



Ethiopian Human Rights Defenders Center
(EHRDC)

**Keynotes on the one-year conflict, the state of emergency,
and the situations of Human Rights Defenders in Ethiopia**

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1. Background

Ethiopia has been going through waves of turmoil since November 2020 when the Tigray Regional government attacked the national defense force in the north and the prime minister ordered a military offensive. The war has been going on for over a year now destabilizing parts of the country and leaving tens and thousands of people in displacement. The current situation presents to be stiff as TPLF rebels claimed to be heading to the capital Addis Ababa. Failed diplomatic efforts have been made by the international community to reach a negotiation between TPLF and the Ethiopian government. Following the alarming developments from the TPLF side, the government has declared a state of emergency which is resulting in a stern security check and searches in Addis Ababa and the regions. Tigrayan individuals have reported that they are being profiled ethnically and have been subject to detainment. The FDRE government on the other hand disclaimed the assertion and stated that there is no single individual who has been arrested because of his/her ethnic background; rather the detention is based on the potential suspicion and report received by the police from the public. According to the government of Ethiopia, all detained individuals are detained based on a reasonable doubt of engaging in criminal activities and violation of the state of emergency.

As the rebel group has claimed to have taken a town 200 km away from the Capital, Prime Minister Abiy Ahmed announced that he is heading to the battlefield to lead what he labeled as existential and African war, the state of emergency has been declared, the US, UK, and other western countries have ordered the evacuation of their citizens in Ethiopia while the government of Russia has announced that there is no plan to evacuate citizens. Similarly, international organizations such as the UN have initiated the immediate evacuation of international staff and family members. The situation is rapidly shifting however implications can be deduced from the underlying incidents. The goal of this keynote is to describe the current situation and possible scenarios, as well as the implications for human rights protection in general and human rights defenders in particular.

1.2 Time and events

Highlighting the measure incidents that happened during the war

- In 2018, Abiy's election marked the end of the TPLF's decades-long rule. Abiy's rise to power was bolstered by his visions of an ethnically harmonious, unified Ethiopia, and he appeared to be a critical departure from the divisive policies of the TPLF-dominated ruling coalition. However, internal political tensions between the TPLF and the government grew during Abiy's first term.
- In June 2018 an assassination attempt on Abiy was followed by a deterioration in power relations between the TPLF and the new administration. The Abiy administration promised greater transparency, released thousands of detainees, and brokered peace with neighboring Eritrea, earning him the 2019 Nobel Peace Prize.
- In September 2020, Following multiple postponements of parliamentary elections and the extension of Abiy's term as Prime Minister, the Tigray State Council defied the federal government and held regional elections, in which TPLF candidates won a majority of seats. Tigray leaders warned ahead of the elections that any intervention by the federal government would be considered a "declaration of war." However, Prime Minister Abiy has condemned the Tigray regional elections.
- Nov. 4, 2020, The TPLF launched an attack on federal forces stationed in Tigray. As a result, government forces launched a retaliation strike. PM Abiy accused the TPLF of storming a military camp and looting federal military assets, announced a six-month state of emergency, and dispatched troops to Mekelle, Tigray's capital, in an offensive ostensibly aimed at TPLF commanders. (Ethiopian forces joined the Ethiopian government's side early in the fight.)
- 28 June 2021, the federal government assumed control of Mekelle and set up an interim government, but it failed, and the government was compelled to proclaim a unilateral cease-fire. The TPLF, on the other hand, refused to accept the unilateral cease-fire and continued the fight, quickly capturing some parts of the Amhara and Afar regions.
- November 20/2021 before the end of the week, rebel groups claimed to have taken control of a town 200 kilometers from Addis Ababa. Currently, however, the government is leading the war and retaking control of most of the areas previously held by the TPLF.

- In March 2021, the Office of the UN High Commissioner for Human Rights announced a joint probe with the Ethiopian Human Rights Commission (EHRC) to investigate alleged serious abuses and rights violations in Tigray. In this regard, the joint investigation by the EHRC and UN has found that all parties to the conflict committed sexual and gender-based violence (see EHRC website).

1.3 The ongoing conflict and possible scenarios

a. TPLF will be advancing to the capital

This scenario is the list of possible and the worst-case scenario. It is the worst in the sense that if the TPLF rules and controls Addis Ababa then there will be civil war in the entire nation since it is hardly possible for the TPLF to get acceptance by the people of Ethiopia. Secondly, it is the list possible to advance Addis Ababa. Before two weeks ago Tsadkan Gebretensae, a former army general and senior commander of the Tigrayan forces, said the war is almost over and the next step will be a post-Abiy national dialogue. However, it has been more than a week since his statement. Furthermore, currently, the government forces are gaining a military advantage over the TPLF groups and controlling areas that were controlled by the TPLF before. Therefore whatever means advancing to the center will create Pandora's box.

b. Negotiation

In this scenario, it is crucial to look at the attempts made by the elders and international communities. During the first time of the war, there were different attempts by Ethiopian elders who went to Mekele and tried to resolve the tension between the central government and TPLF. However, all the attempts were not successful and the parties are waging the war after the TPLF attacked the northern NDF camp and it lasted more than a year. After mass humanitarian crises in Ethiopia international communities are trying to give a solution from the UN secretariat to the Security Council repeatedly dealing with the Ethiopia issue. The USA also deals with the issue from travel restrictions to economic sanctions. Finally, the AU special representative Olusegun Obasanjo is trying his best to reach the negotiation stage, the representative is optimistic as a common ground towards a peaceful resolution of the conflict can be secured and he remains dedicated to the cause of peace. However, Monday's 21/11/2021 statement from Ethiopian Prime Minister Abiy Ahmed promising to personally "mobilize to the front to lead the defense forces"

suggests that those efforts are far from succeeding. Nevertheless, Negotiation is inevitable at the end of any war.

