

# The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion

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## Summary

*Unlike other regional instruments of a general nature protecting human rights (the European Convention and the American Convention) and the International Covenant on Civil and Political Rights, the African Charter contains no clause on the derogation of human rights. This absence must be contrasted with the fact that most African constitutions contain such a clause and that African states frequently declare states of emergency. This deviation from the norm raises several questions that form the subject of this article. Should the limitation clause be considered to offer equivalent, or even a superior, protection to the derogation clause? What is then the specific scope of application of the derogation clause? Must the absence of a derogation clause be interpreted as being more or less favourable for the protection of human rights? What is the position of the African Commission? How does one reconcile international agreements that contain a derogation clause and the African Charter? Two arguments will be presented: one which favours a derogation clause and one which does not.*

## 1 Introduction

The African Charter on Human and Peoples' Rights (African Charter) contains no clause on the derogation of human rights in the event of

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states of emergencies.<sup>1</sup> Such an absence is not common in international instruments, but it is not unique. Let us consider three examples, dating from before and after the adoption of the African Charter. The Universal Declaration of Human Rights (Universal Declaration) does not provide for the derogation of human rights. The International Covenant on Economic, Social and Cultural Rights (CESCR) of 1966 mentions the term 'derogation' only indirectly,<sup>2</sup> in order to demand in substance that states do not propose lesser protection in their internal laws than that which is recognised by the Covenant at the international level. This example is interesting because the International Covenant on Civil and Political Rights (CCPR), adopted on the same day, contains an explicit derogation clause.<sup>3</sup> The International Convention on the Rights of the Child (CRC) of 1989 does not contain a derogation clause. Its article 38 specifies a legal framework in the event of armed conflict. It refers to international humanitarian law applicable to member states, which protection extends to children. The concept is original, implying that the legal protection of children's rights is ensured, not by CRC itself, but by humanitarian standards recognised elsewhere by member states.

There are numerous and significant examples of international instruments that contain an express derogation clause, such as article 15 of the European Convention on Human Rights (European Convention), article 4 of CCPR and article 27 of the American Convention on Human Rights (American Convention). On the national level, constitutions often contain clauses allowing for the derogation of rights. The Constitution of the Republic of South Africa (1996) recognises, in article 37, the constitutional conditions of a state of emergency, illustrated by a schematic table of rights not subject to derogation. All these considerations reinforce the idea that a period of emergency, whatever its causes, is not an occasion to ignore the law, but a legitimate cause to decrease the level of legal protection. This decrease is expressed in two ways: on the one hand, by a brief disruption of the normal organisation of powers in favour of the executive and administrative authority, civil

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<sup>1</sup> F Ougergouz 'L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général' (1994) *RGDIP* 289-336; R Ergéc *Les droits de l'homme à l'épreuve des exceptional circumstances. Etude de l'article 15 de la Convention européenne des droits de l'homme* (1987). See also F Ougergouz *La Charte africaine des droits de l'homme et des peuples. Une approche juridique des droits de l'homme entre tradition et modernité* (1993) 479; V Eteka *La Charte africaine des droits de l'homme et des peuples* (1996) 477.

<sup>2</sup> Art 5(2) CESCR.

<sup>3</sup> Art 4 CCPR.

or military, which has the effect of validating measures otherwise illegal<sup>4</sup> and, on the other, by a reduction of the rights and civil liberties normally recognised in accordance with constitutional and international law.

Why, under these conditions, does the African Charter omit a derogation clause? On a continent unfortunately characterised by an excess of conflict, is this omission a diplomatic paradox, irony or oversight? It is well known that the transition of the African continent towards democracy is delicate and that many new states have not escaped authoritarian regimes, both civil and military. The African Commission on Human and Peoples' Rights (African Commission) has, moreover, 'encourage[d] states to relegate the era of military interventions in government to the past in the interest of the African image, progress and development, and for the creation of an environment in which human rights values may flourish'.<sup>5</sup> Does the absence of a derogation clause imply that it would be impossible for African states to keep such a legal commitment?

The absence of a derogation clause forms a paradox difficult to resolve, for three (complementary) reasons. In the first place, numerous African constitutions contain derogation clauses to become operational in cases of exceptional circumstances, crisis, war or their imminence. This leads one to deduce a common African constitutional standard, not reflected in the African Charter. Secondly, the paradox is continued in so far as many African states are party to both the Charter and CCPR, each requiring different legal commitments from states, since the former has no derogation clause. Supposing a state experiences a serious crisis, such as civil war, would its actions be justified under article 4 of CCPR or with regard to the African Charter? It is obvious that article 30(4) of the Vienna Convention on the Law of Treaties, which attempts to regulate the order of priority among various treaties concerning the same matter, does not resolve the question of this conflict of standards. In fact, the particular nature of treaties concerning the 'protection of the human person'<sup>6</sup> excludes — in my opinion — article 30(4) from being applied. It seems to me that the conflict of standards may be

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<sup>4</sup> *Conseil d'Etat français (CE français), Assemblée, Sieur Laugier, Recueil 161*: automatically suspending an officer, decided by a circular dated 27 August 1944, goes against the principle according to which only a text having the force of law could create a new position. The circular is, however, justified by the 'exceptional circumstances of the time and in particular the fact that the government had not been able to meet and that it was impossible to legislate by edict to deal with the situation temporarily'. See also *Tribunal des conflits français, 27 March 1952; Dame de la Murette, Recueil 626*: The infringement of civil liberties committed in a period of exceptional circumstances cannot be described as such and is regarded as an administrative decision, within the competence of an administrative judge.

