Derogation clauses in International Human Rights Treaties: Relevance in the post-9/11 State of Permanent Legal Emergency.

Human Rights are inalienable.

This article aims at analysing the relevance of the derogation clauses in Article 4 of the ICCPR, Article 15 of the ECHR and Article 27 of the ACHR in the post-9/11 state of permanent legal emergency, which allows State parties the right to suspend some of their obligations in protecting human rights during public emergency. This analysis will be supported first by a brief overview of the derogation clauses in the ICCPR, the ECHR and the ACHR; secondly with explanations of those clauses. The third part of this article will focus on the term 'public emergency threatening the life of the nation' developed by the European Courts of Human Rights (ECtHR), the Human Rights Committee (HRC) and the International Law Association (ILA) before 9/11. The subsequent part will show how the same ECtHR after 9/11 in the judgments of Belmarsh detainees and A and Others v. United Kingdom turned away from their original position in dealing with the term 'public emergency threatening the life of the nation'. This article will conclude with the critique of the judgments of the ECtHR and provide recommendation with example to deal firmly with the derogation clauses in the international human rights treaties as an answer to the analysis, e.g., whether the derogation clauses have become out-dated and meaningless in the post-9/11 state of permanent legal emergency.

Human rights issues are the first casualties whenever State governments have confronted with crisis such as armed conflicts, civil wars, insurrections, severe economic shocks, natural disasters and public emergencies. To deal with such crisis international protection of human rights, however, have become essential as the State governments tends to violate of human rights treaties, which are suspensions of basic human freedoms. The derogation clauses such as Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the European Convention on Human Rights (ECHR) and Article 27 of the American Convention on Human Rights (ACHR) are one of those international protections of human rights, which constrain the behaviour of the State governments. The derogation clauses basically suggest that any restrictions of human rights and civil liberties in times of public emergency must be strictly justifiable through the application of a proportionality test.

Unfortunately, the tragic events of 11 September 2001 (hereinafter 9/11) have led to a dramatic change in the proportionality test. After the 9/11 terrorist attacks in the United States, the United

Nations (UN) Security Council acting under Chapter VII of the UN Charter called on all States to redouble their efforts to prevent and suppress the commission of terrorist attacks, including denying a safe haven to those who finance, plan or support terrorist acts. In response, State governments all over the world have resorted to a wide range of constructions, as well as anti-terrorism laws, to justify, under international law, their unilateral exceptions to human rights in the name of countering terrorism. Moreover, to support those anti-terrorism laws, the European Court of Human Rights (ECtHR) granted margin of appreciation to the State governments which means the State governments have unlimited authority to determine the derogation measures necessary to address the public emergency. All these measures, however, lead to the question whether the derogation clauses in the international human rights treaties have become out-dated and meaningless in protecting human rights in the post-9/11 state of permanent legal emergency. If the answer is yes, then what could be done to lessen the impact of the violations of the derogation clauses?

This means that the ICCPR as well the ECHR and the ACHR envisage a system of derogations allowing States parties to adjust their obligations temporarily under the treaty in exceptional circumstances, such as, war and in times of public emergency threatening the life of a nation. While the State parties may not derogate from the entire treaty, they may legally suspend their obligation to respect and enforce specific rights contained in the respective convention during times of war or other public emergency.

Article 4 of the ICCPR deals with the term public emergency threatening the life of the nation. During the time of public emergency threatening the life of the nation the State Parties may take measures derogating from their obligations under the ICCPR to the extent strictly required by the exigencies of the situation. However, such measures cannot be inconsistent with their other obligations under international law and does not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Moreover, the State Parties cannot derogate from its obligation enshrined in Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 of the ICCPR. This means that if any State Party avails itself of the right of derogation, it shall immediately inform the other State Parties, through the intermediary of the Secretary–General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. Lastly, the State Party shall make further communication, through the same intermediary, on the date on which it terminates such derogation.

