

**Derogation, Emergency and the Rule of Law:
Scope and Limitations**

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ABSTRACT

While human rights are inherent to the dignity of every human being, states are nonetheless given room in international law to suspend some of their human rights obligations although under rigid and unequivocal conditions. Unfortunately, the so called “global war on terrorism” has been misused and abused as a legal justification for state-authored violation of human rights of individuals suspected of complicity in acts of “terrorism”.

In my paper I am examining if measures taken by these states are in line with their human rights obligations under international and treaty law. Because the mere suspicion is not in itself a sufficient ground for torture or other forms of ill-treatment of those accused of being terrorists, the right of states to derogate from their human rights obligations is not a blank cheque for abuse or torture. Hence, the majority of these countries have not properly used their derogation or emergency powers under both international and treaty law.

For the purposes of this dissertation I will explain what we mean by derogation or emergency in national and international law I will also delve into examining different definitions of terrorism and finding a proper one that can lay the ground for the establishment of unified definition of the term. Lastly, with providing practical examples of the measures taken by States to combat terrorism and assess how national and international bodies have reacted to it. I will illustrate that not by breaching human rights and international law States can ensure their security and stability but only by sincere and comprehensive dialogue between nations we can both eliminate terrorism and support stability, peace and the rule of law.

List of Abbreviations

ACHR	American Convention on Human Rights
CIA	Central Intelligence Agency
CoE	Council of Europe
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ENG	English
EGY	Egypt
E.U	European Union
GA	General Assembly
GA res.	General Assembly resolution
GSS	General Security Service
HRC	Human Rights Committee
H.L	House of Lords
ICCPR	International Covenant on Civil and Political Rights
IDF	Israel Defense Force
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
PKK	Patiya Karkeren Kurdistan (Kurdistan Workers Party)
Sec.	Section
Sess.	Session
Series A	Reports of Judgments and Decisions of the European Court of Human Rights
Supp.	Supplement

UK	United Kingdom of Great Britain and Northern Ireland
U.N	United Nations
U.N doc.	United Nations Document
U.N G.A	United Nations General Assembly
U.N S.C	United Nations Security Council
USA	United States of America
WMDs	Weapons of Mass Destruction

INTRODUCTION

As a response to the terrifying attacks against the United States in September 2001, the U.S, along with many other countries worldwide, have adopted new measures and new counter-terrorism laws and policies. These measures have expanded and extended governments powers to combat terrorism. Such excessive measures and policies on the other hand have had a counter-productive impact on human rights and fundamental freedoms of those accused or suspected of terrorism and spurred new acts of violence.¹ Such measures as described by the former U.N Secretary General Kofi Annan have also resulted in “collateral damage” on human rights.² Moreover, some countries where exists no real democracy or rule of law have distorted such powers under emergency laws to subordinate, suppress and abuse their opponents.

In the west, the United States has enacted the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*³ otherwise known as the Patriot Act. The Act considerably increases the authority of law enforcement agencies to search telephone, e-mail communications, medical, financial, and other records thus limiting individual right to privacy. It also relaxed limitations on foreign intelligence gathering within the United States. Additionally, it vests the law enforcement and immigration authorities with a wider berth of discretion in detaining and deporting immigrants suspected of terrorism-related acts.⁴

¹ D Schiff, ‘Managing Terrorism the British Way’ in R Higgins & F Maurice (eds.) *Terrorism and International Law*, Routledge Publishing, London, 1997, p. 125, Para 2.

² B Wolfgang, *Anti-Terrorist Measures and Human Rights*, Martinus Nijhoff Publishers, The Hague, 2004, p. 3, Para 2.

³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, also known as the (USA Patriot Act), Act of 2001, Public Law 107-56-OCT. 26, 2001.

⁴ K E. Whann, D L. Stockamp, Whann & Associates, ‘*Dealership’s Compliance with the USA Patriot Act, Its Implementing Regulations and Other Anti-Terrorism Measures*’, NIADA website, October 2002, retrieved 9

The United Kingdom has followed a similar trail. In 2005, it enacted the *Prevention of Terrorism Act 2005*⁵ which was a response to the Law Lords' ruling of 16 December 2004⁶, that the detention without trial of nine foreigners suspected of terrorism was unlawful, being incompatible with the European Convention on Human Rights ECHR.⁷ This Act gives the Home Secretary the authority to impose control orders on suspected terrorists, allowing him to derogate from human rights standards. The Act has been widely criticized because it permits the conduct of closed proceedings and the employment of special advocates to hear secret evidence against the detainee. It also does not provide guarantees that evidence obtained in other countries by torture will be inadmissible. This Act was later described as an “affront to justice” by Mr. Justice Sullivan in a High Court ruling⁸, as providing a system of control orders against suspected terrorists breached article (5) of the ECHR, which prohibits detention without trial.⁹

In the last year the change of administration in the United States has had a significant impact on the international counter-terrorism debate, as well as on the legal protection of

August 2010, p. 6, Para 1, available online at: <http://www.niada.com/PDFs/Publications/USAPatriotAct.pdf>.