<sup>5</sup> African Commission, 25 October to 3 November 1994, Resolution on the military ACHPR/Res 10(XVI)94.

<sup>6</sup> Art 60(5) Vienna Convention on the Law of Treaties.

resolved by determining the legal standard most favourable for the protection of human rights. Or, in other words, which legal situation — the absence or the presence of the derogation clause — is most favourable for the protection of human rights? Finally, article 4(1) of CCPR mentions that the state has the prerogative of derogation, provided that the measures taken 'are not incompatible with other obligations imposed by international law'. A flagrant contradiction exists between the universal text and the regional text. It is thus debatable whether article 4 of CCPR could be applied by a state since the African Charter makes no provision for such a clause.

In order to initiate a critical discussion, I will consider the notion of a clause or regulation on the derogation of fundamental rights first. Thereafter, I will make the following proposals: I will put forward arguments in favour of the jurisprudential inclusion of such a clause in the African Charter. As a consequence or in parallel, there could be added to this clause, also by jurisprudential means, a list of rights which cannot be derogated from. However, the opposite notion must also be presented: Even though no derogation clause is included in the African Charter, this absence is nevertheless not devoid of relevance for the protection of human rights.

## 2 The derogation clause: Related notions; its contents

The recent drafting of Protocol 13 to the European Convention makes it possible, in my opinion, to distinguish between the notions of derogation, limitation and reservation in relation to human rights.<sup>7</sup> The Protocol bears the evocative title of 'abolition of the death penalty under all circumstances'. It follows on Protocol 6 to the European Convention (1983), also dealing with the death penalty, which decreed that the death penalty was abolished, but could be applied 'for acts committed in times of war or imminent danger of war', which, in turn, follows on article 2(1) of the European Convention, which recognises that the penalty inflicted in carrying out capital punishment pronounced by a tribunal, in the event of the offence punishable by this penalty, constitutes a legal attack on the right to life. In other words, Protocol 6 repealed article 2(1) of the European Convention, except in cases of states that had not ratified it.<sup>8</sup> Three characteristics define the abolition of the death penalty in Protocol 13. No limit or restriction may be placed on the right not to be subjected to the death penalty. That is the sole difference between it and Protocol 6, which does not exclude

<sup>7</sup> *Bulletin d'information sur les droits de l'homme*, Conseil de l'Europe No 55, November 2001/February 2002 50-51.

<sup>8</sup> On 30 June 2003, these were Armenia, Russia, Serbia-Montenegro and Turkey.

the possibility of resorting to the death penalty in the case of war or imminent danger of war.

It is in the nature of human rights that, except in exceptional circumstances, rights are accompanied by limitations. These limitations take their justification from the collective or social effect of the protection of fundamental rights. The text of a treaty or convention sometimes defines guiding principles regarding the limitation of rights. Thus, article 27(2) of the African Charter specifies, in a general limitations clause, that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. A similar clause is found in article 30 of the American Convention entitled 'Range of restrictions'. To a general limitations clause may be added limitations specific to the right under consideration.<sup>9</sup> Certain rights that concern the dignity of the individual cannot be limited, and as their purpose is social harmony, they are exempt from the idea that rights are not limitless. It is in this sense that one must interpret the ban on any limitation or restriction on the right not to be subjected to torture and any other cruel, inhuman or degrading penalty or treatment.<sup>10</sup> The same applies, therefore, to Protocol 13, which deals with the abolition of the death penalty, which is a form of inhuman treatment. Moreover, the text also declares that the abolition of the death penalty is not subject to any derogation, even in the event of war. Finally, this right cannot be the subject of any reservations. In other words, a state that ratifies the text cannot choose which measures it intends adhering to and which it rejects. A clause not liable to reservation is thus binding in its entirety.

The difficulty arises from the fact that various definitions dealing with the limitation or restriction of derogation and reservation of human rights overlap. Thus, the fact that a right is given a limitation does not mean that it cannot constitute a non-derogable right. Let us take the example of the right to equality and non-discrimination in the South African Constitution.<sup>11</sup> Article 9(2) establishes a list of grounds on the basis of which no measure of discrimination is allowed. By defi-

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<sup>9</sup> Thus, art 15 of the South African Constitution is concerned with limitations specific to the exercise of religious freedom, to which is added the general clause on the limitation of rights, to which art 36 refers.

<sup>10</sup> Art 2(2) UN Convention Against Torture, 1984.

<sup>11</sup> The overlap of derogation and limitation can also be illustrated by Protocol 6 (P6) of the European Convention. According to art 2, it was possible to limit the range of the ban of the death penalty, in the case of a crime committed in a time of war or imminent danger of war, whereas no derogation of this right was authorised in accordance with art 15 of the European Convention, applicable in the 'event of war or other public danger threatening the life of the nation'. In other words, the restriction permitted what the clause on special derogation forbade. This contradiction is lifted if one considers that P6 applies to war as a motive of limitation of the right and art 15 applies to war as a condition of application. In other words again, P6 defined a relative right in exceptional circumstances and an absolute right in normal circumstances.

dition, this list, which is neither exhaustive nor definitive, does not exclude the existence of measures adopted on the basis of grounds not explicitly stated. It must be emphasised that the Constitution enumerates, with this list, a series of grounds hierarchically more important. In the event of a state of emergency,<sup>12</sup> some of these grounds may never serve as the basis of discriminatory measures. These are race, colour, ethnic or social origin, sex, religion and language. Conversely, therefore, still in exceptional circumstances, the principle of equality can be derogated on the following grounds: gender, pregnancy, marital status, sexual orientation, age, disability, conscience, belief, culture and birth. A non-derogable right can be understood, but not necessarily described, from the point of view of *jus cogens*. The right not to be subjected to any torture, which has no derogation, no limitation and no reservation, falls in the domain of *jus cogens*.<sup>13</sup> On the supposition that the list of non-derogable rights, established by article 4(2) of CCPR, concerns mandatory standards of international law, other regulations taken from international humanitarian law must be added to it, such as the ban on the taking of hostages or the arbitrary deprivation of freedom.