Similarly, the term public emergency threatening the life of the nation has also been referred in Article 15 of the ECHR. It says that in times of public emergency threatening the life of the nation State Parties are permitted to take derogating measures from its obligations under the European Convention to the extent strictly required by the exigencies of the situation. However, such measures cannot be inconsistent with other obligations under international law. Additionally, no derogations from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. Moreover, if any State party enacts any derogation clause in its laws than such Party shall keep the Secretary General of the Council of Europe fully informed of such measures, as well as providing the reasons for such decisions. Lastly, the State party is under the obligation to inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

The last international human treaties dealing with the term public emergency threatening the life of the nation is Article 27 of the ACHR. According to this Article, a State Party in times of war, public danger, or other emergency that threatens its independence or security can take measures derogating from its obligation under ACHR to the extent and for the period strictly required by the exigencies of the situation. This Article also has restricting clause, which means than State party cannot take measures inconsistent with its other obligations under international law. Additionally, the State party must look into the matter that the derogating measures does not involve discrimination on the ground of race, colour, sex, language, religion, or social origin. Moreover, this provision does not authorize any suspension of Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government) or of the judicial guarantees essential for the protection of such rights. Subsequently, any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the application of which provisions it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

After analysing the derogation clauses in the ICCPR, the ECHR and the ACHR, first of all it appears that these clauses protect three categories of individual rights. Firstly, there are certain rights, which cannot be derogated or abrogated from regardless of the situation. These rights include the right to life; prohibition of slavery; prohibition of torture or inhuman or degrading treatment or punishment; and prohibition of retroactive penal measures. Secondly, there are certain rights that can be limited only by their own built in definitional limitations but that nevertheless can be derogated from in times of public emergency. They are the deportation or forcible transfer of populations that would constitute a crime against humanity. Thirdly, there are certain rights, which are non-derogable on the basis that to derogate from them would undermine the principle of legality. Examples are the rights of all persons deprived of liberty to be treated with humanity; the right to a fair trial during a state of emergency and prohibitions against the taking of hostages, abductions or unacknowledged detention.

Secondly, it appears that the derogation clauses require principles of non-discrimination to be followed by the State; for example, State is under the obligation to make sure that the derogation measures do not involve discrimination solely on the ground of sex, colour, race, language, religion or social origin. The analysis further reveals that the derogation clauses do not cover measures that have indirect effect on particular groups. Although Article 15 of the ECHR did not categorise the grounds of discrimination in the same manner as Article 4 of the ICCPR and Article 27 of ECHR, however, it did mention that derogation measures must not be inconsistent with other obligations under international law. Thus, it is evident from the wordings of the Articles; measures, which discriminate solely on the grounds enumerated above, are prohibited.

Thirdly, in addition to the principles of non-discrimination the derogation clauses require two other procedural principles; they are principles of proclamation and notification. First, the official proclamation of the existence of a public emergency is an essential technical prerequisite for the application of derogation. It is designed to prevent arbitrary or de facto derogation and to obligate derogating States to act openly from the outset of the emergency and to delegitimise after-the-fact

justifications for violation of fundamental rights. Secondly, notification procedures impose the duty on the State to provide information about the provision from which it has derogated and the States Parties are obliged to include in their reports "sufficient and precise information about their law and practice in the field of emergency powers". Thus, proclamation clause serves as a domestic supervision opposed to international supervision tied with the duty of notification, contrarily, the notification requirement serves as a guarantee for supervision by international bodies of the legality of the establishment of a state of emergency. The HRC in an application under the first Optional Protocol declined to recognise the legitimacy of derogation when a State Party failed to follow these two principles.

In dealing with the term 'public emergency threatening the life of the nation' Article 15 and 27 of the ECHR and the ACHR closely resemble with Article 4 of the ICCPR. In contrast with the ECHR and ICCPR, Article 27 the ACHR additionally allows 'public danger' and 'threat to independence or security of a State' as grounds for State Party to derogate from its obligation. Although, all these Articles refers to a State having the right to derogate from its obligation in protecting the rights of its citizens in times of public emergency threatening the life of the nation, the ICCPR, the ECHR and the ACHR lack a specific definition of the meaning of what a 'public emergency threatening the life of the nation' is.

International monitoring organs such as the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) established under the ICCPR and the ECHR provided definitions of the term 'a public emergency threatening the life of the nation'. Additionally, the International Law Association (ILA) and the Siracusa Principles have interpreted the term. Apart from these, there are certain other international standards that provided a guideline to the State party to determine the meaning and scope of the term 'a public emergency threatening the life of the nation'. Those definitions and interpretations are discussed in the following sections.