c. The possible defeat of TPLF

As the current fact on the ground shows, the rebel groups are defeated on almost all battlefields and retreating to the Tigray region. The government is controlling most strategic areas including both in Amhara and Afar. The PM is leading the front and daily reports as his troops are winning the battlefields. On the contrary, the TPLF leaders have claimed that they are moving according to their plan and the retreat is also part of a major plan. However, their promise to overtake Addis Ababa within a short period seems to have lapsed. Therefore it is possible to argue that the power is now shifted to the central government. However, this current scenario makes it hard to claim that it is indeed a lasting solution that brings lasting peace.

d. Prolonged war?

As we can refer from the past rhythm of the war that there have been signs of progress and retreats from both sides. Situations have been changing rapidly and this past year we have been getting news where TPLF has made progress at times and the government forces cleared out TPLF at other times. Both the TPLF and the government have claimed the war would be over in a certain time. The government had also claimed that the war was over in the third week of the start of the war. The going back and forth indicates that there might be a scenario where the war would be prolonged and the current distractions continue to be a sad reality in the nation.

1.4 Human rights concerns

At the present moment, the situation of human rights in Ethiopia is very complicated inflicting distraction of humanity, large displacements, sexual violence, and a lot more. War has become a political solution and is compromising human rights protection. There are different threats of sanctions from westerns that could create economic instability and broaden inequalities. The US has announced the removal of Ethiopia from a key trade agreement AGOA which affects the livelihood of many Ethiopians who depend on the textile industry, particularly women and girls. The ongoing conflict has the following human rights concerns in general

- There are constraints on access to aid and restoring vital services to conflict zones.

- The prevalence of mass atrocities in the conflict, including troops and members of militias perpetrating rape and violence against women and girls in all conflict zones.
- Lack of accountability for serious rights violations.
- Millions of people, including children, are cut off from humanitarian aid and have limited access to shelter, water, food, and other necessities. Most of these social services are distracted by the conflict.
- Hundreds of thousands of people were displaced and had enormous needs.
- The declaration of a six-month state of emergency in the country and related human rights issues. (Search without court warrants, vague provisions of the SOE proclamation, misunderstanding/ abuse of the legal provisions by a law enforcement body.
- The mass arrest of citizens
- The suspension of the judicial system

Erroneous paths

- Alarming reports of mass arrests of Ethiopian citizens of Tigrayan descent point toward the danger of further atrocities. None of the observable trends are pointing in the direction of peace.
- The understanding and characterization of the war as if it is between the people of Tigray and the rest of Ethiopia will be a zero-sum game.
- The undiplomatic expression of anger by high government officials of Ethiopia against other states including USA diplomats and representatives.
- Interferences of both westerns and eastern in Ethiopia internal affairs. Currently, both the western and eastern camps are expressing their interest and concerns in different and opposing ways. For instance the US embassy vs. Russian embassy statements about the situation in Addis. When the former expressed its concerns in relation to terrorist attacks that could happen in Addis and warned its citizens to evacuate, the latter stated as things are as usual normal in Addis. As we can easily understand from Human rights history these two countries are from different camps and do have different understandings of human rights. Their prioritization between civil and political rights and socio-economic rights is also different.

- Weak diplomatic relation with the rest of the world:

1.5 Human Rights work of CSOs during the era of the 1-year war

What are the impacts of these situations on human rights defenders?

War is totally against peace and the absence of peace creates a loophole with the rule of law and results in the violation of basic principles of human rights. What is happening in Ethiopia is not different from this. Because of the war, there are so many human rights abuses. CSOs working on Human Rights couldn't be added to solve the problem rather they remain silent and lay low. To the date of this assessment, most CSOs are observed reluctantly to express their concerns on the ongoing war. Most of them were silent rather than speaking aloud. Till today there is only one CSO who initiated a peace calling for the conflicting parties to stop the war and come to the round table to bring peace. This CSO drafted a peace calling statement and sent for other CSOs to join the press statement and to denounce the war. However, most of the CSOs did not join the press statement. This is a clear indication of the fear of CSOs to denounce the war and to give their voice for peace and protection of human rights. CSOs who issue a press statement or who alert the belligerents from both sides to stop attacks against civilians are considered as a threat to national security.

1.5.1 The situation of Human Rights Defenders

In this very hostile environment many human rights defenders, in Ethiopia, have been subject to violations of their human rights. They have been the target of executions, torture, beatings, arbitrary arrest and detention, death threats, harassment, and defamation, as well as restrictions on their freedoms of movement from both sides of warring parties.

Human Rights Defenders and journalists have been the victims of accusations and unfair trials and convictions. They are also targeted with acts of intimidation and reprisals for their cooperation with the international human rights organization on human rights issues. Journalists were also subject to arbitrary arrest and detention for the mere reason of reporting.

