrong for the ICCPR to contain a mechanism that could assist in the waging of war.<sup>32</sup> In *The Greek Case* the ECtHR set up a four part test to determine threats to ‘the life of the nation.’<sup>33</sup> An emergency must be actual or imminent, it must affect the whole nation, the continuance of the life of the community must be compromised and the crisis must be ‘exceptional’ in that the restrictions ordinarily permitted by the Convention, through normal limitations are inadequate.

The changing nature of warfare has yet to be considered by the ECtHR and with the rise of perpetual low level states of war envisioned in policies such as the ‘the war on drugs’ arguably the nature of a ‘time of war’ as opposed to a time of peace has altered. The ‘war on terror’, the closest that there has been to a definitional problem to date, was treated as ‘a public emergency threatening the life of the

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<sup>29</sup> Bates (n 27) 73.

<sup>30</sup> ECHR Article 15(1).

<sup>31</sup> Pieter van Dijk and others, *Theory and practice of the European Convention on Human Rights* (Martinus Nijhoff Publishers, 1998).

<sup>32</sup> UN Doc. A/2929, ch 5.

<sup>33</sup> *The Greek Case* (1969) 12 YB 1.

nation.<sup>34</sup> Public emergencies must ‘constitute a threat to the organised life of the community of which the state is composed’. This does not prevent the normal functions of the state carrying on but must represent a significant conceptual or practical danger to justify a derogation order.<sup>35</sup> The ECtHR have been willing to give states a wide margin on this particular question and have been reluctant to query the assumptions of states in relation to the declaration of an emergency. Even in *A v UK*, where at the domestic stage of proceedings one of the Law Lords at the UK House of Lords was willing to question whether there was in fact a threat to the life of the nation - the ECtHR refused to explore this question stating that national authorities, due to their ‘continuous contact with the pressing needs of the moment’, made them better placed than the ECtHR to assess threats to the life of the nation.<sup>36</sup> In practice this allows the state an enormously wide discretion as to the circumstances necessary to declare an emergency and fulfil the first requirement of a derogation under Article 15.<sup>37</sup>

The second substantive requirement is that the emergency measures taken under the derogation must be strictly limited to the circumstances of the emergency. This often read as a proportionality test and both ECtHR and other international commentators support this interpretation.<sup>38</sup> The test used by the ECtHR is that the limitation of rights under an Article 15 must be only ‘to the extent strictly required by the exigencies of the situation.’ This requirement has been subject to a wide margin of appreciation by the ECtHR, and in

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<sup>34</sup> David Anderson and Jemima Stratford, ‘Joint Opinion: Proposed Derogation from Article 5 of the ECHR: Anti- Terrorism, Crime and Security Bill, Clauses 21-23’ (*JUSTICE*, 2001) <<http://www.justice.org.uk/images/pdfs/Joint%20Opinion.pdf>> accessed 6 June 2012.

<sup>35</sup> See *Lawless v Ireland* (No. 3) A. 3 (1961) 1 EHRR 15 for an outline.

<sup>36</sup> *A v UK* (2009) ECHR 3455/05 para 173.

<sup>37</sup> Elliot notes that the ECtHR is deferential to national courts in this area, treating them as an arm of the state. See Mark Elliot, ‘The “war on terror,” UK style: the detention and deportation of suspected terrorists’ (2010) 8 *International Journal of Constitutional Law* 131.

<sup>38</sup> See Jaime Oraá *Human Rights in States of Emergency in International Law* (Clarendon Press 1992).

*Brannigan* the Court was willing to conclude that emergency legislation that had been in force for over fifteen years fell within the exigencies of the situation.<sup>39</sup> States should expect to be subject to a stricter degree of scrutiny than that which is normally applied to their domestic law when they engage derogation clauses and the expectation is that in these cases the standard of proportionality will reflect international human rights standards rather than domestic administrative, legal or political concerns.<sup>40</sup> Ultimately even though the ECtHR is prepared to be highly critical the court will not substitute its own judgement for that of a state party unless it is shown to be necessary in the circumstances of an individual case.<sup>41</sup> This has been criticised by Dembour who argues that ECtHR judges have a misplaced faith in ‘long lived democracies’ such as the UK and are ‘unconsciously willing’ to give such states much greater latitude than states such as Turkey.<sup>42</sup> The ECtHR had also been willing to give states a wide margin of appreciation under Article 15 in relation to the weakening of administrative safeguards that protect certain rights, such as the procedures surrounding lawful arrest that safeguard rights under Article 5 of the ECHR.<sup>43</sup>