The HRC first confronted with the term ' a public emergency threatening the life of the nation' in the case of Landinella Silva v Uruguay, Weinberger v Uruguay and Salgar de Montejo v Colombia, however, the Committee concluded, without defining what constitutes a public emergency and what does not, that there was no public emergency in all these cases. Subsequently, the Committee issued General Comment No 29 on Article 4 of the ICCPR according to which a State must meet two fundamental conditions to derogate lawfully from its obligations. Firstly, the situation must amount to a public emergency threatening the life of the nation and the State party must have officially proclaimed a state of emergency. Secondly, not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation. In addition to these, any measure derogating from the provisions of the ICCPR must be an exceptional and must be temporary in nature.

On the other hand, the ECtHR first confronted with the term public emergency in Lawless v Ireland case. The Strasbourg Court defined 'time of public emergency' as an "exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community of which the community is composed". This definition was further developed in the Greek Case, where the European Commission on Human Rights pronounced that a 'public emergency' must have four characteristics. First, it must be actual or imminent. Then, its effects of emergency must involve the whole nation. In addition, the continuance of the organised life of the community

must be threatened. And last, the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the European Convention for the maintenance of public safety, health and order, are plainly inadequate.

The ECtHR in the Ireland v United Kingdom, considered 'terrorism' or 'terrorist activity' in addition to the grounds of public emergency enshrined in Article 15 of the ECHR. The ECtHR keeping that in mind held that violence with bombing, shooting and rioting are no less than minor civil disorders and the derogation measures taken by the State to deal with such civil disorders are lawful. The ECtHR subsequently maintained a similar position in Brannigan and McBride v United Kingdom and Aksoy v Turkey relating to the exceptional measures taken by the governments of these countries to confront terrorist activities. Although these cases provided no development to the term public emergency, nevertheless, they allowed a wide margin of appreciation to the national authorities to the derogation measures in addressing public emergency.

When defining the term 'public emergency threatening the life of the nation' the International Law Association adopted the Paris Minimum Standards of Human Rights Norms in a State of Emergency, according to which public emergency means "an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed".

Similarly, Principle 39 of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights defines the term public emergency. According to the principle 'a public emergency threatening the life of the nation' is one that affects the whole of the population and either the whole or part of the territory of the State, and threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognised in the Covenant. However, Siracusa Principles does not justify internal conflict or unrest or economic difficulties, if they do not constitute a grave and imminent threat to the life of the nation.

Among other international standards containing the provisions of 'public emergency threatening the life of the nation' are the 1987 Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence, 1990 Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency and 1990 Turku/Abo Declaration of Minimum Humanitarian Standards. These standards reflect procedural and structural recommendations however, a common feature to these standards is "their attempt to expand and refine the core of absolute rights never subject to suspension", partly owing to the due account of guarantees provided by international humanitarian law.

Thus, it can be concluded from the above definitions that the international community was unanimous on the general contours of the term 'public emergency threatening the life of the nation', particularly with respect to its contingent and exceptional nature.

The ECtHR, prior to 9/11, developed the principle of proportionality for the justification of derogation and the margin of appreciation a State can enjoy determining public emergency. The principle of proportionality is one of the basic substantive principles underlying the derogation

regime. As discussed earlier, the ultimate purpose of the derogation clauses is to protect human rights in exceptional circumstances and it may not be used for other ends. However, the State does not enjoy unfettered discretion with respect to the derogation measures and such measures are limited "to the extent strictly required by the exigencies of the situation". According to the proportionality principle, derogation can only be justified in times of absolute necessity. Additionally, the ECtHR in McCann and Others v United Kingdom held that the term 'absolutely necessary' indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether state action is 'necessary in a democratic society'.Thus any derogation measure must fulfil the following five basic requirements.

First, the measures must be strictly required, i.e. actions taken under ordinary laws and in conformity with international human rights obligations are not sufficient to meet the threat. Second, the measures must be connected to the emergency, that is, they must prima facie be suitable to reduce the threat or crisis. Next, the measures must be used only as long as they are necessary meaning that there must be a temporal limit. Fourth, the degree to which the measures deviate from international human rights standards must be in proportion to the severity of the threat, that is, the more important and fundamental the right which is being compromised, the closer and stricter the scrutiny. And, finally, effective safeguards must be implemented to avoid the abuse of emergency powers. Thus where measures involve administrative detention, safeguards may include regular review by independent national organs, in particular, by the legislative and judicial branches.