Moreover, it is possible for the derogation clause to be the subject of a reservation. The reservation of France, at the time of its ratification of the European Convention in 1974, is an example of this. France sought, and still seeks (since it has not been withdrawn or abrogated) to achieve the following purpose: on the one hand, to make it known that the conditions for the implementation of the different national systems of derogation of rights must be understood to be in compliance with article 15 of the European Convention and, on the other hand, to rule that the exorbitant prerogatives bestowed on the President of the French Republic, on the basis of one of these systems of derogation, comply with article 15 of the European Convention, despite a considerable difference in terminology.<sup>14</sup>

Finally, to further simplify these different notions, the following table can be drawn up:

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<sup>12</sup> Art 37.

<sup>13</sup> International Criminal Tribunal for ex-Yugoslavia, 10 December 1998, *Furundzija* para 144 and ECHR, GC, 21 November 2001, *Al Adsani v Royaume-Uni* para 61.

<sup>14</sup> Art 15 of the European Convention states that derogation is possible in 'the strict measure demanded by the situation', while the text of art 16 of the French Constitution (1958) makes provision for the President of the French Republic to 'take the measures demanded by the circumstances'.

Level of protection	Highest level of protection	Intermediary level of protection	Protection denied
Theory of the limitation of human rights	Right not subject to limitation (eg ban on torture, article 2(2) UN Convention against Torture, 1984)	Conditional right (namely all rights not part of non-relativist rights)	Right is the subject of a reservation and not of an interpretive declaration
Theory of the derogation of human rights	Right not subject to derogation (article 4 of CCPR: the right to life, ban on torture, the ban on slavery and bondage, ban on imprisonment for debt, non-retroactivity of the penal law, the right to be recognised as a person before the law and right to freedom of opinion)	All other rights consequently subject to derogation	Right is the subject of a reservation and not of an interpretive declaration
Theory of the reservation of human rights	Right not subject to reservation or reservation declared invalid for being contrary to human rights principles	Right partially reserved	Right is the subject of a reservation and not of an interpretive declaration

Does the classification of human rights — according to their level of protection and according to the overlapping of the hypotheses presented — give rise to a normative hierarchy? At the highest level, rights are not subject to reservation, derogation and limitation. At the lowest level, apart from reserved rights, partially reserved rights, derogable and limited rights, rights are subject to reservation, derogation and limitation. Between these two extremes, the classification is more delicate. Let us propose the following classification: relative non-derogable rights and relative derogable rights. Rather than evoking a normative hierarchy of human rights, with reference to *jus cogens*, it is the difference in nature between rights and their subsequent level of protection that is the pertinent criterion for the classification of human rights. Schematically, the following table can be drawn up:

<b>Hierarchy of protection granted</b>
Right not subject to reservation, derogation and limitation
Right non-derogable, but relative
Right derogable and relative
Right partially reserved, derogable and relative
Right reserved

When established by different treaty texts, the system of derogation meets a certain number of conditions before its implementation. In this regard, the General Comment on article 4 of CCPR, issued by the Committee on Human Rights, deserves attention as it defines the doctrine defining the system of derogation.<sup>15</sup>

The structure common to the clauses of derogation correspond, I believe, to the following three characteristics: First of all, an exceptional public danger that threatens the existence of the nation<sup>16</sup> or a war or other public danger threatening the life of the nation<sup>17</sup> or a war or any other crisis situation that threatens the independence or security of a state<sup>18</sup> must exist. One must consider that any armed conflict, internal or international, such as defined by international humanitarian law, constitutes a valid cause to have recourse to the derogation clause. In such a case, international humanitarian law is added to the operation of the derogation clause. It is a threat to the independence of the state or to the existence of the nation that seems to trigger its implementation and, as the clause infringes on the normal course of human rights, it must be understood restrictively. This is because a natural catastrophe that does not threaten the existence of the nation does not justify recourse to the derogation clause. In the first instance, the state is the judge of the need to resort to this clause, but it must define the necessity of doing so. It is not merely a question of authorisation; rather it is for the Committee or the Court to decide whether this recourse is justified. Numerous examples are cited of instances when the invocation of this clause was not justified.<sup>19</sup> This means that the fact of the existence of exceptional circumstances may be legally challenged.

Next, the state may suspend obligations it has contracted in order to confront such known danger. However, this does not mean that the

<sup>15</sup> Committee on Human Rights, 24 July 2001, General Comment 29 (States of Emergency) (Article 4) (CCPR/C/21/Rev 1/Add11). It follows on a previous general comment, very much shorter, made 20 years earlier.

<sup>16</sup> Art 4 CCPR.

<sup>17</sup> Art 15 European Convention.

<sup>18</sup> Art 27 CADH.