⁵ UK, Prevention of Terrorism Act 2005.

⁶ See, House of Lords ruling on Anti-Terrorism, Crime and Security Act

2001, Opinions of the Lords of Appeal for Judgment in the Cause, A and Others v. Secretary of State for the Home Department, [2004] UKHL 56 decided on Thursday 16 December 2004, session 2004-05, available online at: <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf>.

⁷ The *Convention for the Protection of Human Rights and Fundamental Freedoms* [Hereinafter: European Convention on Human Rights, ECHR], CoE, *Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted on 4 November 1950, Rome, CETS No.: 005., entered into force 3 September 1953.

⁸ The Court of Appeal, Secretary of State for the Home Department v. JJ and others [2006] EWHC 1623, opinion of Mr. Justice Sullivan J, cited in United Kingdom Parliament website, in the Opinions of the Lord of Appeal for Judgment in the Cause, Secretary of State of the Home Department v. JJ and others [2007] UKHL 45, decided Wednesday 31 October 2007, Para 1, available online at: <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071031/homejj.pdf>.

⁹ J Rosenberg & G Jones, ‘Human Rights Ruling Leaves Anti-Terror Law in Tatters’, *the Telegraph*, UK, 29 June 2006, retrieved 13 August 2010, available online at: <http://www.telegraph.co.uk/news/uknews/1522610/Human-rights-ruling-leaves-anti-terror-law-in-tatters.html>.

human rights.¹⁰ New crucial reversals of the Bush administration's policy on counter-terrorism and human rights were signaled in three executive orders of 22 January 2009¹¹, that ordered an end to the use of torture and to CIA detentions committed the President to the closure of Guantanamo Bay detention centre and instituted a review of military commissions.¹² Such reveals have shed more light on the greater damage that have been caused by the numerous human right violations that have been reported in Guantanamo, Abu-Graib, Baghram and the various undisclosed and secret CIA run interrogation centers and facilities in Eastern Europe, Afghanistan and several other countries.¹³ Therefore, the change of the U.S administration is not alone enough to end a long run policy of secret prisons and interrogation centers run by the United States intelligence in its so called war on terrorism and on grounds of national security.

Hence, there has been growing pressure on the U.S government and other governments of the world to make sure that their anti terrorist laws and policies are compatible with international human rights treaties and principles. Such pressure has led to a U.S Presidential Order in 2009¹⁴ to Review the Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities. Despite the significance of this step there are still some reports of torture and ill-treatment of prisoners in U.S. secret

¹⁰ R Pillay, *Current Challenges Regarding Respect of Human Rights in the Fight Against Terrorism*, a briefing paper request, requested by the European Parliament's Committee on Subcommittee on Human Rights, for the Policy Department of the European Parliament's Directorate-General for External Policies, EXPO/B/DROI/2009/27, English version, April 2010, p. 13, Para 1,[Hereinafter: Pillay, 2010], retrieved 10 August 2010, available online at: <http://www.statewatch.org/news/2010/apr/ep-hr-and-terrorism-report.pdf>.

¹¹ Executive Order: 13491. Executive Order: 13492. Executive Order: 13493. All signed January 22, 2009, retrieved 17 September 2010, available online at The National Archives of the U.S government website: <http://www.archives.gov/federal-register/executive-orders/2009-obama.html>.

¹² Pillay, 2010, p. 13, Para 1 & 2.

¹³ D Priest, 'CIA Holds Suspects in Secret Prisons', *the Washington Post*, USA, November 2, 2005, retrieved 11 September 2010, available online at: <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

¹⁴ Executive Order: 13492, signed January 22, 2009.

prisons in Afghanistan.¹⁵

Statement of the Problem

In light of the above, this dissertation identifies and examines the following:

- 1- The core question of my paper is, accordingly, can the war on terror or emergency justify violations of human rights? If so are the limits set by national or international bodies that can restrain states from abusing derogation clauses?
- 2- What are the measures that states have adopted to combat terrorism?
- 3- What are situations that states classify as emergency justifying their resort to derogation from their human rights obligations under international and domestic laws?
- 4- What are the responses of national and human rights international bodies where applicable to these states actions?

Methodology and structure

My dissertation is not questioning derogation or the right of states to declare emergency, in my paper, I rather analyze and examine measures taking by states to combat terrorism in emergency situations that may lead to derogation from human rights treaties and conventions such as the ICCPR¹⁶ and the ECHR. I will also demonstrate with examples that such measures and policies have led to undermining human rights as enshrined in international law and the treaties for the protection of human rights and fundamental freedoms.