Similarly, in the context of derogation in times of 'public emergency threatening the life of the nation', the margin of appreciation represents the discretion left to a State in ascertaining the necessity and scope of measures of derogation from protected rights in the circumstances prevailing within its jurisdiction. State Parties under the ICCPR are required to provide careful justification and bear the burden of proof that lies upon the State to prove the existence of a public emergency. By contrast, the European States under the ECHR enjoys a wide margin of appreciation in assessing whether a public emergency exists and what steps are necessary to address it. The development made by the ECtHR in determining margin of appreciation is discussed in the following section.

The ECtHR in Ireland v United Kingdom held that as the States are vested with the duty to protect the life of its nations they have the right to determine whether that life is threatened by the derogation measures in times of public emergency or not. Additionally, national authorities by reason of their direct and continuous contact with the pressing needs of the moment, are in a better position than an international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. The ECtHR in the decision of Brannigan and McBride v United Kingdom has confirmed this approach. By virtue of that case State enjoys wide discretion to determine the nature and the scope of necessary derogations. After this decision one might say the it would be tough to protect the rights of the people in any European states of those who believe otherwise than the government in power and might suffer to the extreme, nevertheless, the European Court will accept only those specific measures when the State would be able to convince the Court about the necessity of such derogations. In the Aksoy's case the ECtHR did not accept the submission of the State that in times of emergency a period of more than fifteen days is necessary for a criminal suspect to be held without appearance before the judge.

In the aftermath of the 9/11 attacks, the UK government was the only European state to claim public

emergency on the ground of threat from the Al-Qaida terrorist network. Thereby, the UK government adopted a new counter terrorist legislative Act known as the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), which declared the suspension of the right to liberty. The ATCSA was enacted to allow detentions of non-UK nationals suspected of terrorism related activities who can hold for indefinite period without charge or without being tried. The UK government claimed that these measures are necessary only for those cases where legal or practical considerations prevented the removal of these persons from its territory. But actually, the Derogation Order was a response by the British government to the ECtHR's decision in the Chahal v United Kingdom case, where the continued detention of a non-UK national in the UK on national security grounds was declared inconsistent with Article 5(1) of the ECHR, for example, the right to liberty and security of a person. Thus, these measures specifically targeted foreigners whom the Home Secretary suspected of involvement with international terrorism who would not be prosecuted for (due, amongst other things, to the sensitivity of the evidence and the high standard of proof required) and who was unable to be deported despite the gravity of the threat to national security posed by the person concerned.

Moreover, the ATCSA was enacted subsequent to the United Nations Security Council (UNSC) resolution. The UNSC adopted resolution 1373 (2001) called, inter alia, on UN member states to "ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts."

The House of Lords in the UK, by an eight-to-one majority declared the ATCSA inadequate and incompatible with the UK's obligations under international human rights law as well as with the Human Rights Act 1998 in the case A and Others v. Secretary of the State for the Home Department commonly known as the Belmarsh Detainees case. In this case, nine non-UK nationals challenged the lawfulness of their detention without any criminal charge under the ATCSA. The House of Lords correctly ruled that to allow the authorities to exclusively detain foreigners suspected of terrorism was discriminatory treatment between nationals and non-nationals. Nevertheless, keeping foreigners in detention for months, or even years, without charge or trial was also disproportionate and not strictly required by the situation. Similarly, the UN Human Rights Committee in its 2001 Concluding Observations noted with concern that the UK, in seeking inter alia to give effect to its obligations to combat terrorist activities pursuant to Security Council Resolution 1373 (2001), was considering adopting legislative measures which may have potentially far-reaching effects on rights guaranteed in the Covenant and which, in the State party's view, may require derogations from human rights obligations.