<sup>19</sup> See General Comment 29 para 1.

rights in the Covenant are nullified. In the first place, certain rights exist for which no derogation is possible. The inviolability of the law thus ensures legal permanence. Next come all the other derogable human rights. The setting aside of these rights is not a *fait accompli*. It must be proven that their suspension is justified, on a case-by-case basis in the event of contention, as it must be proven that the derogable measure was introduced in strict proportion to that which is demanded by the situation. Here, the reference to the principle of proportionality is common to derogation and restriction. In practice, this will ensure that no provision of CCPR, however validly derogated from, will be entirely inapplicable.<sup>20</sup> This interpretation of the Committee is supported by the text of article 4(1) of CCPR, which indicates that the measures taken within the context of the suspension of rights cannot result in discrimination solely on the grounds of race, colour, sex, language, religion or social origin. In other words, the lowering of legal protection as a result of derogable rights cannot bring about discrimination on these grounds. This vigilance of the law, not its sedation, is shared by the classic principles of French administrative law.<sup>21</sup>

Finally, the recourse to derogation rests upon a necessary formality.<sup>22</sup> The state must give notice of the recourse, specify the clauses to which derogation has been applied and give grounds for the derogation. A similar notification is made at the end of the period.

If one looks at the substance of these three conditions, it can be concluded that the system of derogation of human rights meets the following four conditions: necessity, proportionality, inviolability and temporality. What is meant by these terms? The necessity of the derogation implies that only exceptional circumstances can justify the transition to a state of emergency or exception. Consequently, the invocation of this situation by the state allows it to control the reality of the situation, the justification of the necessity of the derogation. Proportionality means that the derogation measures must serve the purpose of protecting public order in exceptional circumstances while recognising civil liberties. Again, control over the proportionality of these measures results. Inviolability introduces an idea of a division of human rights into those, the protection whereof cannot be affected by exceptional circumstances and the others that may be derogated. Finally, the temporary nature of the operation of the derogation clause, besides limiting the declaration, the entry into force and the duration of the state of emergency, brings about the following consequence: While it is inevitable that a time of crisis lowers the threshold of protection of

<sup>20</sup> General Comment 29 para 4.

<sup>21</sup> *CE français*, 28 June 1918, *Heyriès*, *Recueil Lebon* 651: 'The President of the Republic must ensure that at all times the public services instituted by laws and regulations are able to function and that difficulties resulting from war do not paralyse their performance.'

<sup>22</sup> Art 4(3) CCPR.

fundamental rights, should the legal situation, stabilised and validated at this time of crisis, be perpetuated once it has ended? Nothing justifies the maintenance of the lowering of the threshold once the circumstances that justified the crisis have ceased to exist. This is the meaning of French administrative jurisprudence. In *Sieur Laugier*,<sup>23</sup> it is found that the measure of automatic transfer to reserve duty, taken on the basis of a legal statutory circular by virtue of exceptional circumstances, must cease to be applied on the day when an authority with legislative power is capable of exercising this power. When exceptional circumstances cease to apply, the party concerned must logically be given back the rights he previously held and must be given the right to contest the derogation measures to which he was subjected (in this sense, see the solution of *Sieur Laugier*).<sup>24</sup> We turn to the reasons that militate in favour of the inclusion of a system of derogation in the African Charter.

### **3 Arguments in favour of the inclusion of a jurisprudential derogation clause in the African Charter**

Is the absence of a derogation clause not disadvantageous to the protection of human rights? If a plea can be made for the opposite opinion, which seems to have the implicit support of the African Commission, it is on the grounds that, to equate restriction and derogation would lead to raising the level of the protection of human rights: the control of restriction, for whatever period, normal or exceptional, would at least be as advantageous as the control carried out in the case of exceptional circumstances. The strength of the argument has to be taken into account. Must one not conclude that the level of protection of rights is always more extensive due to restriction in a normal period than it is in a period of exceptional circumstances within the context of a system of derogation? Let us nevertheless consider the following three reasons for supporting the opposite point of view.

The first reason stems from the interpretation by the African Commission, of the absence of a derogation clause. Although not well developed, to my knowledge, the interpretation has given rise to jurisprudence sufficiently established to draw lessons from it. Two

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<sup>23</sup> *CE français, Assemblée, Sieur Laugier, Recueil 161.*

<sup>24</sup> *CE français, 28 June 1918, Heyriès, Recueil 651:* In deciding to suspend temporarily the rule of communicating a file — in the case of the dismissal of an official — with the option of an appeal, after the cessation of hostilities. For a revision of the decisions taken, the President of the Republic was not guilty of an abuse of power.

cases must be mentioned, respectively involving Nigeria and Sudan.<sup>25</sup> The guiding principle of jurisprudence is the substitution of the absence of the derogation clause a limitation of rights. In the Nigerian case, it is said:

In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.

The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.

In the Sudanese case, it is added that the absence of the derogation clause in the African Charter can be explained on the grounds that the restriction of fundamental rights is not a solution to national problems: The legitimate exercise of human rights does not present any danger to a democratic government that applies the rule of law:

The Commission has established the principle that where it is necessary to restrict rights, the restriction should be as minimal as possible and not undermine fundamental rights guaranteed under international law.