Finally the emergency measures engaged cannot be discriminatory. Under Article 4 of the ICCPR the suspension of rights in a time of emergency cannot result in discrimination solely on the grounds of race, colour, sex, language, religion or social origin. Similar language is not found in the text of Article 15 although following the UK House of Lords Judgment in *A v Home Secretary*, where the principle of discriminatory emergency powers was tested, it is clear that a derogation under Article 15 cannot violate the non-discrimination provisions of Article 14 of the ECHR.<sup>44</sup> The reasoning behind this

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<sup>39</sup> *Brannigan and McBride v UK* (1993) 17 EHRR 539.

<sup>40</sup> *Tan te Lam v Tai A Chau Detention Centre* (PC) [1997] AC 97 [111].

<sup>41</sup> *Klass and Ors v Germany*, 2 EHRR 214 (6 September 1978) sets up the presumption that unless evidence is shown to the contrary the state’s interpretation of the legislation in issue will be upheld.

<sup>42</sup> Marie-Bénédicte Dembour, *Who Believes in Human Right: Reflections on the European Convention* (CUP, 2006) 52.

<sup>43</sup> *ibid.*

<sup>44</sup> *A & Ors v Secretary of State for the Home Department* [2004] UKHL 56.

provision also has a wider application in that it is generally reasoned that a derogation order has to be compatible within the wider framework of Convention rights. In this respect a derogation order is not intended to be an abdication of the responsibilities of state parties under the Convention but rather a response to the circumstances of a given emergency.

There are two basic procedural requirements under Article 15. First signatory states are required to notify the Secretary General of the Council of Europe of any derogation order they have made and the reasons for such an order.<sup>45</sup> The reason for this requirement is to ensure that the Council has access to sufficient information in order to scrutinise the application of emergency powers.<sup>46</sup> It is possible for the ECtHR to interpret a breach of the procedural requirements of Article 15(3) as nullifying the derogation although that has yet to happen.<sup>47</sup> Secondly a component of the proportionality requirement is that the signatory state's derogation notification must specify the time limit and geographical scope of the proposed derogation. A state is not permitted to use derogation powers outside of their specified geographical scope or use these powers to deal with situations other than those specified in the derogation order.<sup>48</sup> These powers are far reaching and notionally enhance the capacity of the ECtHR to review derogation orders and domestic legislation justified by such orders.

The margin of appreciation given to member states in connection with Article 15 is wide and the ECtHR has not been prepared to intervene in relation to questions of fact. It has consistently maintained as it did in the *Aksoy* judgement that 'national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of

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<sup>45</sup> ECHR Article 15(3) .

<sup>46</sup> *Lawless v Ireland* App. No. 332/57 (1 July 1961).

<sup>47</sup> Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

<sup>48</sup> *Sakik And Others v Turkey* 23880/94; [1997] ECHR 95.

the derogations necessary to avert it.<sup>49</sup> Thus in spite of the notional strength of Article 15 the ECtHR remains deferential to the capacity of sovereign states. There are realist reasons for this as Dembor argues the reason that Article 15 exists in the form it does is precisely to provide ‘limits to governmental impulses to do away with the Convention’ in its entirety.<sup>50</sup> Yet derogation orders under Article 15 remain very much the tool of state governments as Gross and Ní Aoláin note the court has often been satisfied ‘with making a laconic mention of the [margin of appreciation] doctrine without further explanation of the way it was applied to the particular circumstances of the case’ which left open what the question of ‘effective supervision’ by the ECtHR actually means in practice.<sup>51</sup> Thus whilst the broad purpose of Article 15, the prevention of totalitarianism through creeping states of emergency, has been met, the promised supervisory role of the ECtHR contained in the text of Article 15 has not really materialised.

### The Absence of a derogation provision in the African Charter

Okere argued in her 1984 paper comparing the European and African human rights system that an institution such as the ECtHR would not work in ‘African States, still jealous of their newly acquired national sovereignty’.<sup>52</sup> Whilst Okere’s argument was framed in conditional terms – she argued that African states ‘had not yet come round to conceding to an international judicial organ’ on human rights matters - during debates over the creation of an African Court of Human Rights fifteen years later there was a desire among states to create a limited organisation which Mutua dismissed as be-

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<sup>49</sup> *Aksoy v. Turkey* (1997) 23 EHRR 553 [68].