Although, the House of Lords declared that the detention provisions of Part 4 of the ATCSA were contrary to the requirements of Article 15 of the ECHR, the House of Lords in their decision did not really question whether those exceptional measures were required or not, and whether they were justified by the circumstances. On the contrary, it admitted the need to leave a certain margin of appreciation to evaluate and to decide what counterterrorism steps are needed, and what steps will suffice for the government to deal with emergency situations. In this sense, the ruling stated that, the courts are not equipped to make such decisions, nor are they charged with that responsibility,

and that the judiciary is meant to intervene when it is apparent that, in balancing the various considerations involved, the primary decision-makers have given insufficient weight to the human rights factor. The House of Lords, technically, avoided the important question, that is, whether or not the hypothetic threat international terrorist posed to national security constituted a situation allowing for the derogation of human rights, and particularly for the deviation of ordinary procedures for the detention and trial of suspected terrorists.

Following this decision, the U.K. Parliament repealed the powers of detention of terrorist suspects provided in Part 4 of the ATCSA 2001. The U.K. government replaced them with a system of control orders under the Prevention of Terrorism Act 2005 and introduced acts preparatory to terrorism, encouragement to terrorism, dissemination of terrorist publications, and terrorist training offences.

Lord Hoffman was the only judge to respond negatively to the derogation measures being unlawful on the ground that there was no war or other public emergency threatening the life of the nation. With no support from other Lord, he held that:

This is a nation, which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

However, the Grand Chamber of the European Court of Human Rights in appeal explicitly rejected Lord Hoffmann's approach, that is, that the terrorist attacks could not conceivably constitute a threat to the United Kingdom's institutions of government or the United Kingdom's existence as a civil community. Contrarily, the ECtHR accepted that the 9/11 attacks and the threat of international terrorism constituted an emergency threatening the life of the nation within the meaning of Article 15 (1) of the ECHR. The terrorist attacks in London in 2005 later confirmed that such an emergency existed. Further, the ECtHR, disagreed with the Human Rights Committee that the emergency and consequently the derogation measures could only be temporary. It noted that the Court's own cases on Northern Ireland confirmed that an emergency and derogation could last for a long while. The ECtHR took the duration of the emergency into account in the proportionality assessment, as there was no specific temporal limitation to Article 15.

The view of the ECtHR in dealing with the pubic emergency issue is disappointing, particularly as it lacks any observations in relation to the substantive meaning of public emergency in the era of international terrorism. Rather, the Court simply repeated its findings in earlier cases, which of course, preceded the post 9/11-era. It is equally regrettable that the Court, for the most part, did not engage with the factual question as to why and how international terrorism, or the threat thereof, qualified as a public emergency threatening the life of the nation in the United Kingdom. This is rather problematic as empirical research suggests that contemporary terrorism does generally not pose an existential threat to most states.

In the last 50 years the UK has suffered due to the Ireland Republican Army's (IRA) terrorist attacks. The UK faced more than 40 000 terrorist incidents from 1972 to 1992 by the IRA, which directly

affected the day-to-day life of British citizen as well as the affairs of the British government. Thus, derogation measures taken by the UK government in this regard were justified. In contrast, the UK hardly faced any terrorist attack from Al-Qaeda. In post-9/11 terrorist attack in the United States, however, on a baseless belief the UK government started to claim public emergency on the grounds that the UK might be attacked by Al-Qaeda at any time. Additionally, the UK government claimed that they are more prone to Al-Qaeda's terrorist attack than any other European country due to its linkage with the United States. One of the major components of the public emergency is that the State has to explain the necessity of such derogation. However, the UK government in its submission before the Council of Europe, failed to explain why they fear to be more affected by the Al-Qaeda than any other European country, which are also close allies of the United States. In the absence of such sufficient explanations, the question rises whether a public emergency existed in the UK within the terms of Article 15 of the ECHR at that time. Moreover, the Special Immigration Appeals Commission (SIAC) as well the Court of appeal in A and others v Secretary of State for the Home Department confirmed that the UK is more threatened than any other European country by the Al-Qaeda, however, both institutions failed to explain why the UK should be distinguished from its neighbours.

The derogating clauses require the State Party, derogating from the ECHR and ICCPR, to issue the proclamation of a public emergency. This provision is designed to prevent arbitrary or de facto derogation and to obligate derogating states to act openly from the outset of the emergency and to delegitimise after-the-fact justifications for violation of fundamental rights. However, analysing the UK public emergency reveals that the UK government has not followed this essential condition. The British Home Secretary David Blunkett on 12 November 2001, publicly declared a 'state of emergency'. At the same time, Blunkett told the newspaper The Guardian that the declaration was not a response to any imminent terrorist threat, but rather a "legal technicality", necessary to ensure that certain anti-terrorism measures that contravene the ECHR could be implemented. Blunkett on 15 October 2001 confirmed his later statement before the UK Parliament. Thus, the Home Secretary's public pronouncement raises grave concern that the UK sought to derogate from its international human rights obligations in the absence of conditions qualifying as a *bonafide* state of emergency.