The solution presented by the African Commission is logical and legally sound: The derogation clause is considered as a sub-clause implied by the general clause on the restriction of human rights. Drawing the necessary conclusions, the Commission makes the operation of the derogation de facto, rather than legal, under the usual conditions for the operation of restriction: restrictive interpretation, necessity, proportionality and infringement of the substance of the right or rights. Thus, the Commission emphasises a rationale common to the notions of restriction and derogation: Because of the suspicion both notions arouse, legal protection can never be wholly set aside, but merely postponed, whether it be in the context of restriction or derogation. One can share the idea that, by comparison, the legal nature of a reservation is very different from that apparently common to restriction and derogation, since the exclusion of any legal protection stems from a valid reservation.<sup>26</sup>

There are, however, limits to the absolute equation of restriction and derogation. One can take into account that, whereas it is permissible to restrict to the greatest extent possible all kinds of infringements upon

<sup>25</sup> *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) paras 41 & 42; *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 80 (reference made to *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995)).

<sup>26</sup> G Cohen-Jonathan 'Les réserves dans les traités institutionnels relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux' (1996) *RGDIP* 915-949.

human rights, the specificity of the derogation must be emphasised. Above it has been shown that the substance of the system of derogation rests on four elements: necessity, proportionality, inviolability and temporality. Let us consider inviolability. Is there any mention in the jurisprudence of the African Commission of a list of rights not capable of derogation? No such jurisprudence exists, to my knowledge, which establishes a list of non-derogable rights. Would it not be more convincing, and indeed more correct legally, to draw up a list of rights not subject to derogation?<sup>27</sup> What about guarantees attached to the temporary nature of the system of derogation? By equating the system of derogation with that of restriction, the African Commission indicates its desire to create its own interpretation. Despite their similarities, the system of derogation and the system of restriction of human rights are not identical. The absence of a derogation clause in the African Charter must therefore be interpreted as a deficiency, as the system of derogation brings with it specific guarantees of protection.

<b>Derogation clause (special clause)</b>	Control of the necessity of the recourse to derogation Control of the proportionality of the derogable measures Control of the temporary nature of the derogation Inviolability of certain rights
<b>Clause on restriction (general clause)</b>	Control of the necessity of the recourse to restriction Control of the proportionality of the restrictive measures

The absence of a derogation clause in the African Charter encourages states not to include it in their domestic laws. This national absence is naturally prejudicial to human rights. By not having recourse to a derogation clause, as it does not exist in the domestic constitution or in the Charter, a state is able to disregard, for political reasons, its responsibilities while ill-advisedly reducing the free democratic play between the separation of powers and civil liberties (de facto dissolution of parliament, negation of human rights). In other words, the rationality intro-

<sup>27</sup> For the same reasons I do not agree with the doctrinal opinion according to which the absence of a derogation clause does not prevent the state from invoking the principle of a fundamental change of circumstances. So what about non-derogable rights when a treaty is challenged? Indeed, the circumstances invoked in support of the fundamental change — in law and in fact — are such that they lead to the invalidation or the suspension of the treaty (ICJ, 1973, *United Kingdom v Iceland* para 36), that is to say, its complete setting aside. That is not the purpose and the spirit of the clause on the derogation of human rights.

duced by a derogation clause must militate in its favour. Its absence renders exceptional circumstances commonplace, leading to their improper perpetuation. Moreover, this is the position held by the United Nations Sub-Commission on Human Rights,<sup>28</sup> which invites all states, whose legislation contains no explicit clause that guarantees the legality of the implementation of a state of emergency, to adopt clauses in accordance with international norms and principles such as they have been developed, and invites governments to limit recourse to a state of emergency only for circumstances the gravity of which and exceptional character are such that they justify its imposition, and to accompany this imposition with guarantees, notably concerning the proportionality, temporary nature and inviolability of rights. This appeal must be interpreted as an injunction on states not to be satisfied, perhaps and at best, with guaranteeing rights on the basis of a general clause on the limitation of rights in an exceptional period.

The second reason (for favouring the opposite point of view) stems from the compatibility of African constitutional systems with the African Charter. One would think that, in principle, in African legal systems, constitutional law would take precedence over international law and that the constitutions that include such a clause would go further than that which is demanded by the regional instrument for the protection of human rights. This would be applying the principle of minimal equivalence between legal systems: States are forbidden to do less, in terms of the extent of protection, but are left the choice of guaranteeing a right more fully. How then can one justify this absence? It has been shown above that this clause has to be included preferentially in national legal systems. How can one therefore accept that the African Commission should make no distinction, in terms of legal protection, between states that have with this clause in their constitutions and those that do not? Is this levelling-down acceptable?

Finally, the last reason relates to the compatibility of the absence of the clause in the African Charter with regard to CCPR. The following contradiction must be dealt with: Why should a state that has recourse to derogation, *de facto* or legal, have to answer for this act before the Committee on Human Rights and not before the African Commission? How can one accept that Banjul is less protective than Geneva? The contradiction is still more obvious if one asserts that systems of derogation under international law, whether dealing with human rights or with humanitarian law, cannot contradict one other, as this is too contrary to the logic of the state of minimal law applicable in the event of exceptional circumstances: international standards cannot diverge with

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<sup>28</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1995/33, Question on human rights and states of exception, 35th session, 24 August 1995.

regard to the protection of human rights on such a crucial point. However, this is indeed the case here.

Must one add — an argument of a political nature — that it does not seem realistic to act in a crisis situation as if it were possible to protect human rights at the level expected in a normal situation. Because the crisis situation responds on the formal level to a concentration of powers in the hands of the executive and to a lowering of the protection of fundamental rights, it is necessary to choose appropriate means to ensure that legal protection be reasonably maintained.

