

## A CRITICAL ANALYSIS OF THE CONDITIONS FOR STATE OF EMERGENCY\*

### Abstract

*In life nothing seems to be permanent. When it comes to government of human societies, there is the possibility that a phenomenon that an existing legal regime may either not anticipate, or if it does, is unable to comprehend and handle it when it, sadly, happens. The theme of states of Emergency is the device that states have evolved to tackle emergencies situations. The objective of this paper is to examine the conditions for state of emergency, in the bid to know how far declaring states really predicate their declarations on these conditions. The paper adopts a doctrinal methodology, and that is, an examination of conditions for the declaration of state of emergency and how states rely on these conditions to declare state of emergency in appropriate cases. This research found out that not all the state of emergency declared in Nigeria met the conditions stipulated in the extant law. It is recommended that states, for instance, Nigeria, in declaring a state of emergency should make sure that such declaration is a child of necessity-necessitated by the spelt out conditions provided in the law.*

**Keywords:** State of emergency, public emergency, conditions of emergency, derogation, proclamation.

### 1. The Meaning of Emergency

In its ordinary connotation, 'emergency' means a sudden condition or state of affairs calling for immediate action.<sup>1</sup> Though in its legal connotation, the term retains much of its ordinary meaning, however, it acquires restrictive technical meaning. Black's Law Dictionary gives a glimpse of this: 'A legal principle excepting a person from the ordinary standard of reasonable care if that person acted instinctively to meet a sudden and urgent need for aid'.<sup>2</sup> In the above, emergency is described as it relates to a person, but in the context of this paper, emergency got to do with nations. Within the domestic framework of a country, there is a legal system meant to take care of activities of the government and the governed. When issues come up, for instance, breach of contract, or a criminal breach, the legal machinery is called in aid to fix the problems. However, there are situations wherein the domestic legal machinery may or will prove incapable of handling. This is the central core of the concept of emergencies in the life of nations. Thus, when states face dangers, which threaten the security and general welfare of the whole nation, there is an emergency.<sup>3</sup> Times of emergency, and especially national security emergencies, pose a complicated constitutional challenge to the democratic state. In order to fulfill its duty to protect the lives and well-being of its citizens and restore public order as soon as possible, the state must make use of wider administrative powers than those required in times of peace.

### 2. Legal and Institutional Framework for State of Emergency

The under-discussed international covenants are the legal framework for state of emergency.

#### International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights was adopted in 1966 and entered into force in 1976.<sup>4</sup> By article 2, all states parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant.<sup>5</sup> These rights are clearly intended as binding obligations. The International Covenant on Civil and Political Rights, in its central legal component on the matter of derogation, provides in its article 4 (1) that (a) when a government faces an emergency that threatens the life of a nation and (b) where it officially declares an existing state of emergency, it may derogate from its obligation under the Covenant provided that such measures

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<sup>1</sup> *Black's Law Dictionary*, (9<sup>th</sup> edition, USA: Thomson West Group, 2009), p.600.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> See Javaid Rehman, *International Human Rights Law* (2<sup>nd</sup> edition, England: Pearson Education Ltd., 2010), p.85

<sup>5</sup> M N Shaw, *International Law* (5<sup>th</sup> edition, Cambridge University Press, 2003), p. 292.

are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex language, religion, or social origin.

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

Given the above, that is, article 4 (1) of ICCPR, it is discernible that due to the inherent tension between human rights protection on the one hand and allowance to derogate from same on the other, unsurprising, the treaty provisions allow derogation only under certain specified and restrictive conditions. Moreover, article 4(3)<sup>6</sup> required derogating parties to immediately inform other state parties of the reasons for doing so.<sup>7</sup> They are also required to inform other state parties about the date of termination of the derogation. Importantly, the ICCPR<sup>8</sup> exempt a range of human rights from the ambit of article 4(1) – derogable rights, such that these rights simply cannot be derogated from. The most relevant of these are the right to life,<sup>9</sup> the right not to be subjected to torture, cruel, inhuman and degrading treatment or punishment,<sup>10</sup> the right not to be held in slavery or servitude,<sup>11</sup> the right not be held guilty of a criminal offence that did not constitute such an offence at the time of commission,<sup>12</sup> and the right to the freedom of thought, conscience and religion.<sup>13</sup> While not explicitly stated in article 4(1) of the ICCPR or in other major instruments such as article 15 of the European Convention on Human Rights (ECHR, 1950) or article 27 of the American Convention on Human Rights (ACHR, 1975), it is generally understood that derogation from respect for human rights is to be both limited in scope and temporary in application.<sup>14</sup> In addition, the extent and nature of derogations are to be proportional to a crisis actual threat.<sup>15</sup> The International Law Association's Paris Minimum Standards of Human Rights Norms in a State of Emergency<sup>16</sup> details requirements, including that the declaration of state of emergency shall never exceed the period required to 'restore normal condition', that the emergency should be for a fixed period defined by a constitution, and that extension should be subject to a prior legislative approval.<sup>16</sup> Furthermore, the Paris Minimum Standards details that a state of emergency should only cover that part of a state's territory actually affected and, in doing so, states retain the right to extend the spatial scope of the emergency as necessary.<sup>17</sup>