<sup>50</sup> Dembour (n 42).

<sup>51</sup> Oren Gross and Fionnuala Ní Aoláin, ‘From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of European Convention on Human Rights’ (2003) 23 Human Rights Quarterly 625.

<sup>52</sup> B Obinna Okere, ‘The Protection of Human Rights in Africa and the African Charter of Human and Peoples Rights: A Comparative Analysis with the European and American Systems’ (1984) 6 Human Rights Quarterly 141, 158.

ing as useful as a ‘two legged stool.’<sup>53</sup> The African Commission on Human and Peoples Rights (‘the Commission’) had a much narrower powers than the ECtHR and a mandate that was aimed not at reviewing states legislation, but rather at providing a forum for consensually resolving disputes under the Charter and promoting human rights.<sup>54</sup> As Viljoen argues, the Commission was not deliberately created as a ‘weak’ institution but rather was an institution with a very open ended and unclear purpose.<sup>55</sup> Some criticism of the Commission has argued that it was little more than ‘window dressing’ and was specifically designed to preserve member state’s sovereignty by creating a very weak regime of human rights protection.<sup>56</sup> What is significant about the formation of the ACHPR was that unlike the ECHR, which was defined by a common commitment against totalitarianism, there was no comparable common political project among the states who drafted the Charter. As Kufor argues there are numerous different explanations for the Charter’s formation, such as the rise of personalist dictators in the 1970s, the promotion of human rights in US foreign policy and the growing strength of the OAU in dealing with human rights.<sup>57</sup> However none of these explanations was the equivalent of the political imperative provided by the struggle against totalitarianism which the states signing the ECHR had in common.

The historical provenance behind the absence of a derogation clause from the Charter is not entirely clear. Wessels notes that there was a substantial divergence of opinion at early conferences on the rule of law in Africa over the relative roles of the judiciary and executive

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<sup>53</sup> B Obinna Okere and Makau Mutua, ‘The African Human Rights Court: A Two-Legged Stool?’ (1999) 21 Human Rights Quarterly 342.

<sup>54</sup> See Jean Didier Boukongou, ‘The appeal of the Africa system for protecting human rights’ (2006) 6 African Human Rights Law Journal 260, 270.

<sup>55</sup> Frans Viljoen, *International Human Rights Law in Africa* (OUP, 2007) 310-312.

<sup>56</sup> Boukongou (n 54) 271.

<sup>57</sup> Kofi Oteng Kufor, *The African Human Rights System: Origin and Evolution* (Palgrave Macmillan, 2010).

which resulted in the exclusion of derogations from the Charter.<sup>58</sup> Early legal works analysing the Charter tend to describe the lack of a derogation clause as being a weakness. Umozurike in a 1983 analysis of the Charter noting the absence of a derogation clause and the absence of a court in the African Charter argued that it subscribed ‘to the consent theory’ of international human rights law which in the context of African states was a ‘commonsensical approach in a world of unequal political, economic and military powers.’<sup>59</sup> Meron noted in 1989 that there existed the potential for states to ‘infer that the ACHPR implicitly allows [them] to invoke the customary law exception of state of necessity to derogate from the rights enunciated in the Charter’ and expressed the hope that the then nascent Commission would be able to successfully prevent this from happening.<sup>60</sup>

The wider experience of the operation of emergency powers in African states was largely negative as they were often linked with wider acts of repression by autocratic governments. Within colonial states emergency powers and provisions were often used to repress independence movements, the British made extensive use of emergency powers in their fight against the Mau Mau in Kenya and declared an eight year state of emergency in the period prior to independence.<sup>61</sup> Two trends emerged from the exercise of domestic emergency powers in postcolonial states. Firstly some states often used emergency powers to execute wider social programs without consultation with political stakeholders or the wider population. In Egypt the military government declared a state of emergency in 1981 which has continued in various forms until 2006 and was only finally removed following the 2011 revolution. As Reza argues emergency powers have been used to suppress the political opposition, a category which has

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<sup>58</sup> Leon Wessels, ‘Derogation from human rights: A possible dispensation for Africa and southern Africa’ (2002) 27 South African Yearly Bulletin of International Law 120.