In Aksoy v Turkey the ECtHR is of the view that a person cannot be detained for more than 14 days without sufficient judicial control on suspicion of involvement in terrorist offence. Contrarily, section 23(1) of ATCSA allows indefinite detentions to a person suspected of international terrorism. The UK being a member of the ECHR runs law, that is, ATCSA, which is contrary to the established principles set by the ECtHR. Thus, in the light of the Aksoy decision it is difficult to ascertain how indefinite detention of suspected terrorists can be strictly required even in circumstances that amount to an Article 15 emergency.

Another disappointment issue was the judgment of the Lord Bingham, which had the agreement of six other judges out of seven judges. Although, Lord Bingham did not accept the view of Lord Hoffman that there was no public emergency in the UK threatening the life of the nation, he still, granted a wide margin of appreciation to the UK government to derogate from Article 15 of the ECHR. He found that to hold that there was no public emergency in cases where, 'a response beyond that provided by the ordinary course of law was required, would have been perverse'. This reasoning does not seem logical, as it is not essentially based on the determination of the question of whether a

public emergency exists on the measures taken to address it.

Lord Bingham continued to hold that the burden of proof lies upon the individual suspected of terrorism to show that there was no public emergency. He further held that as the victim failed to disprove the government's decision than it could be considered that there was a public emergency. Lord Bingham's judgment, however, reversed the established norm of burden of proof in the criminal justice system. In practical, this reversal raises serious concerns. In reality, it is difficult for an individual to disprove the government's claim of the existence of a public emergency because the government itself holds all the relevant evidence. Moreover, Lord's Bingham's view runs contrary to the decisions of the ECtHR as is has repeatedly confirmed that the burden is not upon the individual, but upon the government to demonstrate that there exists a national emergency, which requires derogation from international human rights obligations. The Human Rights Committee in its General Comment No 29 has confirmed the view of the ECtHR.

In the UK, in the case of Belmarsh detainees, the majority of the House of Lords relied upon the statements of the executive and concluded that the terrorist threat constituted an emergency. In Australia, the High Court has taken a different approach. The government of Australia in 1951 enacted the Communist Party Dissolution Act (CPD), which declared that the Communist Party of Australia was illegal. The Act further attached highly restrictive conditions to its members who could be prescribed by an executive declaration. Similar to the Belmarsh detainees on appeal to a Court, the onus was on the applicant to prove non-membership. The government repeatedly claimed that the threat of international communism justified the validity of the Act. Questions arose whether the Act could be justified under the defence power as a law with respect to defence. The Court considering the activities of international communism rejected the government's claim and held the CPD Act invalid. Contrary to the position taken by the House of Lords in Belmarsh, the High Court refused to take account of the executive's declarations and based its finding squarely on judicial notice. The position taken by the Court as to the threat of communism to Australia proved correct and the fears held by the then government as to what would happen if the Act were held invalid, were never realised.

State Parties under the ICCPR, the ECHR and the ACHR are obliged to protect human rights in every situation. However, in contrary to these obligations such treaties allow derogation clauses, that is, in time of public emergency State party may derogate from its obligation. In fact, these derogation clauses were not designed to allow for a permanent legal emergency. The HRC and the ECtHR in different cases confronted with the derogation issue and their findings developed the jurisprudence of derogation clauses in time of public emergency threatening the life of the nation. Significant development included, the inclusion of the threat of terrorism as a ground of public emergency and a wide margin of appreciation allowed to the State party to determine the necessary measure to address public emergency. However, the analyses in the Belmarsh detainees and A and others v United Kingdom case reveal that the operation of derogation clauses in international human rights treaties and their interpretation in the era of permanent legal emergency are problematic. Moreover, indefinite derogations were effectively allowed in these cases, which runs totally contrary to the international human rights obligations. One may take a general overview that the derogation clauses are outdated and meaningless in post-9/11 era of international terrorism so the total abolition of the derogation clauses might be a solution. However, without approval from the majority of the State parties to the treaties it will likely prove impossible to amend any international treaties

because of the inherent complexity of the amending process. If someone waits for the amendment of these clauses then the likelihood of future violations of human rights will be greater. Therefore, strong monitoring mechanism must be improved and developed by the international organisations such as Human Rights Committee, which could overall strengthen the protection of human rights in the treaty regimes of the ICCPR, the ACHR and the ECHR.