Violations most commonly target human rights defenders themselves, their families, or the organizations and mechanisms through which they work. Occasionally, violations target members of defenders' families, as a means of applying pressure to the defender. Some human rights defenders are at greater risk because of the nature of the rights they seek to protect. Furthermore, women human rights defenders might confront risks that are gender-specific and require particular attention. In the areas of conflict happening in Ethiopia women, girls and children are more vulnerable to the violation of human rights and WHRD who fight for the protection of human rights are subjected to the violation of their own rights. They are targeted by the party of conflict from both sides. Nowadays voicing for the protection of human rights is politicized and considered as treason and betrayal of the country. HRDs in Amara, Tigray, and Afar regions are in a very dangerous situation. Most acts committed against human rights defenders during the era of war and state of emergency are in violation of both international and national law.

2. Critical Analysis of the State of Emergency Proclamation No. 5/2021 in light of the FDRE Constitution and International human rights instruments

Needless to say, recent Ethiopian history is marked by continuous proclamation of the state of emergency. For instance, from 2016 to date the Ethiopian government has declared a state of emergency at least four times. There is no question that conflict and a state of emergency are major threats to human rights. However, it should also be underlined that a state of emergency is sometimes important for human rights protection.

It is undeniable that since the outbreak of Non-international armed conflict (NIAC) between the Federal government and the Tigray People Liberation Front (TPLF) back in November of 2020, Ethiopia has been encountering an unprecedented myriad of crises that got national, regional, and global attention. Following the continuous conflict and other security concerns in some parts of the country, Ethiopia's Council of ministers has proclaimed a state of emergency on November 2 of 2021, throughout the country. The proclamation got the approval of the House of People Representatives (HPR) on November 3 of 2021. Subsequently, the international community including the United Nations (UN) expressed their concerns that the declaration of a state of emergency could further exacerbate the already dire political, humanitarian, and security situation of the country.

Ethiopia is a party to different international and regional human rights treaties including, but not limited to the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR). The FDRE Constitution and ICCPR have set directly and indirectly various principles and standards to be adhered to. Therefore, the core purpose of this assessment is to critically analyze the state of emergency proclamation No.5/2021 which was proclaimed in a complicated political situation against both the substantive and procedural standards set in the FDRE Constitution and international bills of rights and to assess the impact of the proclamation on activities of human rights defenders.

2.1 The notion of State of Emergency

A state of emergency derives from a governmental declaration made in response to an extraordinary situation posing a fundamental threat to the country.¹ The term emergency connotes a sudden, urgent, usually unforeseen event or situation, which requires immediate action, often, without having time for prior reflection and consideration.² In common parlance, the “state of emergency” denotes a legal regime in which public institutions are vested with extraordinary powers to address existential threats to public order.[6] States of emergency have two components:

- A legal framework consisting of the constitutional and legislative bases for the state of emergency, and
- An operational framework involving the organizational structure and strategic plans for dealing with the state of emergency.³

While separate, these components must be compatible; in other words, the legal framework must take into account operational requirements, and the operational requirements must respect the legal framework, which includes international law.⁴ In short, the principle of the state of emergency recognizes the right of every sovereign state to take all reasonable steps needed to protect and

¹ Gerard Emmanuel Kamdem Kamga, *State of emergency, state of exception: A critical investigation*, University of Pretoria, p.3. (2010)

² Vesna Stefanovska, *Derogation of Human Rights Rules in Times of Emergency*, Cambridge Int. L. jou. P. (2021)

³ Ibid

⁴ Ibid

preserve the integrity of the state. However, this does not mean that the state can always resort to a state of emergency as a matter of principle because a state of emergency is a state of exception; the state can derogate rights if and only if the circumstances that constitutionally warrant derogations are satisfied.

2.2 International Principles Governing State of Emergency

a. Substantive Principles

The substantive requirements are those rules which govern the material, temporal, and geographical scope of the state of emergency and the emergency measures, including derogation of human rights. ICCPR has unequivocally indicated substantive principles governing the state of emergency.⁵ These are the principle of necessity, legality, proportionality, the respect and protection of non-derogable rights, consistency with other states' obligations under international law, and the principle of non-discrimination. The above principles will be further discussed in the subsequent section.

The Principle of Strict Necessity

For a derogation to be admissible, the situation must constitute a 'public emergency which threatens the nation's life.'⁶ Treaty monitoring bodies have developed several criteria in this regard. The HRC has deemed the principle of strict necessity to be "a fundamental requirement for any measures derogating from the Covenant" and one which relates "to the duration, geographical coverage and material scope of the State of emergency or any measures of derogation resorted to because of the emergency."⁷ While assessing the requirement of strict necessity, treaty monitoring bodies have regularly referred to the availability of sufficient safeguards against the abuse of derogation measures. Accordingly, the need for proper assessment of derogation measures and a periodic review by the legislature and the judiciary has been identified as essential preventive factors in this respect.⁸

In light of this, there was a controversy that whether the reality on the ground is a threat to the life of the nation or the incumbent government.

⁵ See, article 4 of ICCPR

⁶ ICCPR Article 4(1)

⁷G.C. 29, (53) Para. 4 and 8

⁸ ECtHR, Lawless Case, para 37.

According to EHRDC informants, almost all constitutional systems give the power to determine national security to the executive. The informant further added, “the state/executive with all its security apparatuses is the one which has the information about the actual security situations of the country, and whether it entails being a public emergency that threatens the life of the nations”⁹ it is highly difficult for anyone, be it an individual or juridical person, to verify the existence of a public emergency that threatens the life of the nation because the mandate of assessing national intelligence information falls solely on the executive branch of government for obvious reasons.