A final element of the discussion: May the African Commission, and especially the African Human Rights Court that came into being on 25 January 2004,<sup>29</sup> declare by jurisprudential means a state of emergency? Can the praetorian exercise include such a competence? The Human Rights Committee has shown<sup>30</sup> that the interpretation of article 4 could not be fixed by the text. In particular, the Committee has added to the list of non-derogable rights the following supplementary rights: the right of a person deprived of his or her freedom to humane treatment, the ban on the taking of hostages, the ban on genocide, the ban on the deportation or forced removal of the population, the ban on the call to national, racial or religious hatred. For its part, the Council of State in France did not hesitate to establish a jurisprudential system of government, by decree, to satisfy demands for the protection of legality during World War I.<sup>31</sup> What is more, in French law, the jurisprudential system of government coexists with three other legal systems for exceptional circumstances: the state of siege (Law of 9 August 1849), the state of emergency (Law 3 April 1955) and the system of article 16 of the Constitution of 4 October 1958. Moreover, the extent of their respective guarantees is not similar. Thus, it must be noted that the jurisprudential system is more protective than the constitutional system.<sup>32</sup> Why, under these conditions, would the African Court on Human and Peoples' Rights not be able to institute a jurisprudential system of government in the absence of a reform of the African Charter by the states?

<sup>29</sup> On 26 December 2003, the threshold of the 15 ratifications needed for the Court to come into effect was reached with the ratification of the additional Protocol relating to the African Charter on Human and Peoples' Rights by the Union of the Comores. The other 14 African states that have ratified the Protocol are: Algeria, Burkina, Burundi, Côte d'Ivoire, The Gambia, Lesotho, Libya, Mali, Mauritius, Rwanda, Senegal, South Africa, Togo and Uganda.

<sup>30</sup> General Comment 24 July 2001.

<sup>31</sup> *CE français*, 28 June 1918, *Heyriès*, *Recueil* 651 and *CE français*, 28 February 1919, *Dames Dol et Laurent*, *Recueil* 208. In certain respects, the system of emergency is similar to that of exceptional circumstances: *CE*, 4 June 1947, *Entreprise chemin*, *Recueil* 246: the forced execution, carried out in irregular conditions but justified by the emergency, cannot be considered an infringement of civil liberties; in the same way, the period of exceptional circumstances prevents it being termed an infringement of civil liberties.

<sup>32</sup> *Grands arrêts de la jurisprudence administrative*, Paris, Dalloz, 13th ed (2001) 202.

#### 4 The establishment of minima fundamental rights for Africa: Between autonomy and corollary of a clause on the derogation of human rights in the African Charter

The inclusion of a clause on the derogation of human rights in the African Charter would result in the establishment of minima fundamental rights for Africa. However, in the absence of a regional derogation clause, it would be necessary to proclaim a list of rights valid at all times and in all places. While this proposal *de lege ferenda* has solid justifications of timeliness, the heterogeneousness of constitutional situations does not favour the creation *by the Court* of a common African standard.

The normative weaknesses of contemporary international law must not be ignored. The relationship between the law on human rights and humanitarian law does not always offer appropriate legal protection.<sup>33</sup>

On the one hand, the applicability of international humanitarian law depends on conditions related to the material nature of the conflict. Therefore the deliberately reductionist notion of internal armed conflict prevents numerous situations, although destructive, from being subject to humanitarian law. In particular, there are cases in which humanitarian law, despite there being a crisis situation, is of no use. Thus, article 93(1) of the Ethiopian Constitution, by referring to the situation of a natural catastrophe or epidemic liable to justify recourse to a state of emergency, reinforces the hypothesis of three sets of legal protection elaborated by the International Court of Justice. In its advisory opinion on the Legal Consequences of the Construction of the Wall,<sup>34</sup> the Court makes an ideological distinction between the hypothesis in which humanitarian law alone is applicable, that in which, on the contrary, only human rights are applicable and, lastly, that in which both branches of rights are applicable.

On the other hand, the international law on human rights, by allowing the validity of clauses of derogation, results in lowering legal guarantees. Therefore, the international law on persons is characterised by a situation of lesser rights because of the possible inapplicability of humanitarian law and the partial applicability of the international law on human rights. There does indeed remain a virtual applicability of principles of humanity, which flows from customary standards. Thus, in a famous judgment, the International Court of Justice alluded to 'considerations of elementary humanity'.<sup>35</sup> However, is the content of these customary standards really ensured?

<sup>33</sup> Services consultatifs, *Droit international humanitaire et droit international des droits de l'homme: Similitudes et différences*, CICR, 2003.

<sup>34</sup> ICJ, 9 July 2004 paras 102-113.

<sup>35</sup> ICJ, 9 April 1949, *Détroit de Corfou*, *Recueil* 1949.22

In an effort to respond to the demands for minimal common standards, mention must be made of an academic initiative. A declaration on minimum humanitarian standards by the Institute for Human Rights of Åbo Akademi University, Turku, has been taken up by the United Nations.<sup>36</sup> This text does not have any legal value. Its intention is clear: to compensate for the present inadequacies of international humanitarian and human rights law,<sup>37</sup> by not making the application of protected rights depend on 'situations' or on 'categories of protected persons'.<sup>38</sup> Article 1 states:

This Declaration affirms minimum humanitarian standards which are applicable in all situations, including violence, disturbances, tensions, and public emergency, and which cannot be derogated from under any circumstances. These standards must be respected whether or not a state of emergency has been proclaimed.

Article 2 states:

These standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.