### **European Convention on Human Rights (ECHR)**

The Convention was signed on 4 November, 1950 and entered into force in September 1953. Together with eleven protocols, it covers a wide variety of primarily civil and political rights. The preamble notes that the European states are like-minded and have a common heritage of political tradition, ideals, freedom and the rule of law.<sup>18</sup> The rights covered in the Convention itself include the right to life (article

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<sup>6</sup>Of the ICCPR.

<sup>7</sup>The Human Right Committee to the ICCPR has criticized several states for failing to notify apparent declared or *de facto* emergency, some of which have subsequently officially derogated.

<sup>8</sup> Article 4(2), ICCPR.

<sup>9</sup> Article 4, ICCPR.

<sup>10</sup> *Ibid*, article 7.

<sup>11</sup> *Ibid*, article 8, paragraphs 1 and 2.

<sup>12</sup>*Ibid*, article 15.

<sup>13</sup> *Ibid*, article 18.

<sup>14</sup>see generally, Oraa, *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press, 1992); Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (New York: Oxford University Press, 1999).

<sup>15</sup> See, generally Hekin et al, *Human Rights* (New York: Foundation Press, 1999).

<sup>16</sup>See, Human Rights Committee, General Comment 29, States of Emergency (Article 4) U.N. Doc. (CCPR/C/21/Rev.1/Add.1/ (2001) reprinted in compilation of general comment and general Recommendation Adopted by Human Rights Treaty Bodies, U.N.De.HR1/GEN/1/REV6 at 186(2003)

<sup>17</sup>Lillich 'The Paris Minimum Standards of Human Rights in a State of Emergency', *The American Journal of International Law* 79(4):1073-1074.

<sup>18</sup> M N Shaw, *op cit*, p.321.

2), prohibition of torture and slavery (article 3 and 4), right to liberty and security of person (article 5), right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (article 7) right to respect for private and family life (article 8), freedom of thought, conscience and religion (article 9), freedom of expression (article 10) freedom of assembly and association (article 11), the right to marry and found a family (article 12), etc.

### ***Derogation in Time of Emergency under the ECHR: Article 15***

When a state is struck by an emergency, necessity dictates that such a state must react to save its skin. The response of states hit by emergencies is accommodated and thus regulated by international law by way of treaties. Although some rights guaranteed in human rights treaties can be regarded as *jus cogens*, and therefore are absolute rights binding not only as mutual treaty commitments, not all human rights have the status of *jus cogens*. Given this, just like article 4 of the ICCPR (International Covenant on Civil and Political Rights), article 15 of the ECHR (European Convention on Human Rights) also provided a derogation provision. In exceptional circumstances, states parties are permitted to take certain measures which interfere with or restrict the enjoyment of the rights provided in the Convention and the Protocols. In legal terms such restrictions and interference are termed derogations.<sup>19</sup> The permissibility of such restrictions is authorized by article 15(1) of the Convention<sup>20</sup> which provides:

In time of war or other public emergency threatening the life of the nation, any high contracting party may take measures derogating from its obligation under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Gleaned from the above treaty provision, it becomes obvious that for the derogation clause to be operational, some conditions must be met. These include, firstly, that these clause provision have to be narrowly construed and are legitimate only to the extent that they are required by the exigencies of the situation.<sup>21</sup> Secondly, that they are not inconsistent with other obligations of international law. Thirdly, the Secretary-General of the Council of Europe is to be informed of the measures which are taken with a detailed explanation of the reasons that led to such derogation. It is of importance to note that the ECHR like the ICCPR, recognizes non-derogable rights.<sup>22</sup>

### **American Convention of Human Rights (ACHR)**

A regional treaty, the American Convention on Human Rights, provides a legal framework for state of siege within the Western hemisphere.<sup>23</sup> This treaty regulates the assertion of emergency power by any state party to it.<sup>24</sup> The American Convention on Human Rights (ACHR), also known as the Pact San Jose, alongside its protocols, represents the second part of the inter-American Rights System, ACHR was adopted in 1969 and entered into force in 1978. In 1988, an additional protocol was concluded extending its range of rights covered. In 1990, the death penalty was abolished through the addition of another protocol.<sup>25</sup> There have been several sources of inspiration for the ACHR, including the ECHR and ICCPR.<sup>26</sup> In the light of the influence of the comparable and regional human rights instruments, it is not surprising that many of the rights confined in the American Convention overlap or relate very closely to that of other regional and international human rights treaties.<sup>27</sup> The ACHR contains traditional civil and political rights as well as economic social and cultural rights. Many similarities can be found between the rights contained in the Convention, the International Covenants and the ECHR, although

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<sup>19</sup>J Rehman, *op cit*, p.229.