In Ethiopia, a state of emergency has been declared for matters much less dangerous than the one that we are in right now. He endorses the fact that the current Ethiopian situation amounts to a public emergency that threatens the life of the nations. The other Human Rights defender also strengthened the point that the reality on the ground is a threat to the life of the nation. According to HRD, this was attested by the call for the establishment of a new confederation by TPLF and its allies, and the rhetoric which unequivocally depicted Ethiopia as an empire, further stating the “Ethiopian empire should collapse”. Therefore, for him, there is no question that the reality on the ground is legally and morally justifiable for the declaration of a state of emergency. However, he claimed reservation on its implementation.

The other human rights defender who is working on conflict areas argued that despite the contentious nature of the election which brought the ruling party to government power, the FDRE Constitution clearly states that election is the only way through which government powers can be assumed. TPLF and other insurgent groups are fighting the government to assume political/government power which is an extra-constitutional practice; it is inconsistent with the constitutional provision which dictates election as the sole means of assuming political powers. In other words, the constitutional order is under immense threat.

According to an HRD who request to be anonymous, the fact that a rebellion with an objective of dismantling the central government and terrorizing the public is advancing and controlling significant parts of the country, along with the immense economic, social and diplomatic costs incurred of the war, the situation constitutes an emergency, where the constitutional order and

⁹ EHRDC interview, January 2022

security of the country is threatened. Hence, the proclamation of a state of emergency was legally justifiable and satisfies the requirements of the principle of necessity.

The Principle of Proportionality

The severity of the threat, the duration of the emergency decree, and the extent of the emergency declaration's application are all factors considered in the proportionality test.¹⁰ The principle of proportionality is reflected in Art 93(4) of the FDRE Constitution, which states: "The CoM shall have the power to suspend such political and democratic rights contained in this Constitution to the extent necessary to avoid the conditions that required the declaration of a state of emergency."¹¹ Any emergency action, according to this principle, must serve a legitimate public interest and be proportional to the threat posed.

According to several experts, the geographic scope is one of the most contested and problematic parts of the recent proclamation because it was declared throughout Ethiopia.

Indeed, the conflict, which posed an existential threat to the life of the nation, is active in most parts of the country. There are also some parts of the countries where there is no ongoing armed conflict. However, the absence of active conflict in some parts of the country doesn't imply stability. Cognizance of the national intelligence information is an essential precondition to determine and assess the proportionality of the decree against its geographic expanse.

An academic who requested anonymity added that while the war was limited to certain areas, the measures taken - including restrictions related to liberty, press, habeas corpus, access to justice, fair trial, privacy, associations, and assembly - are inflated. Therefore, the state should justify the fact that these restrictions are required to avert emergencies.

Needless to say, human rights protection is a principle while a state of emergency is an exception and exceptions shall be interpreted very narrowly. The geographic scope of the proclamation is broad, in light of the matters which necessitated the emergency and the golden rule of interpretation, which dictates that exceptions shall be interpreted narrowly.

¹⁰ GC 29, (n50) para 4.

¹¹ FDRE Constitution Art 93(4)

According to different informants who gave their concerns, the application of the proclamation in some parts of the country such as the Somali Regional State, the State of the Southern Nations, Nationalities, and Peoples, and Addis Ababa does not make sense. The geographic span of the proclamation is broad and problematic. This might show the intention of the executive body beyond the intended goal of the state of emergency declaration. The aforementioned points made by the experts indicate that the geographic span of the emergency proclamation has deviated from the principle of proportionality which is unequivocally provided under article 4(1) of the ICCPR. This has been also shown in practice most human rights defenders become the victim of the state of emergency. They have been arrested without a court warrant, most journalists were also detained and their media houses were also closed.

The Non-Derogable Civil and Political Rights

The derogation clauses of the different treaties contain a catalog of these rights with remarkable differences.¹² For instance, the ICCPR lists non-derogable rights.¹³ Importantly, HRC noted that some of the provisions of the Covenant have been listed as non-derogable doesn't mean that others may be subjected to derogations arbitrarily.¹⁴ The list of non-derogable rights mentioned under the main instruments is illustrative. In addition to what is stated in art. 4 of ICCPR, there is an international effort to expand the list of non-derogable rights by treaty monitoring and other advisory bodies.¹⁵ The HRC, for instance, suggested that the rights of fair trial and writ of habeas corpus are non-derogable rights.¹⁶ Furthermore, the Paris Minimum Standards came up with sixteen rights and freedoms as a non-derogable.¹⁷ The Siracusa Principles also recommended the

¹² Joan F. Hartman, Working Paper for the Committee of Experts on the Article 4 of Derogation Provision, 7 Human Rights Quarterly 1, (1985) 113—114.

¹³ ICCPR, Article 6-8 11, 15, 16, 18

¹⁴ GC 29 para 6.

¹⁵ Yehenew T. Walilegn, State of Emergency and Human Rights under 1995 Ethiopian Constitution, 21 Journal Of Ethiopian Law, (2007) 96.