<sup>59</sup> U Oji Umozurike, ‘The African Charter on Human and Peoples Rights’ (1983) 77 The American Journal of International Law 902, 911.

<sup>60</sup> Theodor Meron, *Human Rights and Humanitarian Norms as Customary law* (Clarendon Press, 1989) 218-219.

<sup>61</sup> For more examples, see Denys C Holland, ‘Emergency Legislation in the Commonwealth’ (1960) 13 Current Legal Problems 148.

included both political parties and extremist Islamic groups, and in so doing has allowed ordinary courts to promote a more liberal agenda.<sup>62</sup> In Cameroon overlapping states of emergency allowed the progressive restriction of political space and the formation of opposition political parties.<sup>63</sup> This was a manifestation of Agamben's concern that the 'state of exception' would become the 'state of normalcy' as the sovereign's capacity to control the polity would be greatly enhanced in a permanent state of exception.<sup>64</sup>

Secondly emergency powers were often an effective method of 'producing' security and reasserting state power as they allow the executive to implement and manage acts of repression. For example in Nigeria military regimes in the 1980s and the 1990s used far reaching emergency powers to protect oil companies and in doing so frequently committed mass human rights violations.<sup>65</sup> Military and one party regimes were often prone to using military states of emergency to safeguard their power and during the 1980s half of all African states declared emergencies or governed using emergency powers, the OAU due to its stance on non-intervention in domestic affairs, did not monitor states of emergency and even when states were ICCPR signatories they often did not fulfil their reporting obligations.<sup>66</sup> Reporting performance by states on states of emergency enacted in line with Article 4 of the ICCPR did improve from the late 1990s onwards although there were still examples of wide ranging derogation orders being filed by states such as Sudan who were often engaged in wider patterns of repression.<sup>67</sup> Thus the lack of a derogation clause in the Charter needs to be seen in the wider context of the experience

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<sup>62</sup> Sadiq Reza, 'Endless Emergency: The Case of Egypt' (2007) 10 *New Criminal Law Review* 532.

<sup>63</sup> Charles Manga Fombad, 'Cameroon's Emergency Powers: A recipe for (un)constitutional Dictatorship' (2004) 48 *Journal of African Law* 62.

<sup>64</sup> Agamben (n 14).

<sup>65</sup> For a detailed study on this, see Scott Dolezal, 'The systematic failure to interpret Article IV of the International Covenant on Civil and Political Rights: is there a Public Emergency in Nigeria' (2000) 15 *American University International Law Review* 1163.

<sup>66</sup> John Hatchard, 'States of Siege/ Emergency in Africa' (1993) 37 *Journal of African Law* 104.

<sup>67</sup> Sudan in 2001; UN Doc A/57/40, Vol I.

of emergency powers within African states: as there was a strong correlation between the exercise of emergency powers and the removal of human rights.

There are three broad interpretations as of the broader legal significance of a lack a derogation clause in the ACHPR. Firstly it is sometimes argued that the absence of derogation clause is another example of the Charter's inherent legal weaknesses. As Mutua argues, the system under the Charter was designed to protect state interests because, as was shown above, derogation clauses could lead to enhanced scrutiny and curtailment of state power.<sup>68</sup> A variation of this argument is pursued by Gittleman who argued that Charter lacked a robust legal framework capable of balancing and protecting rights and elsewhere has gone further noting that the Charter is 'incapable of supplying even a scintilla of external restraint' upon governments.<sup>69</sup> This line of argumentation has been attacked by Okafor as being overstated noting that much of this criticism ignores the steps that the Commission has taken to overcome these weaknesses.<sup>70</sup> Yet as Sermet notes the contradictions presented by the absence of a derogation clause in the Charter are enormous as states are allowed to maintain their own domestic emergency clauses and derogate under Article 4 of the ICCPR, leading one to the conclusion that the absence of a derogation clause in the Charter is due to it being impossible for 'African states to keep [to] such a legal commitment.'<sup>71</sup>

A second, and more generous interpretation, is that the framers of the Charter wanted to encourage states not to use emergency powers, due to their historic legacy both in colonial and postcolonial societies, as a justification for suspending rights. The Commission in *Constitu-*

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<sup>68</sup> Okere and Mutua (n 53).