¹⁵ See, J Hari, *The Independent*, UK, 'Obama's Secret Prisons in Afghanistan endanger us all' Friday, 12 February 2010, retrieved 19 October 2010, available online at: <http://www.independent.co.uk/opinion/commentators/johann-hari/johann-hari-obamas-secret-prisons-in-afghanistan-endanger-us-all-1896996.html>.

¹⁶ International Covenant on Civil and Political Rights, adopted by U.N G.A resolution 2200A (XXI), adopted 16 December 1966, U.N. GAOR 21st Sees., A/6316, art. 23, entered into force on 23 March 1976, [Hereinafter: ICCPR].

Moreover, I will assess if national and international reactions to violations committed by states have led to a change in their policies. In order to achieve this I will examine a number of jurisdictions that will include the U.S, Canada, and some Middle Eastern countries with special focus on Israel and Turkey. Where the mentioned states have avoided resorting to proper derogation and went beyond its limits and what is really required by the exigencies of the emergency situation. In this circumstance there is growing fear and a real risk of a state “permanent emergency” whereby the exception becomes the norm.¹⁷ This is what led a leading writer in the field of law and human rights, David Dyzenhaus to say that any state which declares a state of emergency should only do that in compliance with the rule of law, since “the values of the rule of law are not to be compromised.”¹⁸

Dyzenhaus further argued that torture is absolutely prohibited by international law and by the domestic laws of many states, but the most important element is the humanitarian one. No decent regime would permit torture, so if officials consider that they have to torture to avoid catastrophe- the ticking bomb situation- such an act must happen extra-legally.¹⁹ And in this case all courts should say is that if officials are going to torture they should expect to be criminally charged even if they claim the existence of a defense necessity. And even if they argue that it was a necessity to act outside of the law, and the law did not provide them with the resources they needed. The twist with torture is that a decent regime is precluded from providing prospective legal resources to legalize what otherwise would be illegal. Torture is, in other words, ‘unrealizable.’²⁰ What is clear from Dyzenhaus argument is that Because of the absolute nature of the prohibition of torture, no balancing of “emergency situations” or

¹⁷ H Duffy, *The War on Terror and the Framework of International Law*, Cambridge University Press, New York, 2005, p. 346, Para 1, see also footnote 351 same source.

¹⁸ D Dyzenhaus, ‘The State of Emergency in Legal Theory’ in V Ramraj, M Hor & K Roach (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press, New York, 2005, p. 84.

¹⁹ Ibid.

²⁰ Ibid.

“necessity” is to be conceivable.

The real challenges though, are that many of the most grave and systematic human rights abuses occur during public emergencies, when states employ extraordinary powers to address threats to public order. In responding to this challenge, leading international and regional covenants like the ICCPR and ECHR has endeavored to regulate states entry into and conduct within states of emergency. The “cornerstone[s]” of these covenants, therefore, is the derogation clauses²¹, which will be the main point of discussion in my thesis.

In order to find answers to these questions, it is necessary first to know what we mean by derogation or emergency in both international and regional human rights treaties, such as the ICCPR and the ECHR and whether all rights in these conventions are subject to derogation or not. And then it is necessary to explore and analyze the different definitions of terrorism adopted by States, although taking note that there is no internationally agreed upon definition of the term. This study examines and compares the jurisprudence of different national jurisdictions, as well as the jurisprudence of international and regional human rights mechanisms. Lastly, in chapter III, I have analyzed a number of derogations applied in different countries around the world through state practice; also the national and international reactions to such measures and derogations carried out by resorting to derogation clauses and emergency powers by these countries.

Finally, I will show that such measures and policies adopted by States are misused by States counter to their obligations under international treaties. And that states should respect their obligations and work together to achieve one definition of terrorism in order to save not only their security but also their legitimacy under the rule of law.

²¹ E. J. Criddle, E Fox-Decent, ‘*Human Rights, Emergencies, and the Rule of Law*’ Canadian Political Science Association website, 18 April 2010, retrieved 12 August 2010, p. 1, Para 2, also see footnotes 1 & 2 same article. Available online at: http://www.cpsa-acsp.ca/papers-2010/Criddle_Fox-Decent.pdf.

CHAPTER I

THE CONCEPT OF DEROGATION

In times of war or public emergency, states are allowed to suspend or derogate from certain human rights that are protected by international conventions. In exercising such powers, states have to guarantee that their derogation is strictly required by the exigencies of the situation and that such measure are consistent with other obligations the states have under international law. Hence, derogation is not a blank cheque for states but it has to be subject to judicial review both domestically and internationally. In this chapter, I will dissect derogation and the related concepts of emergency powers under international law and the domestic laws of the states under scrutiny, with special emphasis on both the ECHR and the ICCPR.