¹⁶ U.N. Human Rights Committee, General Comment 29, A State of Emergency CCPR/C/21/Rev.1/Add.11, adopted on 31 August 2001 Para. 8

¹⁷ Paris Minimum Standards, Sec C, arts 1-16.

right to a fair trial to be non-derogable.¹⁸ The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa adopted by the African Commission states that “no circumstances whatsoever, may be invoked to justify derogations from the right to a fair trial.¹⁹ In the opinion of the HRC, the reason for making selected rights non-derogable is partly to recognize the peremptory nature of some fundamental rights ensured in treaty form in the Covenant.²⁰ In line with this, Fitzpatrick suggested two potential reasons for the non-derogability status of some rights: first, some of these rights are fundamental and indispensable for the protection of human beings; second, derogation from some of those rights during states of emergency would never be justified because they have no direct bearing on the crisis.²¹

The Principle of Consistency with the State's Other International obligations

Measures required by the exigencies of a given situation may be impermissible if they conflict with other obligations of the State under international instruments. This requirement would include obligations under the UN Charter,²² International Humanitarian Law,²³ other universal or regional human rights treaties,²⁴ UN Security Council Resolutions and any rule of international law that should attain the status of jus cogens.²⁵ Treaties of the field of international disaster response law such as International Health Regulations, whose purpose is health response to the international spread of disease, are essential in this respect. Sometimes it would be difficult for States to suspend. With this regard raising the case of the African Charter of Human and People's Rights, is essential. The treaty monitoring body of the Charter has ruled that the treaty "does not allow for State parties

¹⁸ Siracusa Principles on the limitation and derogation of provisions in the International Covenant on civil and political rights Annex, U.N. Doc E/CN.4/1984/4 (1984)

¹⁹ African Commission on Human and Peoples' Rights, Guidelines and Principles

²⁰ ICCPR, Articles 6 and 7.

²¹ Joan Fitzpatrick, Protection against Abuse of Concept of "Emergency" in Human Rights: An Agenda for the Next Century (Louis Henkin et al., eds., 1994). 203, 209

²² Oraà (n4) 194, referring to the Commission's Report in Cyprus v. Turkey, Report of 10 July 1976, paras 510, 512.

²³ Hartman (n92), 17; Svensson-McCarthy (n36), 637.

²⁴ Novak M U.N. covenant on civil and political rights—C.C.P.R. commentary, 2nd rev ed. N.P. Engel Publisher, Kehl am Rhein (2005), 99

²⁵ General Comment 29 para 11.

to derogate from their treaty obligations during emergencies."²⁶ Therefore State parties to the Charter would have to make sure that the exceptional measures they intend to adopt are consistent with the obligations established therein. Close attention should also be paid to human rights instruments containing provisions designed to be applied explicitly in situations of emergency.²⁷

Therefore, derogation prerogatives given to the state during a state of emergency under article 4 of ICCPR should not be invoked if it is contradictory to the obligation that IHL has imposed on Ethiopia.²⁸ The government needs to be extremely cautious because Ethiopia has signed and ratified the Geneva Conventions and its additional protocols, and the principles of IHL are non-derogable even during a state of emergence.

Despite the existence of a law that regulates war, it has not been observed by the warring parties in the Ethiopian context. This is further vindicated by the joint investigation report of Ethiopian Human Rights Commission and the UN Human Rights office which found military crime, mass murder, civilian attacks, rape as a weapon of war, and other war crimes committed by all the warring parties namely: the Ethiopian National Defense Force (ENDF), the Tigray People's Liberation Force (TPLF), the Eritrean Defence Force (EDF) and the Amhara Special Force and militia.

The Principle of Non-Discrimination

The principle of non-discrimination requires that emergency measures adopted by the derogating state should not entail discrimination solely on the basis of race, color, language, religion, sex, ethnic group, political belief, or another status.²⁹ The multiple references to the principle of non-discrimination in international instruments show that the principle has already attained a status of *jus cogens* which could render a legitimate suspension of human rights invalid if done in a

²⁶ African Commission on Human and People's Rights, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Decision adopted during the 18th Ordinary session, 2–1 October 1995, para 21

²⁷ Convention on the Rights of Persons with Disabilities, Article 11; African Charter on the Rights and Welfare of the Child (1990)Article 23

²⁸ Getachew Jima, *The Role of Courts in protecting Human Rights during a state of Emergency in Ethiopia*; LLM thesis, AAU (unpublished), p.39 (2022)

²⁹ ICCPR, art 4(1); A.C.H.R., art 27(1).

discriminatory manner based on the above grounds.³⁰ As far as this principle is concerned, the nature of the conflicting parties posed difficulty. Since TPLF is an ethnonational party, its members and supporters are primarily Tigrayan. This puts innocent Tigrayans in a vulnerable position in contrast with other citizens.

There are two kinds of discrimination: direct and indirect discrimination. Though there is no provision in the proclamation that discriminates against specific ethnic groups, the impact of the proclamation has been absolutely discriminatory. This can be understood from its implementation. It is being implemented in a way that deems “all Tigrayans are guilty until proven innocent”.³¹ Being a member of a certain ethnic group and speaking a certain language by itself should not suffice to make a person suspect. What can be understood from the above-mentioned points of experts and stakeholders makes clear that the emergency decree is not discriminatory in itself but there are indications that it is being implemented in a discriminatory manner. Therefore, the law enforcement agency should be cautious while implementing the proclamation.

b. Procedural Principles

The procedural requirements are those norms determining the procedures for initiation, execution, and termination of the emergency powers. The ICCPR under articles 4(1) and 4(3) provides the principle of official proclamation and the principle of international notification as mandatory procedural requirements that should be obeyed by the state which declares a state of emergency.

The Principle of Official Proclamation

As per Article 4 (1) of the ICCPR, an official proclamation is one of the procedural requirements that should be fulfilled during a state of emergency. Similarly, the Human Rights Committee minutes state that the official proclamation of the state of emergency is a fundamental prerequisite for invoking derogation power by states.³² The purpose of this requirement is to inform the public of the declaration of a state of emergency and its territorial, material, and temporal consequences which also helps to maintain the principles of legality and rule of law.³³ The Council of Ministers

³⁰ EHRDC Interviewee January 2022

³¹ EHRDC interview January 2022

³² See, general comment No 29

³³ Ibid

had officially declared the state of emergency which after receiving the approval of the HPR became law. Therefore, the principle of official proclamation is satisfied.