<sup>69</sup> Richard Gittleman, 'The Banjul Charter' in Claude E Welch Jr and Ronald I Meltzer (eds) *Human Rights and Development in Africa* (State University of New York Press, 1984); Richard Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 *Virginia Journal of International Law* 667.

<sup>70</sup> Okafor (n 1) 67-79.

<sup>71</sup> Laurent Sermet, 'The Absence of a Derogation Clause From the African Charter on Human and Peoples' Rights: A Critical Discussion' (2007) 7 *African Human Rights Law Journal* 142.

*tional Rights Project & Others v Nigeria* held that ‘in contrast to other international human rights instruments’ the Charter did not contain a derogation clause and therefore limitations of the rights and freedoms in the Charter could not ‘be justified by emergencies or special circumstances.’<sup>72</sup> A similar position on derogations is taken in the 2003 Principles and Guidelines on the Rights to Fair Trial and Legal Assistance in Africa, which was adopted by the Commission in 2003. As Manby notes this actually goes much further than the ECHR which allows for some provisions of the Right to a Fair Trial under Article 6 of the ECHR to be the subject of a derogation under Article 15.<sup>73</sup> Alternatively this argument can also be read as a symptom of the relative weakness of the Commission, as given that it lacked the supervisory powers of the ECtHR, it was probably easier to adopt a ‘bright line’ approach and try and set a clear principled position that rights could not be limited in an emergency.

The third and final argument centres around the role of clawback clauses which it is argued are used by states instead of derogation clauses. Clawback clauses are not emergency powers and are not formulated with reference to any specific state of affairs but they are often associated with emergency powers in the literature on the ACHPR as they operate as rights limiting mechanisms.<sup>74</sup> Clawback clauses are internal modifiers ‘that qualify rights and permit a state to restrict’ those rights ‘to the maximum extent permitted by domestic law’.<sup>75</sup> Unlike the qualification clauses in the text of the ECHR clawback clauses create legal spaces that are notionally outside of the

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<sup>72</sup> *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) paras 41 & 42.

<sup>73</sup> Bronwen Manby, Civil and Political Rights in the African Charter on Human and Peoples Rights: Articles 1 – 7’ in Malcolm Evans and Rachel Murray (eds) *The African Charter of Human Peoples’ Rights: The System in Practice 1986-2006* (CUP, 2008) 176.

<sup>74</sup> For associations between Clawback Clauses and Derogations, see Burns H Weston, Robin Ann Lukes and Kelly M Hnatt, ‘Regional Human Rights Regimes: Comparison and Appraisal’ (1987) 20 *Vanderbilt Journal of Transnational Law* 585.

<sup>75</sup> M Mutua, *The African human rights system: a critical evaluation*, 6, [http://www.hdr.undp.org/docs/publications/background\\_papers/MUTUA.pdf](http://www.hdr.undp.org/docs/publications/background_papers/MUTUA.pdf) (accessed 10 Jan 2012).

Commission's scope of review.<sup>76</sup> The ACHPR does subject some rights to limitations that are closer to qualifications, in a manner similar to the ECHR, but there are still a number of implicit restrictions and references to domestic law.<sup>77</sup> This roots rights within states, making them entities to be recognised and enforced within the confines of domestic legal systems. As clawback clauses apply to the whole population and are not subject to temporal or geographic limitations they significantly enhance the power of the executive in deciding the scope of rights limitations.<sup>78</sup> Sermet has argued that this weakens the ACHPR as there is a danger that a right that is subject to a clawback clause will be 'defined, implemented and applied [by a state party] in a manner that may deprive it of any real substance.'<sup>79</sup>

Despite the numerous criticisms of the derogation clauses the Commission has been relatively consistent in resisting attempts by states to use clawback clauses as surrogate derogation clauses. Article 60 and 61 of the ACHPR allow international instruments to be used to interpret substantive rights and rights limitations and this has been used by the Commission to hold that any limitations of rights must be in line with international law. For example in *Free Legal Assistance v Zaire*, it was held that a crisis in one part of Zaire was not sufficient justification to restrict the religious activities of Jehovah's Witnesses throughout the entire country. The Commission has also rejected any attempts by state parties to limit the applications of the ACHPR in response to an armed insurrection of civil war in their territory.<sup>80</sup> In *Amnesty International v Zambia*, the Commission held

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<sup>76</sup> *ibid.*

<sup>77</sup> For a good example see Article 6 of the ACHPR which states that 'Every individual shall have the right to liberty and to the security of his person' and specifically prohibits arbitrary arrest or detention whilst still deferring back to the provisions of national law.