<sup>20</sup>European Convention on Human Rights (ECHR).

<sup>21</sup>K Reopstorff, 'Terrorism as a Public Emergency and its Impact on Human Rights' <http://www.lawanddevelopment.org/articles/terrorismhumanrights.html>. Accessed on 16th August, 2016.

<sup>22</sup>The list of non-derogable rights and freedom is provided for in article 15, paragraph 2: rights to life, the prohibition of slavery, and the prohibition of punishment without law.

<sup>23</sup>C Grossman, 'A Framework for the Examination of State of Emergency under the American Convention on Human Rights', *American University International Law Review*, no.1 (1986), p35.

<sup>24</sup>*Ibid.*

<sup>25</sup>J Rehman, *op cit*, p.279.

<sup>26</sup>*Ibid.*

<sup>27</sup>*Ibid.*

there are a number of significant differences.<sup>28</sup> The ACHR contains a number of rights, not found in either the International Covenants or the ECHR. Rights contained include: right to judicial personality,<sup>29</sup> right to life,<sup>30</sup> right to humane treatment,<sup>31</sup> freedom from slavery,<sup>32</sup> right to personal liberty,<sup>33</sup> right to fair trial,<sup>34</sup> freedom from ex post facto laws,<sup>35</sup> etc.

### ***The American Convention of Human Rights and State of Emergency***

Article 27 of the American Convention of Human Rights (ACH) regulates the suspension of Human Rights guaranteed during state of emergency. Paragraph 1 of that article declares:

In time of war, public danger, or other emergency that threatens the independence or security of a state party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation provided that such measures are not in consistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion, or social origin.

### **3. Conditions for State of Emergency**

So far in this paper, all the treaties examined contain derogation clauses, and consequently, stated conditions upon which state parties must fulfill to invoke the derogation power granted them. Here, these conditions shall be examined.

#### **Public Emergency**

Although the existence of a state of emergency must be determined on a case-by-case basis, given its unpredictability, there are some conditions which must be satisfied for a derogation to be valid.<sup>36</sup> The conceptual rationale for states of emergency is relatively clear and is rooted in the nature of the exceptional. It has been suggested, that in times of crisis a government must ‘temporarily be altered to whatever degree is necessary to overcome the peril and restore normal conditions.’<sup>37</sup> A major research study of the International Commission of Jurist (ICJ) on states of emergency that involved fifteen international experts and various national studies has suggested that the ‘state of emergency is the – counterpart in international law of self-defence in penal law’<sup>38</sup>. This idea of an exceptional situation and a state’s need to defend itself is underpinned by an unusual balance between the collective interests (for example, the life of the nation) and the interests of the individual, in particular, in human rights and civil liberties. The existence of mechanism such as derogation is often seen as a concession to the inevitability of exception in times of emergency, and also as a means to control these measures.<sup>39</sup> Derogation are based on the balancing of human rights with collective goals such as public order and national security, terms that are not easily defined by law.<sup>40</sup> It is against the background above, that Article 27 of the American Convention on Human Rights regulates the suspension of human rights guarantees during states of emergency. Under this article, ‘in time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measure derogating

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<sup>28</sup>*Ibid.*

<sup>29</sup> American Convention of Human Rights (ACHR), article 3.

<sup>30</sup>*Ibid.*, article 4.

<sup>31</sup>*Ibid.*, article 5.

<sup>32</sup>*Ibid.*, article 6.

<sup>33</sup> *Ibid.*, article 7.

<sup>34</sup> *Ibid.*, article 8.

<sup>35</sup> *Ibid.*, article 9.

<sup>36</sup>E Saterno, ‘In the Fight against Terrorism, does Article 15 of the ECHR Constitute an Effective limitation to State’ power to derogate from their human rights obligation? p. 6 [www.guiriprudenzapenale.com](http://www.guiriprudenzapenale.com) (visited 25<sup>th</sup> Nov., 2016).

<sup>37</sup>L Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (1948) p.5.

<sup>38</sup>R. Hickman, ‘Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism,’ 68 *MOD.L.REV.* 678 (2005), cited in P Sheeran, Reconceptualizing State of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politic’, 34 *MICH-J. INT’L L.* 491 (2013), p. 499.