Derogation under Regional and International Conventions

1.1 Derogation under the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights permits states to derogate from certain human rights obligations, subject to conditions. The specific provision states:

In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.²²

Moreover the same Covenant provides in no uncertain terms that:

any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, 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. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.²³

²² Article 4 ICCPR.

²³ Ibid section 3.

We can understand from this derogation clause under the ICCPR that strict conditions are stipulated, which constitutes a guarantee for the people in the state where the emergency occurs.²⁴

1.2 Derogation under the European Convention on Human Rights

On the other hand there is a similar provision in the European Convention on Human Rights, viz:

In times of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.²⁵

It further states that (no) derogation 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.

Section 3 of the same article provides:

Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also 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.²⁶

What appears from the above provisions is that they relate to the scope and exercise of the rights guaranteed and “they are also not intended to secure additional rights, but rather to ensure the effective exercise of the rights set out in the earlier provisions. Or in certain situations to permit their limitation, as in article 15 of the ECHR, it allows the exercise of emergency powers.”²⁷

²⁴ E Brems, *Human Rights: Universality and Diversity*, Martinus Nijhoff Publishers, The Hague, 2001, p. 125, Para 3.

²⁵ ECHR, Article 15, Section 1.

²⁶ ECHR, Article 15, Section 3.

²⁷ J.G Merrill's & A. H. Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights*, Manchester University Press, New York, 2001, p. 177, Para 1. [Hereinafter: Merrill's & Robertson, 2001].

1.3 Differences between derogation under the ICCPR and the ECHR:

Both treaties allow derogation from human rights obligation in times of public emergency. While the ECHR includes war as a condition justifying derogation, it is to be understood that the public emergency the ICCPR refers to, is to cover times of war.

The two treaties on the other hand differ in some respects in regard to their provisions on derogation. Three differences between the two treaties are the following: ²⁸

- 1- The ICCPR requires that the public emergency which threatens the life of the nation must be officially proclaimed in order to bring into play the right of derogation. The ECHR merely requires the contracting State to 'keep the Secretary-General of the CoE fully informed of the measures which it has taken and the reasons therefor'.²⁹ This does not necessitate the official declaration of a public emergency.
- 2- The ICCPR requires the derogating state to inform the other Contracting States of its decision to derogate. No such requirement is imposed by the ECHR.
- 3- While the ECHR lists four rights which may not be suspended even in times of emergency, the ICCPR adds three more to these lists: a) freedom from imprisonment for civil debt. b) The right to recognition as a person before the law; c) The right to freedom of thought, conscience and religion.

Moreover, the ICCPR specifies that derogation measures must not involve 'discrimination solely on grounds of race, colour, sex, language, religion or social origin',

²⁸ Ibid, p. 184, Para 3.

²⁹ ECHR, article 15, section 2.

while nothing in the ECHR differentiates expressly between different bases of discrimination.³⁰ It is thus easily discernible that the International Covenant provides more extensive protection than the European Convention on Human Rights.

1.4 What constitutes an emergency threatening the life of the nation?

On the question of what constitutes an emergency threatening the life of the nation, the European Court of Human Rights held in *Lawless v. Ireland*³¹ that “the natural and customary meaning of the words ‘public emergency threatening the life of the nation’ is sufficiently clear as they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed.”³² Also the existence of an emergency could be reasonably deducted from the level of violence that had taken place in the recent past and the difficulty the government was having in controlling it.³³ Furthermore, in the case of *Ireland v. UK*³⁴ the court held that “the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it, by reasons of their direct and continuous contact with pressing needs of the moment”.³⁵ Nevertheless the description of Court on what constitutes an emergency

³⁰ H Davis, *Political Freedom: Associations, Political Purposes and the Law*, Continuum International Publishing Group, New York, 2000, p. 37, Para 2.

³¹ European Court of Human Rights [Hereinafter: ECtHR], *Lawless v. Ireland*, judgment of 1 July 1961, Application no. 332/57, Series A No. 3 (1961), Para 28.

³² Merrill’s & Robertson, 2001 , p. 148, Para 4.

³³ C. F.J. Doebbler, *Introduction to International Human Rights Law*, Revised Printing, CD Publishing, Washington DC, 2007, p. 85, Para 1. [Hereinafter: Doebbler, 2007].

³⁴ ECtHR, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Application no. 5310/71, Series A No. 25 (1978), Para 207.