<sup>78</sup> See Rachel Murray, *The African Commission on Human and People's Rights and International Law* (Hart Publishing, 2000).

<sup>79</sup> Sermet (n 71) 152.

<sup>80</sup> *Commission Nationale de Droits de l'Homme et des Liberties v Chad* Communication No. 74/92 (1995).

that limitations of rights through clawback clauses are not meant to give 'credence to violations'.<sup>81</sup>

The absence of a functional derogation clause was in part a reflection of the relatively weak structure of the African Human Rights Commission under the 1981 draft of the Charter which was arguably not designed to have as invasive a supervisory role as the ECtHR. The African Court of Human Rights which has been in operation since 2004 has notionally stronger powers of scrutiny than the Commission, although it still has significant structural problems. However in spite of the lack of a derogation clause in the Charter the Commission has been able to achieve some control over states who have sought to use their own domestic emergency laws to circumnavigate their duties under the Charter, thus allaying some of the concerns raised by Meron and others.<sup>82</sup>

## Conclusion

Derogation clauses have a difficult task as they are notionally required to regulate the actions of sovereign states at crucial points of political crisis. The presence or absence of derogation clauses within a human rights instrument can often be revealing about the different intentions the drafters of a human rights instrument had about the level of sovereignty they expected state parties to delegate to an international organisation. Commentary on the ACHPR's lack of a derogation clause has often argued that the Charter compares unfavourably with the ECHR's regime under Article 15.<sup>83</sup> However as argued above, this interpretation ignores the fact that there were different conceptions of emergencies and emergency powers in Africa and Europe that influenced the assumptions about emergency powers in the formation of regional human rights instruments.

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<sup>81</sup> *Amnesty International v Zambia* Communication No. 12/98 (2000).

<sup>82</sup> Meron (n 60).

<sup>83</sup> Sermet (n 71).

Additionally the comparative experience of the ECHR and the ACHPR presents a much more complex picture about the impact of a derogation clause. The African Commission, in spite of the lack of a derogation clause, has been able to resist some of the attempts made by state parties to circumnavigate the general prohibition in the Charter on suspending rights in response to an emergency. The inability of a state party to suspend rights during a time of emergency has not yet been a factor that has influenced a state party's withdrawal from the Charter, which as Dembour notes is part of the realist case for the inclusion of a derogation clause in the ECHR.<sup>84</sup> Equally in some respects the protection of some rights is arguably greater under the ACHPR than the ECHR because rights contained in both documents, such as the right to a fair trial, are immune from derogation under the ACHPR but amenable to derogation under the ECHR. Although this entire comparative exercise comes with significant qualifications, as the ACHPR has much weaker institutions than ECHR and the system of clawback clauses still allows for many other limitations of substantial rights, it nevertheless illustrates that the absence of a derogation clause from a human rights instrument does not in and of itself equate to substantially weaker rights protection.<sup>85</sup>

Rather the presence of a derogation clause can be read in a Leftorian sense as a reflection of the debates around the political legitimacy of rights that underpins different human rights instruments.<sup>86</sup> The key factor behind the absence of derogation clause in one instrument and the presence of a derogation clause in the other instrument is the overriding commitment behind the ECHR to preventing totalitarianism – to which there is no real equivalent in the ACHPR. The drafters of the ECHR envisaged the Convention as an anti-totalitarian instrument and were able to legitimise a notionally strong institu-

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<sup>84</sup> Dembour (n 42).

<sup>85</sup> Naldi outlines how clawback clauses weaken rights protection: Gino J Naldi, 'Limitation of Rights under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights' (2001) 17 *South African Journal on Human Rights* 109.

<sup>86</sup> Lefort (n 23).

tional framework as a result. Whereas the ACHPR had a much more limited institutional framework and the precise level of sovereign delegation to its institutions was much more opaque. Whilst the Commission has maintained that emergency powers can never be a justification for limiting rights under the Charter, reflecting the broader experience of emergency clauses in African states, the absence of a derogation clause still highlights the relative weakness of the institutions under the ACHPR.

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