<sup>39</sup>R. Hickman, *op cit*, p. 499.

<sup>40</sup>P Sheeran, *op cit*, p.499.

from its obligation under the present Convention ...<sup>41</sup> Similarly, Article 15 ECHR<sup>42</sup> endows the political branch of states with the extraordinary power to derogate from human rights obligation, though subject to limitation.<sup>43</sup> Commenting on the ECHR:

It is possible to identify textual restrictions, convening the determination of the existence of a time of war or other public emergency threatening the life of the nation and the necessity that the adoption of the derogation measures are strictly required by the exigencies of the situation. Furthermore, non-derogable rights ... Finally, a procedural safeguard is established, namely the notification to the competent authority of the measure taken and the reasons thereof.<sup>44</sup>

Thus, the ECHR, like the ACHR, for there to be a declaration of emergency, there must be ‘war or other public emergency, threatening the life of the nation’.<sup>45</sup> Another treaty, worthy of mention, as per the existence of an emergency, as a condition for resort to derogation, is the ICCPR<sup>46</sup>. The treaty, under its Article 4, on the ground of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, may take measure derogating from their obligation under the treaty. It has been observed, as far as the emergency concept is concerned, the only difference with the ECHR, is that the ICCPR does not include the term ‘war’ because to admit derogations under the Covenant in time of war, would have been a contradiction, since the establishment of the United Nations was founded on the purpose of maintaining peace and preventing war.<sup>47</sup>

According to Hartman, the plain language of Article 4 of ICCPR and 15 of ECHR suggest that a fundamental element of statehood must be endangered and that this danger has to be actual or imminent before resort to derogation is lawful.<sup>48</sup> Although, General Comment 29<sup>49</sup> does not list criteria for determining the existence of an emergency within the meaning of Article 4, the HRC<sup>50</sup> makes clear two things. First, disturbances can arise without constituting an emergency threatening the life of the nation.<sup>51</sup> According to the Committee’s earlier recommendations, political and social disturbances in the form of protest movements and strikes, or high crime rates, are no such emergencies.<sup>52</sup> On the basis of reviewing the HRC’s case law and observations, Svensson – McCarthy has suggested a definition whereby only ‘very serious, visible and violent political and social confrontations or turmoil that cannot be controlled by ordinary means normally available to the authorities qualify as emergency within the meaning of Article 4. Thus, it seems that the principal criterion for the HRC is not the nature of the havoc, but intensity.’<sup>53</sup> Secondly, it is clear from General Comment 29 that armed conflict would be regarded as an emergency for the purpose of derogation.<sup>54</sup> The same holds true for the ECHR, in which Article 15 explicitly mentions ‘war’ as an example for a public emergency threatening the life of the nation. The wording of Article 15 suggests that emergencies can exist in situations other than war, although only when of similar gravity.

<sup>41</sup>Article 27, American Convention on Human Rights.

<sup>42</sup>ECHR – European Convention on Human Rights.

<sup>43</sup>E Salerno, *op cit*, p.7.

<sup>44</sup>*Op cit*.

<sup>45</sup>Article 15, ECHR.

<sup>46</sup>ICCPR – International Covenant for Civil and Political Rights.

<sup>47</sup>F Cowell, *op cit*, p. 145.

<sup>48</sup>F Hartman, ‘Derogations from Human Rights Treaties in Public Emergencies – A critique of Implementation by the European Court of Human Rights and Human Rights Council; (1981) Harvard International Law Journal 22(1). p. 16.

<sup>49</sup>UN Human Rights Committee (HRC) CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at <http://www.refworld.org/docid/453883fdif.html> (accessed 6 February, 2017).

<sup>50</sup>HRC – the United Nations Human Rights Committee.

<sup>51</sup>General Comment 29, *op cit*, para. 3.

<sup>52</sup>Anna-LonaSvensson-McCarthy, *The International Law of Human Rights and State of Exception* (The Hague: Martinns Nijhoff, (1998), p.239.

<sup>53</sup>M Lehmann, ‘Limits to Counter-Terrorism: Complaining Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights’, *Essex Human Rights Review*, Vol. 8 No. 1, October 2011, p. 107.

<sup>54</sup>*Lawless v Ireland*, European Court of Human Rights, No. 332157, (1961) *European Human Rights Reports* 1 (15), para.28.