The Principle of International Notification

According to this requirement, a derogating state must notify other state parties of the derogations through the depositary of the instrument, to the United Nations Secretary-General in the case of the ICCPR. This is useful in ensuring international supervision over derogation measures by other state parties or treaty monitoring organs. As per the Siracusa Principles, a states' notification should include information regarding the derogated provision of the Covenant; a copy of the emergency proclamation together with the constitutional provisions, legislation, or decrees governing the state of emergency; the date of proclamation and effective date of the state of emergency; the reasons for derogation; and effect of the derogation on the Covenant rights. It also provided that states parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers.

3. The FDRE Constitution

The FDRE Constitution empowers the Council of Ministers to declare a state of emergency under limited conditions. These conditions are exhaustively listed: an external invasion, a breakdown of law and order which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic.³⁴ If one of the aforementioned substantive criteria is fulfilled, the Council of Ministers can declare a state of emergency.

A key informant who requested anonymity contended that there was a breakdown of law and order which could not be controlled even by the Ethiopian National Defense Force let alone regular law enforcement agencies. Hence, according to the informant, the proclamation of the emergency decree by the Council of Ministers was constitutionally justifiable.

Besides the above-mentioned substantive requirements, the FDRE Constitution also provides the mandatory procedural requirements to be fulfilled. The proclamation of the state of emergency by

³⁴ FDRE Constitution Article 93(1) (a)

the Council of Ministers can only be binding and effective if it passes through the procedural requirements. The constitutional procedure through which the emergency decree was proclaimed is not a contentious subject.

Generally speaking, rights enshrined in the FDRE Constitution can be classified into derogable and non – derogable rights.³⁵ In the FDRE Constitution certain rights have been considered so important that they are not derogated even during a state of emergency; Article 1 which has to do with Nomenclature of the State, Article 8, Prohibition against inhuman Treatment, Article 25, The Right to Equality, and Article 39 (1) and (2) the unconditional right to self-determination of every Nation, Nationality and People, including the right to secession. This is explicitly provided under article 93(4) (c) of the FDRE Constitution.

However, there is a common major misconception. Every time a state of emergency is declared the assumption is that all rights stipulated in the FDRE Constitution, apart from the aforementioned four rights, are outright and forthwith suspended. Contrary to that, Article 93 of the FDRE Constitution merely provides the maximum threshold. Put differently, the reading of the FDRE Constitution implies that depending on exigencies of situations, the government prerogatives during a state of emergency could go to the extent of suspending and derogating all rights excluding the above-mentioned four rights.

Furthermore, according to Article 9(4) FDRE Constitution, international human rights agreements ratified by Ethiopia are considered an integral part of the law of the land. The FDRE Constitution states that the fundamental rights and freedoms guaranteed by the Constitution shall be interpreted in conformity to the Universal Declaration of Human Rights, International Covenants on Human Rights, and international instruments adopted by Ethiopia. The right to life and the right to freedom of thought, conscience, and religion is recognized as non-derogable rights under international bills of rights. Therefore, despite the presence of explicit provisions, the reading of article 4 of the ICCPR, Article 9(4) of the FDRE Constitution in conjunction with article 13(2) of the same Constitution gives the impression that the right to life and the right to freedom of thought, conscience and religion are non-derogable even under the FDRE Constitution.

³⁵ FDRE constitution Article 93(4) (b and c)

According to the informant, there is a contradiction between the FDRE Constitution and ICCPR on those lists of rights deemed to be non-derogable. Under the FDRE Constitution, the right to life is derogable whereas it is non-derogable under ICCPR. Therefore, extrajudicial killings can be justified under the FDRE Constitution during a state of emergency. Additionally, the right to secession is non-derogable while it is not provided among the lists of rights considered as non-derogable under ICCPR.

On the other hand, some human rights experts stated that there is no contradiction between the FDRE Constitution and ICCPR on those lists of rights considered as non-derogable. Article 93 of the FDRE Constitution from which the concept of derogable and non-derogable rights derives should be seen in conjunction with article 13(2) of the FDRE Constitution. And since Ethiopia has ratified the ICCPR, chapter three of the FDRE Constitution shall be interpreted in a way that is conforming to the ICCPR. Hence, extrajudicial killings cannot be justified even during a state of emergency under the FDRE Constitution and the ICCPR.

The Ethiopian Human Rights Commission did not conduct a proper legal analysis on the current state of emergency decree. Hence, they don't have an official position. But they have done a comprehensive legal analysis on the emergency decree that was proclaimed during the onset of Covid-19 which is applicable for any kind of emergency irrespective of its nature. In addition to those lists of rights recognized as non-derogable rights under article 93 of the FDRE Constitution, the Commission argued that the right to life and due process of law should be considered as non-derogable rights. Therefore, the provision of the proclamation which suspends the power of the court to entertain matters that fall within the realm of emergency proclamation is against international human rights standards. The failure to establish an administrative judiciary or an ad hoc court that can entertain these matters, and not the suspension itself, is seen as problematic.