Bibliography

1. Aolain, Oren Gross and Fionnuala Ni (2006), 'Law in Times of Crisis: Emergency Powers in Theory and Practice', Cambridge Studies in International and Comparative Law.
2. Bates, Ed (2005), 'Public Emergency Threatening The Life Of The Nation'? The United Kingdom's Derogation From The European Convention On Human Rights Of 18 December 2001 And The 'A' Case', The British Yearbook of International Law, 76 (1), 245-336.
3. Chowdhury, Subrata Roy (1989), 'Rule of Law in a State of Emergency', International Commission of Jurists, 242.
4. Costas-Trascasas, Milena (2008), 'Terrorism, State of Emergency, and Derogation from Judicial Guarantees', in Fernandez-Sanchez and Pablo Antonio (ed.), International Legal Dimension of Terrorism (International Humanitarian Law Series), 469-96.
5. Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss (2011), 'Emergency and Escape: Explaining Derogations from Human Rights Treaties', International Organization 65 (4), 673-707.
6. Greenwell, John (2011), 'Judges, Emergencies and the Protection of Rights in a Democracy', ISAA Review, 10 (1), 39.
7. Gross, Oren (1998), 'Once More unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', The Yale Journal of International Law, 23, 437.
8. Hartman, Joan F. (1981), 'Derogation from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations', Harvard International Law Journal, 22 (1).
9. Hickman, Tom R. (2005), 'Between Human Rights And The Rule Of Law: Indefinite Detention And The Derogation Model Of Constitutionalism', The Modern Law Review, 68 (4), 655.
10. Korimova, Tahmina (2012), 'Derogation from Human Rights Treaties in Situations of Emergency', Rule of Law in Armed Conflict Project (RULAC).
11. Lillich, Richard B. (1985), 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency', American Journal of International Law, 79 (October).
12. McGoldrick, Dominic (2004), 'The Interface between Public Emergency Powers and International Law', Intenational Journal of Constitutional Law, 2 (2), 380-429.
13. Michaelsen, Christopher (2003), 'International Human Rights on Trial- The United Kingdom's and Australia's Legal Response to 9/11', Sydney Law Review, 25 (3), 275.
14. Michaelsen, Christopher (2005), 'Derogating from International Human Rights Obligations in the 'War Against Terrorism'? -A British-Australian Perspective', Terrorism and Plitical Violence, 17, 143.
15. Michaelsen, Christopher (2010), 'Reforming Australia's National Security Laws: The Case for a Proportionality-Based Approach', University of Tasmania Law Review, 29 (1), 31-48.
16. Michaelsen, Christopher (2014), "Permanent Legal Emergencies and the Derogation Clauses in International Human Rights Treaties: A Contradiction?', in Aniceto Masferrer (ed.), Post 9/11

and the State of Permanent Legal Emergency (14: Ius Gentium: Comparative Perspectives on Law and Justice), 287-314.
17. Nations, United (2003), 'The Administration of Justice During States of Emergency', Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (Professional Training Series No. 9), 811.
18. Neumayer, Eric (2013), "Do Governments mean business when they derogate? Human Rights violations during notified states of emergency', Review of International Organizations, 8 (1), 1-31.
19. O'Donnel, D (1985), 'Commentary by the Rapporteur on Derogation', Human Rights Quarterly, 7, 24.
20. O'Donnell, Thomas A. (1982), 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights', Human Rights Quarterly, 4 (4).
21. Titberidze, Ilia Siatitsa and Maia (2011), 'Human Rights in Armed Conflict From the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to Certain Hypothetical Challenges', ADH Research Paper, 1.
22. Vermeulen, Martin Scheinin and Mathias (2011), 'Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism', Essex Human Rights Review, 8, 20.
23. Wintour, Patrick (12 November 2001), 'Blunkett rejects 'airy fairy' fears', Guardia