### Temporal Element of Derogation

Both Article 4 ICCPR and Article 15 ECHR contain a temporal element; derogation is only permitted in time of public emergency which threatens the life of the nation. Svensson McCarthy has pointed out that when considering the United Kingdom's periodic report in 1995, the HRC implicitly questioned whether derogating measures in place since 1976 were still necessary to address the situation in Northern Ireland, which at that time has decreased in volatility.<sup>55</sup> However, the fact that the necessity of the derogation was not questioned to the same extent in previous reports indicates that a state of emergency may well persist for decades and that for such time a state may derogate. On the other hand, the HRC in its concluding observation on Egypt made clear that it regarded the thirty year-long emergency measures in place a violation of the Covenant.<sup>56</sup> As for the ECHR, the Court has never incorporated the temporal requirement into its jurisprudence. In *Brannigan and McBride v UK*<sup>57</sup>, a case concerning extraordinary powers of detention in Northern Ireland pursuant to a repeated derogation, the court confirmed the existence of an emergency within the meaning of Article 15.<sup>58</sup>

### Procedural Requirement: Proclamation and Notification

The ICCPR seems to be more exigent than the ECHR since it provides that the existence of an emergency has to be officially proclaimed.<sup>59</sup> In General Comment 29, the HRC underline the importance of this requirement.<sup>60</sup> In contrast, the ECHR does not require an official proclamation. However, in *Cyprus v Turkey*<sup>61</sup>, where there was large scale detention of Greek Cypriots and deprivations of their possessions pursuant to the Turkish Invasion, the Commission found that Article 15 required some formal and public act of derogation, such as a declaration of martial law or state of emergency<sup>62</sup>. Both treaties require notification in order to legitimately invoke the right to derogation. In General Comment 29, the HRC underscores the significance of notification by stating that it is essential for the discharge of the Committee's function and to permit other state parties to monitor compliance with the provisions of the Covenant<sup>63</sup>. The HRC in *Adrien Mundy Busyo et al v Democratic Republic of the Congo*,<sup>64</sup> argued that derogation by the Democratic Republic of Congo had not been in accordance with Article 4 because of, among others, the lack of notification. As regards the ECHR, the European Committee on Human Rights (EComHR) pointed out that notification was 'an essential link in the machinery provided in the Convention for ensuring the observance of the engagements undertaken by the High Contracting Parties' and that without notification, the other Parties would not know whether or not breaches are occurring<sup>65</sup>. The Commission and the court have thus both been unwilling to accept derogation in the Greek case<sup>66</sup>. Notification under the ECHR encompasses an explanation 'of the measures ... taken', and rather than, as in the Covenant, mere identification of the provisions derogated from. Arguably, the former requirement is stricter<sup>67</sup>. However, General Comment 29 has attempted to level this difference, stating that '...in view of the summary character of many of the notifications received in the past. The Committee emphasizes that the notification by State 'parties should include full information about the measures taken'<sup>68</sup>. Lastly, under the ICCPR, State Parties invoking the right to derogate shall 'immediately' inform the other parties through the intermediary of the UN Secretary – General whereas the ECHR is silent in this regard. Although the EComHR has

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<sup>55</sup>Svensson-McCarthy, *op cit*, p. 223.

<sup>56</sup>Report of the Human Rights Committee, GAOR, A/48/40, p. 148, para.704, cited in Svensson-McCarthy, *op cit*, p. 109.

<sup>57</sup>*Brannigan and McBride v, The United Kingdom*, 5/1992/350/423-424, Council of Europe: European Court of Human Rights, 22 April, 1993 at: <http://www.refworld.org/cases/ECHR,3ae6b6f94>. Html (accessed 6 February, 2017).

<sup>58</sup>M Lehmann, *op cit*, p. 110.

<sup>59</sup>Article 4(1), International Covenant on Civil and Political Rights.

<sup>60</sup>General Comment 29, para. 2, *op cit*.

<sup>61</sup>*Cyprus v Turkey*, European Court of Human (1976) European Court of Human Rights Reports 4 (482), para. 527.

<sup>62</sup>*Ibid*.

<sup>63</sup>General Comment 29, para. 17.

<sup>64</sup>*Adrien Mundy Busayo et al v Democratic Republic of the Congo*, Communication, No. 933/2000. UN-Doc. CCPR 178/D/933/2000 (2003), para. 52.

<sup>65</sup>*Lawless v Ireland*, Commission Report, Series B, 1960 – 1961, pp. 74, 335-336.

<sup>66</sup>*Greece v. UK*, Yearbook of the ECHR. In the Greek case, the Commission has held the detention of Prisoners of War to be in violation of the Convention.

<sup>67</sup>F Hartman, *op cit*, p. 19.