³⁵ Ibid.

threatening the life of the nation has been criticized by some, as “being desiccated, because it gives the state a wide ‘margin of appreciation’ in deciding both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it”.³⁶

Moreover, in the Greek case of 1974³⁷, the European Commission of Human Rights enumerated four separate elements of a public emergency:³⁸

- 1- The public emergency must be actual or imminent;
- 2- Its effect must involve the whole nation
- 3- The continuance of the organized life of the community must be threatened; and
- 4- The crisis or danger must be exceptional, in that the normal measures or restrictions permitted by the Convention for the malignance of public safety, health and order are plainly inadequate.

A public emergency may therefore happen in a portion of a State’s territory and would still be of such nature as to justify derogation if the whole nation is affected in an adverse way. There is no need for such emergency to actually happen in every corner of a State’s territory.

1.5 Derogation: Its Nature and Extent

In order to protect the very foundation of the society, a state of emergency can be proclaimed under existing laws to enable the government to resort to measures of an exceptional and temporary nature.³⁹ Hence, derogation as a concept does not exist in a vacuum. As Kent Roach in *Emergencies and Limits of Legality* posits that it is “designed to be a temporary measure that comes with considerable political and legal costs, both domestically and internationally.”⁴⁰ Thus, he adds, it cannot be a continuing measure because if so, it

³⁶ D Dyzenhaus, S. R. Moreau & A Ripstein, *Law and Morality: Readings in Legal Philosophy*, third ed., University of Toronto Press, Toronto, 2007, pp. 824-825.

³⁷ The Greek Case, European Commission of Human Rights, Report of the Commission, adopted 5 November 1969, Council of Europe Doc. 15, 707/1, vol. 1, pp.5-11, cited in R P Claude & B. H. Weston, *Human Rights in the World Community: Issues and Actions*, University of Pennsylvania Press, Philadelphia, Chapter 6, footnote 38.

³⁸ Merrill’s & Robertson, 2001, p. 184, Para 4-5.

³⁹ N Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, Cambridge, 2002, p. 202, Para 1.

⁴⁰ K Roach, ‘Ordinary Laws for Emergencies and Democratic Derogations from Rights’ in V Ramraj (ed.),

becomes a whimsical and capricious exercise of power. He further says that “derogation is a conservative strategy because, like emergency powers, it recognizes the baseline set by existing rights, even as it departs from them.”⁴¹ Hence, states should adopt those measures that least restricts the rights derogated from.

Roach further asserts that derogation is not a “blank cheque as exact extent to derogation may be subject to domestic judicial review,”⁴² or sometimes a certain degree of parliamentary supervision.⁴³ In other words, derogation is not a weapon that the State may use as a veil to camouflage State-authored violations of fundamental rights. States should provide mechanisms by which derogation measures may be reviewed and annulled if necessary. Otherwise, these measures may institute a culture of impunity.

Thus, “some constitutions have standards to justify derogation from rights and some exempt some rights from derogation. Even under more permissive approaches, any derogation will be subject to continuing legislative review and international supervision.”⁴⁴ Such domestic standards may be more stringent than international standards but they cannot reduce or relax the restrictions set under international law.

1.6 Limitation clauses under the ECHR

The ECHR provides a number of limitations on states that restrict their powers when exercising their rights under the Convention. Such restrictive clauses can be found particularly

Emergencies and the Limits of Legality, Cambridge University Press, Cambridge, 2008, p. 245, Para 4.[Hereinafter: Roach, 2008].

⁴¹ Ibid

⁴² Ibid

⁴³ R. Gordon & T Ward, *Judicial Review and the Human Rights Act*, Cavendish Publishing Ltd, London, 2000, p. 19, Para 4.

⁴⁴ Roach, 2008, p. 246, Para 1.

in Article 8 (2) of the ECHR as well as article 10 and 11.⁴⁵ For example Article 8 (2) of the ECHR provides:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

From the above clause it is necessary to any state party to the ECHR when exercising its derogation power under the convention to make sure that the three conditions provided in this article are fulfilled. Therefore the state has to guarantee the following:

- 1) The state action has to be in accordance with the law:

Any interference by the public authorities has to be justified⁴⁶, in the case of *Sunday Times v. the United Kingdom*, the court gave a thorough explanation of what the term means:

The Court observes that the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation. It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10 (2) (art. 10-2) and strike at the very roots of that State's legal system.⁴⁷
[....]

In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.⁴⁸

- 2) Having a Legitimate aim:

Any interference by the state has to pursue a legitimate aim. In this regard any "formalities", "conditions", "restrictions" or "penalties" imposed have to be proportionate to the legitimate aim

⁴⁵ Yearbook of the European Convention on Human Rights, Council of Europe Staff, Martinus Nijhoff Publishers, 1998, the Hague, p. 115, para 1.

⁴⁶ Ibid

⁴⁷ ECtHR, *The Sunday Times v. The United Kingdom*, judgment of 16 April 1979, Application no. 6538/74 Series A, no. 30, (1979), Paras. 47-49.