3.1 Access to justice and Restrictions on Fair Trial Guarantees

In a democratic society, the judiciary should protect human rights and ensure access to justice for its State's population.³⁶ It is because besides being an end by themselves, they are a means to control the possible abuses and violations of human rights by the government during states of

³⁶ International Commission of Jurists' (ICJ), Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Principles 1 and 4 and pp. 1-15, 57-75 of the Commentary (2011) (hereinafter I.C.J., Geneva)

emergency. This obligation does not erode in times of crisis but rather becomes even more critical to protecting human rights and ensuring that the executive branch of government does not abuse its additional emergency power.³⁷ Regional instruments, including the African Charter on Human and People's Rights, underscore the importance of the protection of fundamental human rights at all times.³⁸

From the IHRL perspective, the specific procedural guarantees available in criminal cases have been laid down under Article 9 of the ICCPR, providing for protections against arbitrary arrest and detention, and Article 14 of the ICCPR, dealing with the principles of a fair trial.³⁹ While the former includes the rights of arrested persons to be informed of the reasons for their arrest, brought to trial within a reasonable time, and the like.⁴⁰ And the latter includes the right to a fair trial and a fair and public hearing by a competent, independent, and impartial tribunal.⁴¹

Art 8(1) of the state of emergency proclamation stipulated that any judicial organ shall not have authority with regard to the enforcement of this proclamation until it expires. It can be argued that in addition to those lists of nondelegable rights provided under Article 4(1) of the ICCPR, there are non-derogable rights that derive from customary international law. Among them, due process of law is the most important one. The judicial guarantee has already reached the status of jus cogens. Hence, the provision of the proclamation which suspends the power of the court to entertain the matters that fall within the domain of the emergency proclamations is against international human rights standards and absolutely unacceptable and against the international human rights standard. It is not only the fact that it suspends the power of the court but its failure to establish at least an administrative judiciary or some sort of ad hoc court which could entertain the matters.

³⁷ Office of the High Commissioner for Human Rights (OHCHR), Coronavirus Emergency: Challenges for the Justice System, Special Rapporteur on Independence of Judges (2020), available at; <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25810&LangID=E>> Accessed 19 April 2021

³⁸ African Charter on Human and Peoples' Rights, adopted 27 June 1981, art. 62, OAU. Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) (ratified Nov. 17, 1989)

³⁹ FDRE Constitution, (n30) Art 19 & Art 20

⁴⁰ ICCPR Art 9 (1-5)

⁴¹ Id Art 14 (1-7)

One informant who wants to remain anonymous argued that, in addition to those lists of non-derogable rights provided under Article 4(1) of the ICCPR, there are non-derogable rights that derive from customary international law. Among them, due process of law is the most important one. He added that due process of law has already reached the status of jus cogens. Hence, the provision of the proclamation which suspends the power of the court to entertain the matters that fall within the domain of the emergency proclamations is against international human rights standards.

3.2 Journalists and issue of media houses

Another controversial provision of the proclamation is the one that talks about CSO, Journalists, and media houses. It is controversial for two main reasons. In the first place, it penalizes suspicion, which means, if a certain CSO, journalists or Media House are just suspected of providing support for the terrorist organization, it suffices for the command post to order the relevant regulatory authority to make the suspension or permanent cancellation of licenses of the CSO, Media House or journalists who have been suspected of providing support.

The second point is concerning the notion of moral support. It prohibits providing moral support to terrorist organizations. At the same time, it fails to provide a definition for what ‘moral support’ stands for. According to a person who requested to be anonymous the prohibitions under articles of 4(9), 4(10), and 6(3) moral support to terrorists -is subject to subjective definitions, difficult to prove with material evidence, and restricts one of the non-derogable rights which is stipulated under article 18 of the ICCPR, right to have a conscience and thought. The provisions of the proclamation which bans moral supports without providing an ‘objectively workable definition’ are inconsistent with the freedom of Conscience which is recognized as a nondelegable right under ICCPR. Therefore, it infringes the Constitutional and international human rights obligations of the Ethiopian polity. The most visible and obvious impact of the state of emergency on the media, journalists and other institutions tasked with upholding human rights is the chilling effect. Therefore, it's worrisome for the Media houses, journalists, and CSO to investigate any things relating to the state of emergency and the ongoing armed conflicts for that matter. Furthermore, the state of emergency gives more power to the incumbent government to silence the journalist and human rights defenders who give strong critiques against the government. The below factual evidence can prove this.

4. The arrest of journalists and Human rights defenders following the state of emergency

Ethiopian authorities have arrested journalists since declaring a state of emergency on November 2 as part of the government's response to a year-long civil war against rebel forces allied with the Tigray People's Liberation Front (TPLF). Those detained include two former reporters at the Tigrigna-language radio service of the state-owned Ethiopia Broadcasting Corporation (EBC), the editor-in-chief of the YouTube channel Ubuntu TV, an editor at the Terara Network, the co-founder of Roha TV, a freelance video journalist accredited with The Associated Press, a cameraperson, and a journalist with the state-affiliated Fana Broadcasting Corporation. The following are the arrested journalist and the date of their arrest.

- On November 28, according to The Associated Press (AP) and local state media reports, three workers of AP were arrested including Amir Aman Kirayo.
- On December 7, police in Addis Ababa arrested Eyasped Tesfaye, co-founder, and editor-in-chief of the YouTube channel Ubuntu TV, at his home in Addis Ababa,
- On December 10, police also arrested Temerat Negara, a co-founder, editor, and presenter with the Terara Network, from his Addis Ababa home, saying that he was detained in connection to the state of emergency. According to his wife, Selam Belay Tamerat is currently under Oromia police custody in Gelan. He is not brought before the court yet and he is not allowed to be visited by his lawyer and only family members can see him.
- On December 11, security personnel in civilian clothes arrested Roha TV founder and reporter Meaza Mohammed. And like Tamirat she didn't bring before the court and the police refused the court order of bringing her. The police stated that the case of Meaza is not under its power rather she is under the control of the state of the emergency command post.
- Before the state of emergency that he was also arrested by Kibrom worku and Luami who worked at Ahadu radio. Even though Kibrom was released on bail of 15000 but the police didn't release him yet and currently he is under police custody named Aba Samuel in Addis Ababa. No family is allowed to visit him.