<sup>68</sup>General Comment 29, para. 17.

implicitly imposed a notification ‘without delay’, the court accepted a twelve-day delay in *Lawless v United Kingdom*.<sup>69</sup>

### **The Relationship between Limitation and Derogation**

Article 4 ICCPR and Article 15 ECHR are to be distinguished from internal limitations clauses, by virtue of which a right may be restricted if so prescribed by law and if necessary for the protection of public safety, order, health, morals or the fundamental rights of others<sup>70</sup>. Just as in the case of derogation, limitation clauses in the Covenant and the European Convention allow for some flexibility by the domestic court in the interpretation of a provision from either treaty<sup>71</sup>. Evidently, before seeking recourse to derogation, a state can justify interfering with the enjoyment of a particular freedom by relying on a limitation power. Ultimately, the question arises where a state may derogate from a provision containing a limitation clause, in order to narrow its obligation to justify a limitation<sup>72</sup>. The HRC state that:

The reference in Article 4, paragraph 2, to Article 18, a provision that includes specific clause on restriction ... demonstrates that permissibility of restriction is independent of the issue of derogability. Even in time of most serious public emergencies, states that interfere with the freedom to manifest one’s religion or belief must justify their actions by referring to the requirement specified in Article 18, paragraph 3.

As for the ECHR, in contrast to the ICCPR, all provisions with built-in limitations, including freedom of religion, thought and conscience, are derogable.

### **Proportionality**

The derogation clauses in the ICCPR and ECHR contain the principle of proportionality by stressing that measures taken ‘to the extent strictly required by the exigencies of the situation’<sup>73</sup>. This requirement of proportionality subordinates the states subjective digression under a strict standard, to that of absolute necessity. Any violation of the principle renders the respective measure null and void, but does not affect pursuant to which the measure was taken<sup>74</sup>. General Comment 29 makes it clear that states must ‘provide careful justification ... for any specific measure based on a proclamation of the state of emergency’, justifying that ‘all their measures derogating from the Covenant are strictly required by the exigencies of the situation.’<sup>75</sup>

## **4. Conditions for the Declaration of the State of Emergency in Nigeria**

The declaration of state of emergency is premised on reasons – not exercised *in vacuo*. The Nigerian Constitution, in its provisions, states the conditions.<sup>76</sup> The President shall have power to issue a proclamation of a State of Emergency only when:

- (a) The federation is at war;
- (b) The federation is in imminent danger of invasion or involvement in a state of war;
- (c) There is actual breakdown of public order and public safety in the federation or any part thereof to such extent as to require extraordinary measure to restore peace and security;
- (d) There is a clear and present danger of an actual breakdown of public order and public safety in the federation or any part thereof requiring extraordinary measures to avert such danger.
- (e) There is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the federation;

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<sup>69</sup>(1961)1 EHCR 15, (ECHT), 15<sup>th</sup> July 1961, European Court of Human Rights (ECHR).

<sup>70</sup>M Lehmann, *op cit*, p.112.

<sup>71</sup>*Ibid*.

<sup>72</sup>*Ibid*.

<sup>73</sup>M. Lehmann, *op cit*, p. 114.

<sup>74</sup>*Ibid*.

<sup>75</sup>General Comment 29, para. 5.

<sup>76</sup>Section 305 (3)(1)-(g); 305(4) of the CFRN stipulates these conditions

- (f) There is any other public danger which clearly constitutes a threat to the existence of the federation; or
- (g) The President receives a request to do so in accordance with the provisions of subsection (4) of this section.

With respect to the last condition (g) above, the Constitution provides that the Governor of a state may, with the sanction of a resolution supported by two-thirds majority of the House of Assembly, request the President to issue a proclamation of a state of emergency in the State when there is in existence within the state any of the situations specified in (c), (d), and (e) above and such situation does not extend beyond the boundaries of the state.<sup>77</sup> Whether any of the above conditions exists, that is, whether a state of public emergency exists in Nigeria, is within the bounds of parliament, and not for the courts to decide.<sup>78</sup> The first two and last three conditions<sup>79</sup> are yet to be the reasons for the declaration of any state of emergency in Nigeria so far. Given the country's peculiar history of state of emergency, the conditions in paragraph (c) and (d) of section 305 (3)<sup>80</sup> have been given as the reasons for the proclamation of emergency rule.

### **Synopsis of Emergency Rule in Nigeria**

#### ***Western Nigeria, 1962***

The history of emergency rule in Nigeria dates back to May 29, 1962. On this day a state of emergency was declared in the then Western Region of Nigeria-this was invoked under section 65 of the Constitution of Western Nigeria. This state of emergency has been criticized to have been a dangerous precedence by virtue of section 65(3) (3) of the Independence Constitution.<sup>81</sup> The background of the said declaration of emergency rule was that there was the struggle for power in the Western region between Chief Obafemi Awolowo and Chief Samuel Ladoke Akintola, there was widespread rigging in both the Federal Elections of 1964 and Western Region Election of 1965. There was crisis and the Federal government declared a state of emergency in the Western Region with an enabling legislation, the Emergency Power Act 1961.