⁴⁸ Ibid

pursued.⁴⁹

3) Necessary in a democratic society:

Any interference by the state authorities has to be necessary. Such necessity has to be within the context of democratic society.⁵⁰ In the case of *Silver and Others v. the United Kingdom*, the court explained the meaning of the term by stating that:⁵¹

On a number of occasions, the Court has stated its understanding of the phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions. It suffices here to summarise certain principles:

(a) the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" (see the *Handyside* judgment of 7 December 1976, Series A no. 24, p. 22, § 48);

(b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention (ibid., p. 23, § 49);

(c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" (ibid., pp. 22-23, §§ 48-49).

(d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted (see the above-mentioned *Klass* and others judgment, Series A no. 28, p. 21, § 42).⁵²

Moreover, in the case of *Handyside v. the United Kingdom*, the Court provided that a democratic society is to be characterized by 'Pluralism', 'tolerance' and 'broadmindedness'.⁵³

Even though the state enjoys a certain margin of appreciation in determining the necessity of the interference, such interference is not a *Carte blanche* for the state to restrict or interfere in

⁴⁹ ECtHR, *Gündüz v. Turkey*, judgment of 14 of June 2003, Application no. 3507/97, Reports 2003-XI, (2003), para. 40.

⁵⁰ Year book of the ECHR, pp. 116, para. 4.

⁵¹ ECtHR, *Silver and Others v. the United Kingdom*, judgment of 15 March 1983, Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Series A no. 61, (1983), Para. 88.

⁵² In the case of *Klass v. Germany* the court held that: "the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 para. 2 (art. 8-2), are not to be exceeded. One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention", See, *Klass and Others v. Germany*, judgment of 6 September 1978, Application no. 5029/71, Series A no. 28, (1978), Para 55. Also see *Golder* judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34). "The rule of law implies, inter alia, that interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure".

⁵³ ECtHR, *HandySide v. the United Kingdom*, judgment of 7 December 1976, Application no. 5493/72, Series A no. 24, (1976), Para 49.

the private life of others.

1.7 Limitation Clauses under the ICCPR

In the ICCPR there are three articles that specifically talk about this kind of restrictions on states when exercising their rights under the Covenant. Article 12, 22 and 23 discuss such restrictions in a number of limitation clauses. For example article 22 (2) of the ICCPR reads:

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Article 22 (2) thus, provides a number of restrictions on state members of the ICCPR. In explaining the meaning and interpretations of the limitation clauses contained in the ICCPR and in particular article 22 (2) of the ICCPR, a panel of thirty-one distinguished experts met in 1984 at *Siracusa*, Sicily, in order to adopt a uniform set of interpretations of the limitation clauses contained in the ICCPR. The *Siracusa* Principles on the limitation and Derogation Provisions in the ICCPR (“the *Siracusa* Principles”) provide guidelines for the justifications of limitations of the ICCPR rights:⁵⁴

- The Scope of the limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned
- All limitations shall be interpreted strictly and in favor of the rights at issue.
- Whenever a limitation is required in the terms of the covenant to be “necessary,” this term implied that limitation
 - (a) Is based on one of the grounds justifying limitation recognized by the relevant article of the covenant;
 - (b) Responds to a pressing public or social need;
 - (c) Pursues a legitimate aim; and
 - (d) Is proportionate to that aim.

Any assessment of the necessity of a limitation shall be made on objective considerations.

- In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.⁵⁵

⁵⁴ Human Rights Watch, ‘Hostile to Democracy: The Movement System and Political Repression in Uganda’, Human Rights Watch, New York, 1999, pp. 21-22.

⁵⁵ “The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights”, Human Rights Quarterly, vol. 7, no. 1, February 1985, principles 2,3,10 and 11, cited in IBID.

1.8 Non-derogable Rights under the ECHR

The ECHR provides a number of rights that absolute, and may not be subject to any limitations, restrictions or derogation. The ECHR contains the shortest list of non-derogable rights; it enumerates four common non-derogable rights that reflect existing conventional and customary international law.⁵⁶ Being one of the oldest conventions of human rights the ECHR contains the shortest list of non-derogable rights. These rights are enumerated in Article 2; the right to life; article 3 the right to freedom from torture and from inhuman or degrading treatment or punishment, article 4(1); the right to freedom from slavery and servitude, article 7; the right not to be subjected to retroactive penal legislation. Such enumeration of these four common non-derogable moreover reflects existing conventional and customary international law.⁵⁷

In the case of *Chahal v. the United Kingdom*, the court affirmed the principle of non-derogable rights by stating that even in times of emergency or terrorist violence, the ECHR prohibits in absolute terms torture or inhumane or degrading treatment or punishment, irrespective of the victims conduct and even in public emergency threatening the life of the nation⁵⁸, (see also *Ireland v. the United Kingdom*).⁵⁹ Furthermore, in the case of *Saadi v. Italy* the court reiterated its previous ruling in *Chahal* and further said:

Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation.⁶⁰

⁵⁶ R Pati, 'Due Process and International Terrorism: An International Legal Analysis', Martinus Nijhoff Publishers, The Hague, 2009, p. 260, para. 3.