EHRDC has learned that these journalists are not yet brought to court. Some of them are only visited by family and denied lawyers and some of them are totally banned to be visited by anyone. The situation of their health is also questionable for instance the father of kaboom Mr. worku stated that his son Kibrom is medically diagnosed with heart problems and he was ordered by a doctor to watch his activities carefully. His father believes that the lack of food and proper sleep can trigger his heart issues and might be a threat to his life. Similarly, the wife of Amir Aman indicated that Amir suffers from Asthma. Ethiopia's state of emergency law gives security personnel extremely broad powers of arrest and suspends due process, effectively bans critical journalism, and sends an intimidating message to the press.

5. General observation and remarks

Observation One: Most CSOs indicate reluctance on advocacy works on human rights and limit their interventions. Understandably the civic space has been narrowed; however, the reaction from CSOs seems limited.

Observation two: Women and girls often bear the brunt of armed conflict and displacement and are disproportionately affected by the ongoing conflict in the northern region of Ethiopia. Both conflict and the war contributed to the mass displacement and this more affected women and children. Among the persons affected by conflict-induced displacement, the majority are women.

Displacement has left hundreds of thousands of Ethiopian women and girls in precarious situations by disrupting livelihood, food security, and access to basic social services such as health care and educational facilities, employment opportunities. Women and girls who are living in IDP camps and sites have particular vulnerabilities. Women have limited access to maternal and reproductive health care services. Safety and security are often compromised as living conditions in camps and IDPs sites expose them to various forms of violence. Girls remain out of school, vulnerable to harmful traditional practices, labor, and sexual exploitation.

According to the recent joint report by EHRC and OHCHR, various acts of SGBV including physical violence and assault; Rape including gang rape, ethnic slurs, and other inhuman acts has been committed. However, the ongoing conflict and displacement crises hampered the capacity and activities of WHRDs. In times of displacement, the likelihood of WHRDs to be targeted due to their sex and nature of the activity is higher. Besides, due to the nationwide state of emergency

civic spaces have been narrowed and freedom of expression, right to assembly, association, and movement have been restricted. A hostile and polarized political environment has been a big challenge for WHRDs to be a voice for the voiceless and speak out on the current distractions. This puts WHRDs in a position where their concerns are taken for supporting a rebel group.

Observation four: Using atrocities and violations of human rights in conflict zones for political gain and propaganda. The warring parties are using one other's atrocities as a weapon to achieve their political goals. This exacerbates the human rights situation and makes the work of neutral HRDs more difficult.

Observation Five: Human rights abuses are becoming more common. Victims of human rights breaches normalize the atrocities, making it more difficult for human rights defenders to investigate and monitor human rights violations in conflict zones. HRDs in crisis zones have difficulty gathering information from victims. Human rights violations are viewed by most victims as minor. Those who have been raped by a single man, for example, interpret this violation differently than women who have been raped by a gang, and it becomes normalized.

Observation six: The state of emergency is being used to target HRDs. As we know, a state of emergency is a period where rights could be suspended, hence this puts HRD in a very dangerous spot where anyone can target them for the work they do. This includes ethnic profiling.

Conclusion

Conflict is a major threat to human rights. When constitutional order and the very existence of the nation is under existential threat, the state can resort to a state of emergency. The FDRE Constitution and the ICCPR have set preconditions that need to be fulfilled before the state resorts to the declaration of a state of emergency and suspends and derogates the human rights of its citizens. The FDRE Constitution has specified the occurrence of one of the following conditions as a ground for the declaration of a state of emergency: an external invasion, a breakdown of law and order which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster or an epidemic. On the other hand, the ICCPR has stated that in order for party

states to declare a state of emergency and derogate human rights, there must be a “threat to the life of the nation”.

There was a debate whether the current situation in Ethiopia amounts to a “threat to the life of the nation” or to the life of the incumbent government. In addition to the contentious nature of the election which brought the ruling party to government power, there is a clear attempt by the TPLF and other insurgents’ groups to take government power in an extra-constitutional manner. It is extra-constitutional because the FDRE Constitutions designates election as the sole means of assuming government power. Hence, there is a breakdown of law and order which cannot be controlled even by Ethiopian National Defense let alone regular law enforcement agencies. The existence of a threat against constitutional order is tantamount to the threat to the life of the nation. Therefore, it can be concluded, theoretically speaking, there was sufficient justification that necessitated the declaration of the state of emergency. On the other hand, the state of emergency proclamation No.5/2021 deviated from constitutional and international principles governing the state of emergency in many ways. For instance, the geographic scope of the proclamation is broad and deviates from the principle of proportionality. By suspending the power of the court, the proclamation violates due process of law which should not be violated under any circumstances. It has failed to adhere to the principle of respecting and protecting non-derogable rights such as freedom of conscience. It also indirectly infringes on the principle of non-discrimination. Consequently ignorance of these principles resulted in violations of basic human rights and fundamental freedom of human rights defenders and all citizens.

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