#### ***Plateau State, 2004***

On Tuesday, May 18, 2004, the then president of Nigeria, Chief Olusegun Obasanjo, made a broadcast to the nation, pointing out security challenges in Plateau State and declaring a state of emergency in that state. According to the President, tension and social differences have been heightened within the state, and as a result, violence has reached unprecedented levels and hundreds of persons have been killed and much more wounded or displaced from their homes on account of their ethnic or religious identification.<sup>82</sup> Consequent upon the declaration, Obasanjo suspended both the governor and the deputy governor of the state as well as the state House of Assembly. The emergency declaration in Plateau State was subsequently challenged in the Nigerian Supreme Court in Plateau State of Nigeria v Attorney General of the Federation.<sup>83</sup> But the suit did not get to trial.

#### ***Plateau State, 2011***

On 31<sup>st</sup> day of December, 2011, the then President, Dr. Goodluck Jonathan declared a state of emergency in Plateau State, thereby giving the state another taste of the concept after President Obasanjo's declaration. The declaration which affected some other Northern states was in the wake of Boko haram insurgency that claimed many lives through shooting of guns as well as bomb blasts. The said declaration was restricted to some local government areas in Plateau, Yobe, Niger and Borno

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<sup>77</sup> Section 305(4) of the CFRN (as amended).

<sup>78</sup> *F.R.A. Williams v M.A. Majekodunmi* (1962), SCNLR.

<sup>79</sup> Section 305(3) (a) (b) (e) (f) (g).

<sup>80</sup> Section 305 (3) (c) (d) of the CFRN, 1999.

<sup>81</sup> E Azinge (ed), *State of Emergency in Nigeria: Law and Politics* (Abuja: NIALS Press, 2013), P.ix.

<sup>82</sup> Declaration of Emergency Rule in Plateau State of Nigeria by President Olusegun Obasanjo, available at <http://www.waado.org/nigerdelta/FedGovt/Federalism/emergency-rule/Plateau-Obasanjo.html> (accessed on 27/7/2012).

<sup>83</sup> (2006) 3 NWLR (pt. 967) 346.

States.<sup>84</sup> Areas affected in Plateau State were Jos-North, Jos-South, Barkin-Ladi and Riyom local government areas. Several people were killed in the four local governments. Commenting on the attribute of state of emergency under President Jonathan, a learned writer observed:

A major attribute of emergency under President Goodluck Jonathan is its restriction to trouble local government areas instead of the whole state as we saw under Obasanjo. Similarly, President Jonathan did not allow the path of unconstitutionality of President Obasanjo by suspending democratic institutions and democratically installed public officers. The Chairman of the local government areas affected were still in charge but there was much military presence in the affected areas.<sup>85</sup>

### ***Ekiti State, 2006***

The next state to taste the pill of emergency rule declaration was Ekiti State. It was on the 19<sup>th</sup> day of October 2006, then President of Nigeria, Olusegun Obasanjo declared a state of emergency in Ekiti State. Ekiti emergency declaration has been premised on the crisis in the State House of Assembly – wherein the then state governor, Ayo Fayose was impeached.

### ***Adamawa, Borno and Yobe States, 2013***

On May 11, 2013, President Goodluck Ebele Jonathan declared emergency in the three states of Adamawa, Borno and Yobe. The president, in a national broadcast of 14<sup>th</sup> May, 2013, remarked, in a bid to justify his action, that there has been terrorists activities and protracted challenges in some party of the country, particularly, in Borno, Yobe, Adamawa, Gombe, Bauchi, Kano, Plateau and most recently Bayelsa, Taraba, Benue and Nasarawa states. The president further said, that these unfortunate events have led to needless loss of lives and property of many innocent Nigerians, including members of security forces. He maintained that what the country is facing is not just militancy or criminality, but a rebellion and insurgency by terrorist groups which pose a very serious threat to national unity and territorial integrity. He concluded by saying that a responsible government would not tolerate the actions of the terrorist groups.<sup>86</sup> From the president's broadcast, it is evident that Borno, Adamawa and Yobe states were the hotbed of Boko haram insurgency which killed more than 13,000 and displaced hundreds of thousand since 2009.<sup>87</sup> It is noteworthy that Jonathan's emergency declaration in the three states did not sweep away the executive and legislative structures in these states – the governor, deputy-governor and the House of Assembly of the states were left intact; the governor and other political office holders in the affected states will continue to discharge their constitutional responsibilities.<sup>88</sup>

## **5. Whether Declared State of Emergency in Nigeria Meets the Conditions of the Law**

Here, the task is to analyze Nigerian extant law on emergency (and the emergencies declared based on the law) against the background of international law.