⁵⁷ Ibid

⁵⁸ ECtHR, Case of *Chahal v. the United Kingdom*, judgment of 15 November 1996, Application no. 22414/93, Reports 1996-V, (1996), Para 79.

⁵⁹ ECtHR, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Application no. 5310/71, Series A No. 25 (1978), Para. 163.

⁶⁰ ECtHR, *Saadi v. Italy*, judgment of 28 February 2008, Application no. 37201/06, 2008, Para 127.

1.9 Non-Derogable Rights under the ICCPR

The Siracusa Principles provided a number of guidelines and limitations that states should abide to when making any derogation under the ICCPR by listing a number of non-derogable rights. This list included:⁶¹

1) No state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.

2) State parties to the Covenant, as part of their obligation to ensure the enjoyment of these rights to all persons within their jurisdiction (Art. 2(1)) and to adopt measures to secure an effective remedy for violations (Art. 2(3)), shall take special precautions in time of public emergency to ensure that neither official nor semi-official groups engage in a practice of arbitrary and extra-judicial killings or involuntary disappearances, that persons in detention are protected against torture and other forms of cruel, inhuman or degrading treatment or punishment, and that no persons are convicted or punished under laws or decrees with retroactive effect.

3) The ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.

1.10 Conclusions

What emerges from a cursory review of ICCPR and the ECHR, as well the as opinions of respected jurists is the unanimous agreement that derogation should be based on particular legal standards and it should also be subject to creative forms of judicial, legislative and administrative review and constant reconsiderations, and that no model can provide a foolproof guarantee against the real dangers of permanent emergencies.⁶² As some other autocratic regimes in the world and especially in the developing world and the Middle East in particular are doing and abusing their derogation and emergency laws to exclude and discourage their opponents from seeking democratic reforms. Some examples of state practice

⁶¹ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), Paras 58-60.

⁶² Roach, 2008, p. 257, Para 3.

with regard to derogation will be provided in Chapter III of the present dissertation. Nevertheless, there should be a wise design of ordinary laws to govern emergencies with the requirement that any derogation from rights be made democratically and subject to review and reconsideration provide the optimal conditions for subjecting all emergencies to the rule of law.⁶³

⁶³ Ibid., Para 4.

CHAPTER II

THE CONCEPT OF DEROGATION, TERRORISM AND THE “WAR ON TERROR”

2.1 The Global “War on Terrorism” vis-à-vis Derogation

On September the 11, 2001, the United States was attacked by al-Qaeda. Thousands of innocent people died, not to mention the massive destruction of property. This event reshaped our world, as the United States; backed by a number of U.N Security Council resolutions⁶⁴ that required all member states of the U.N to pursue terrorists, dismantle financial support systems and to prevent all forms of terrorism. A Counterterrorism Committee⁶⁵ to monitor implementation of the resolutions has also been created.⁶⁶ Subsequently, in 2001 the United States and the United Kingdom began military operations in Afghanistan and invaded the country. Both have notified the UN SC in writing that ‘Operation Enduring Freedom’ against Afghanistan was an exercise of individual and collective self-defense, and this operation is in compliance with article 51 of the U.N Charter.⁶⁷ Soon after that in 2003, backed by the United Kingdom and other coalition forces and allies, the U.S. invaded Iraq without a resolution emanating from the UN Security Council. The US and its allies used what they called the

⁶⁴ UN Security Council Resolution 1368, 12 September 2001, UN Doc. S/RES/1368 (2001), Resolution 1373, 28 September 2001, UN Doc. S/RES/1373 (2001), Resolution 1377 12 November 2001, UN Doc. S/RES/1377 (2001)

⁶⁵ “The Counter-Terrorism Committee (CTC) was established pursuant to Security Council resolution 1373 (2001), which was adopted unanimously on 28 September 2001 in the wake of the 11 September terrorist attacks in the United States. The Committee, comprising all 15 Security Council members, was tasked with monitoring implementation of resolution 1373 (2001), which requested countries to implement a number of measures intended to enhance their legal and institutional ability to counter terrorist activities at home, in their regions and around the world”. More details are available on the official website of the Committee at: <http://www.un.org/en/sc/ctc/aboutus.html>.