The Turku declaration then specifies the minimum protected rights that are classified under international humanitarian law.<sup>39</sup> The Human Rights Committee classifies non-derogable or minimal rights into three categories, or rather two plus one categories: rights formally non-derogable in accordance with article 4(2) of CCPR and article 6 of the Second Optional Protocol to CCPR; derived non-derogable rights: respect for person deprived of freedom, the ban on the taking of hostages, rights of minorities (genocide), the ban on forced deportation and the ban on war propaganda. Moreover, formal and substantial non-derogable rights must be legally effective. This is why, for the Committee, the right of judicial control in the event of their alleged violation must also be considered imperative. Could these reflections not inspire the African Court?

Could the African Court establish a jurisprudential charter of minima

<sup>36</sup> Déclaration de Turku, 'Déclaration de règles humanitaires minima' *RICR*, No 789, May-June 1991 350-356; A Bouvier & M Sassoli *Un droit dans la guerre* Vol II Genève, CICR (2003) 679-683.

<sup>37</sup> H-P Gasser 'Les normes humanitaires pour les situations de troubles et tensions internes, aperçu des derniers développements' *RICR* May-June 1993 238-244.

<sup>38</sup> An analogous initiative can be mentioned. It concerns the rights of displaced persons, within their own country, who cannot claim the status of refugees: P Lavoyer 'Principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre pays' *RICR* No 931 503-516 and Commission des droits de l'homme, 16 October 1998, *Principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre pays* (E/CN/1998/53/Add 2).

<sup>39</sup> Eg arts 5 and 6 resembling the right of The Hague relating to the use of force, as well as under International Law on Human Rights (eg arts 8 and 9 on the right to life and procedural rights). General Comments 29 of the Committee on Human Rights, interpreting art 4 of CCPR, also deserves to be cited (CCPR/C/21/Rev 1/Add.11).

rights for Africa? To institute such a charter, the Court would have to prove, in my opinion, that there exists, first of all, many points of agreement on the level of national legal systems, in order to sanction subsequently such an interpretation on a regional level. This progressive method of interpretation is followed by the European Court of Human Rights.<sup>40</sup>

The constitutional law of African states shows that clauses of derogation fall into two categories. The first concerns institutional clauses.<sup>41</sup> Prejudicial to the customary separation of powers, they temporarily modify the operation of institutions by transferring responsibility and competence to the executive head. In fact, they imply only a weak protection of fundamental rights.<sup>42</sup> The only guarantee offered by this type of clause, in this regard, lies in the fact that the prorogation of the state of emergency can only be authorised with the agreement of the legislative power. In the absence of such an authorisation, the suspension of fundamental rights would become *de jure* unconstitutional. The second category concerns clauses of derogation that envisage, besides the transfer of competences and responsibility to the executive head, the respect of the fundamental rights of persons.<sup>43</sup> A table of non-derogable rights, which cannot be the subject of any suspension measure, can be decreed. Thus, article 37 of the South African Constitution of 1996 makes provision for the rights to equality, human dignity, life, security of persons, individual freedom, ban on slavery, protection of the child and satisfactory conditions of imprisonment to be guaranteed. It specifies that the non-derogable part of these rights is only partial: It does not include the non-derogability of the whole of the right.<sup>44</sup> In other cases, there exists no list of non-derogable rights. For example, article 269 of the Constitution of Cape Verde ensures that the suspension of rights does not 'affect rights to life, physical integrity, personal identity, civil status, and citizenship, the non-retroactivity of

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<sup>40</sup> The method of progressive interpretation is notably based on taking into account legal consensus of the law in member states, which authorises the Court to develop a common European standard, including a reversal of the interpretation. See recently, concerning the abolition of the death penalty in Europe, first shared by the member states, then by the Court: ECHR, 12 March 2003, *Öcalan v Turkey*, specifically paras 189 and following.

<sup>41</sup> The quasi-totality of African constitutions envisages situations of internal unrest in the context of a state of emergency, state of siege, and exceptional circumstances, which have the effect of threatening the integrity of the territory, and the independence of the regular operation of institutions.

<sup>42</sup> Eg, see the Constitution of Gabon, arts 49 & 50; the Constitution of Djibouti, art 62; the Constitution of Côte d'Ivoire, art 43; the Constitution of the Congo, art 109; the Constitution of the Comores, art 45; the Constitution of Guinea, art 74.

<sup>43</sup> Eg, see the Constitution of Cape Verde, art 293; the Constitution of Mauritius, art 18; the Constitution of South Africa, art 37.

<sup>44</sup> Under the heading of the principle of equality, see L Sermet 'Considérations sur la structure du principe d'égalité, à la lumière de l'article 9 de la Constitution sud-africaine de 1996' La Réunion, *Revue Alizés*.

criminal law, the right of the accused to defence, or freedom of conscience and religion'. While the presence of such a clause is laudable, it is regretted that the level of guarantee is not as high as that proposed by the declaration of Turku.

## 5 Arguments in favour of maintaining the absence of a derogation clause in the African Charter on Human and Peoples' Rights<sup>45</sup>

Both legal and political arguments may be presented in this regard. Their soundness is real and it enables one to justify maintaining the absence of a clause on the derogation of human rights in the African Charter. Two legal arguments may be submitted.