### **Nigeria and the Factor of Public Emergency**

The situations mentioned above (in section 305 (3) (a)-(g)) fit into public emergency. Equally important to the issue of the public emergency factor, is how to determine actually that a fundamental element of statehood is endangered. What does international instrument regard to be the barometer for evaluation? According to Hartman, the plain language of Article 4 of ICCPR and 15 of ECHR suggest that a fundamental element of statehood must be endangered and that this danger has to be actual or imminent

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<sup>84</sup>Samuel Oguche in 'Challenges of use of State of Emergency in Democratic Governance: Plateau and Ekiti Experiences' in E Azinge (ed) *State of Emergency in Nigeria: Law and Politics* (Abuja: NIALS Press, 2013), p.351.

<sup>85</sup> *Ibid.*

<sup>86</sup>Saharaporters.com/2013/05/14/breaking-new-jonathan-declares-state-emergency-borno-yobe-and-adamawa-state. Accessed 1<sup>st</sup> April, 2017.

<sup>87</sup>www.Premiumtimes.ng.com/news/healthline/171366-jonathan-writes-national-assembly-requests-extension-emergency-rule-borno-adamawa Accessed 1st April, 2017.

<sup>88</sup>www.telegraph.co.uk/news/worldnes/africaandindianocean/nigeria-declares-state-of-emergency-in-three-states. html. Accessed April 1, 2017

before resort to derogation is lawful<sup>89</sup>. Although, General comment 29<sup>90</sup> does not list criteria for determining the existence of an emergency within the meaning of Article 4, the United Nations Human Rights Committee makes two things clear. Firstly, disturbances can arise without constituting an emergency threatening the life of the nation. According to the Committee's earlier recommendation, political and social disturbances in the form of protest movements and strikes, or high crime rates, are no such emergencies. Applying the above to Nigeria, given our history of emergencies rule, how well has the government at various times complied with this? Let us take the Ekiti State emergency declaration under Obasanjo, as an example, does the situation in Ekiti warrant the declaration? It appeared that Obasanjo premised his declaration of emergency on either section 305 (3)(c) or section 305 (3)(d). Either way, there is the requirement that the public emergency, by way of *actual breakdown of public order and public safety*, should be to 'such an extent as to require extraordinary measures to restore peace and security.' In actual fact, was Ekiti of this dimension? Informed and neutral parties have submitted that Obasanjo, in declaring a state of emergency, was motivated by political consideration.<sup>91</sup> We contend that the language of article 4 is almost, if not entirely, the same with Nigerian Constitutional provision in section 305 (3) (c) and (d). Secondly, it is clear from General Comment 29 that armed conflict would be regarded as an emergency for the purpose of derogation<sup>92</sup>

## 6. Recommendation

In the course of this paper, it has been demonstrated that not all state of emergencies declared in Nigeria were declared in accordance with the law, the Nigerian Constitution of 1999. In this light, the declaration of a state of emergency in Ekiti state of Nigeria has been said by critics to have been uncalled for, as facts constituting the declaration of emergency is not sufficient or potent or of the gravity provided for as amounting to actual breakdown of public order and public safety or a clear and present danger of an actual breakdown of public order and public safety.<sup>93</sup> However, the emergencies declared in Plateau State of Nigeria (in some local government areas), Borno, Adamawa and Yobe states, as declared by erstwhile president Goodluck Ebele Jonathan, have been unanimously adjudged as right in the eye of the law as required.

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<sup>89</sup>F. Hartman, 'Derogation from Human Rights Treaties in Public Emergencies – A Critique of Implementation by the European Court of Human Rights and Human Rights Council (1981) *Harvard International Law Journal* 22(1), p. 16.

<sup>90</sup>UN Human Rights Committee (HR), CCPR General Comment No. 29 Article 4: Derogations during a State of Emergency, 31 August. 2001, CCPR/C/2121 Rev. 1/Add. //available at <http://www.refworld.or/docid/453883fdil.html> (Accessed 6 February, 2007).

<sup>91</sup>B Aturu, 'Emergency Rule in Ekiti as the 1999 Holds' <http://www.dawodu.com/aturu/html>. (Accessed 10<sup>th</sup> April, 2017).

<sup>92</sup>*Lawless v Ireland*, European Court of Human Rights, No. 332157, (1961) European Human Rights Reports (15), para. 28.

<sup>93</sup> Nigerian Constitution, 1999, section 305(3) (c-d).