A derogation clause can be considered as contrary to *jus cogens*.<sup>46</sup> While it is true that doctrine regards the very notion of *jus cogens* with scepticism,<sup>47</sup> this is probably because the International Law Commission has refused to define the notion materially,<sup>48</sup> opening the door to only a formal definition. The rule of *jus cogens* can be defined as follows: It is sanctioned in articles 53 and 64 of the Vienna Convention because states, with the notable exception of France, have acknowledged that the subjectivism that characterises the ability of the state to conclude treaties could and should be limited or, in other words, that it is necessary to set a limit on the autonomy of the will of the state, regarded nevertheless as absolute because of the sovereignty of the state.<sup>49</sup> The rule of *jus cogens* is formally distinct from a simple conventional or customary rule that only links some states; it is also formally distinct from a universal conventional or customary rule that creates, for the international community, obligations *erga omnes* giving any state an interest in acting.<sup>50</sup> What difference can then be established between the rule of *jus cogens*, universal by definition, and the equally universal obligation *erga omnes*? The first, alone, would have the effect of rendering void a conflicting legal act, treaty or custom, while the second would involve the responsibility of the author of the act. Finally, how is one to interpret the notion of 'imperative standard of a general international right'?<sup>51</sup> In my opinion, the notion of 'imperativeness' is not

<sup>45</sup> The elements of discussion developed in what follows owe much to the friendly criticism of Prof Oswald Ndeshyo, Honorary Dean of the University of Kinshasa, during presentation of the paper on which this article is based.

<sup>46</sup> Art 53 Vienna Convention on the Law of Treaties.

<sup>47</sup> P Reuter *Introduction au droit des traités* (1972) 177: 'Finally, the uncertainties relating to the effects of *jus cogens* are affected by an uncertainty as serious as the notion itself.'

<sup>48</sup> ILC, *Rapports de la Commission à l'Assemblée générale, Annuaire de la CDI* (1966) 270.

<sup>49</sup> M Virally 'Réflexions sur le 'jus cogens' (1966) *Annuaire français de droit international* 10.

<sup>50</sup> International Court of Justice, 5 February 1970, *Barcelona Traction, Light and Power Limited*, Compendium 1970.32 para 33.

<sup>51</sup> Art 53 Vienna Convention on the Law of Treaties.

synonymous with absolute right, without limit, without constraint. Therefore, the right to life is, in my opinion, a right that falls under *jus cogens*, but which is limited in the event of legitimate defence,<sup>52</sup> while the right to a ban on all forms of torture can validly claim to qualify as a standard of *jus cogens* and not be subjected to any limitation.<sup>53</sup> Doctrine also explains that the notion of 'imperativeness' is not to be confused with that of 'obligatory nature' and that it is useful in distinguishing between the notions of *jus dispositivum* and *jus cogens*.<sup>54</sup> Contrary to the latter, *jus dispositivum* is a law to which states can add modifications, amendments and derogations as they like. This is perhaps where the central point of the argument lies. Legally, the derogation clause can be analysed as an exorbitant prerogative of the state, which can be subjected to restrictive conditions. Is this not the expression of a form of *jus dispositivum* of a unilateral kind? In other words, to recognise legally the state's prerogative to derogate from human rights would be to admit that human rights are at the disposal of the state. It can, however, be noted that certain rights cannot be the subject of a 'dispositivity' on behalf of the state,<sup>55</sup> thus expressing the notion that only certain human rights can claim the status of the standard of *jus cogens*. This is where the second legal argument intervenes, as a complement.

Is it possible to divide human rights into two categories: non-derogable rights, which do not allow the state any leeway in their derogation, and derogable rights? A formal approach to the law on human rights can effectively create this duality. However, in judicial practice,<sup>56</sup> in accordance with the political will of the United Nations<sup>57</sup> and also the facts, the dividing line between the two is far from being watertight and precise. Thus, the right to life is a right not capable of derogation,<sup>58</sup> whereas the right to be treated humanely and with due respect to the inherent dignity of the human being, in the event of being deprived of one's freedom, is.<sup>59</sup> A de-formalised approach to human rights argues strongly that the substance of human rights is one and the same thing and that there is no justification in dividing them. This concept seems all the more admissible because only certain civil and political rights would be derogable, while all economic, social and cultural rights would not

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<sup>52</sup> Art 6(1) CCPR.

<sup>53</sup> Art 2(2) CAT.

<sup>54</sup> Virally (n 49 above) 8 9.

<sup>55</sup> Art 4(2) CCPR.

<sup>56</sup> Eg, the symbolic example of the European Court of Human Rights, 9 October 1979, *Airey v Ireland*, series A No 32 para 26 that refuses to consider that there is a watertight partition between civil and political rights and economic and social rights.

<sup>57</sup> See World Conference on Human Rights, 12 July 1993, Declaration and Programme of Vienna, para 74 on the Interdependence of Human Rights, Democracy and Development.

<sup>58</sup> Art 4(2) CCPR.

<sup>59</sup> Art 10 CCPR.

be, due to the lack of a clause in CDESCR similar to that of article 4 of CCPR.

Finally, an argument of political expediency must be raised. This is perhaps the strongest. Owing to the dangerous political instability of numerous African states, it would be risky to introduce a derogation clause in the African Charter as certain states with evil intent could simulate a serious crisis, or even provoke one, in order subsequently to invoke the clause and thus escape their obligations. It is the risk of abuse of the use of the derogation clause that is to be feared. The solution, thus, lies in not sanctioning it. Under these conditions, even if the gap between the desirable and the possible remains wide, the dynamism created by the absence of a clause on the derogation of human rights in the African Charter remains promising for the protection of human rights in Africa.