⁶⁶ T Lansford, R. P. Watson & J Covarrubias, *America’s War on Terror*, 2nd edition, Ashgate Publishing Ltd, Farnham, 2009, p. 59, Para 1.

⁶⁷ Ibid, see footnote 24, “Letter dated October 7, 2001 from the Permanent Representative of the United States to the U.N addressed to the President of the Security Council, U.N SCOR, 56th Session, U.N Doc. S/2001/946 Also letter dated October 7, 2001 from Chargé d’affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council”, UN Doc. S/2001/947.

“War on Terrorism” to justify the war on Afghanistan and later claimed that the former Iraqi regime under Saddam Hussein possessed WMDs, which later U.N and secret intelligence reports indicated that such weapons did not exist.⁶⁸

Under the so called “War on Terrorism” derogation, emergency laws and human rights violations continue to be justified in a number of states including the U.S, UK, Israel, Turkey and many other countries especially in the Middle East. But what is terrorism? And how justifiable are derogations so far carried in its name? In this chapter and the chapter that follows I will delve into the definition of terrorism from both international and national perspectives. I will also examine measures taken by these countries to combat what they call terrorism and how do human rights bodies, international and national courts reacted to these measures.

2.2 Defining terrorism:

Even though many scholars in the field of law, political science, history, psychology, theology and criminology have tried to define the term, there is no single agreed upon definition of terrorism.⁶⁹ I find it very important to find a definition of terrorism before trying to evaluate legal responses to it or the misapplication of the term by states. Also finding a legal definition of term can serve as an effective instrument to counter terrorism.⁷⁰

In this respect, some scholars in trying to define terrorism distinguished between two

⁶⁸ See, S. A. Squassoni ‘Iraq: U.N. Inspections for Weapons of Mass Destruction’ report to the Congressional Report Service (CRS), Foundation of American Scientists website, 7 October 2003, order Code RL31671, retrieved 18 August 2010, available online at: <http://www.fas.org/man/crs/RL31671.pdf>.

See also, MSNBC News, USA, ‘CIA’s Final Report: No WMD found in Iraq’, under conflict in Iraq. This report also recommended freeing detainees held for weapons knowledge, cited from Associated Press, updated April 25, 2005, retrieved 2 August 2010, available online at: <http://www.msnbc.msn.com/id/7634313/>.

⁶⁹ M Williamson, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001*, Ashgate Publishing Ltd, Farnham, 2009, p. 38, Para 2, see also footnote 7 same page. [Hereinafter: Williamson, 2009].

⁷⁰ U.N G.A resolution, in its sixteenth session, 20 September 2006,(A/RES/60/288), under, The United Nations Counter-Terrorism Strategy, p. 2, Para 4.

aspects of terrorism the first one is the form of state practice, where the act is carried out by a state or a regime, like that of Nazi Germany which led to the horrifying events in Europe which were committed against civilians in the Second World War.⁷¹ The second aspect is the form of non-state practices, in the form of illegitimate non-state political violence.⁷²

In the late nineteenth century terrorism came into the picture by non-state actors like that of the Russian revolutionists and anarchists in tsarist Russian, which some referred to as a “revolutionary terror” and later came the events that precipitated World War I when the heir to the Austro-Hungarian throne Archduke Franz Ferdinand was assassinated in 1914 in the Balkans by ethnic separatists.⁷³ Later, after the World War II, this notion of terrorism started to develop, especially in the wake of a growing number of terrorist attacks that targeted civilians worldwide. Whilst developed and Western States concentrated their efforts to limit the definition of terrorism to non-state practices, Developing, Socialist and Islamic states emphasized on defining and combating the so called “state terrorism” by the imperial powers, and regarded anti colonial violence either as an exception to terrorism, or as justified by colonialism or occupation.⁷⁴ In the new century, the world has been alarmed and there is momentum that started to evolve in the form of U.N G.A, S.C resolutions, reports and recommendations by U.N committees and Agencies as well as national legislations, which I will discuss in this chapter and the in following chapter as well.

2.3 “State Terrorism”

While there is very limited work by scholars in the field of international and human rights law

⁷¹ B Saul, *Defining Terrorism in International Law*, Oxford University Press, New York, 2006, P. 2, Para 1.[Hereinafter: Saul, 2006].

⁷² R Jackson, ‘Knowledge, Power and Politics in the Study of Political Terrorism’ in R Jackson, M. B. Smyth & J Gunning (eds.), *Critical Terrorism Studies: A new Research Agenda*, Routledge Publishing, New York, 2009, p. 70, Para 3.

⁷³ Saul, 2006, p. 2, Para 2.

⁷⁴ Ibid.

to examine state terrorism. The spotlight has tended to be on the U.S or Western States state-sponsored terrorism especially in the latter half of the twentieth century.⁷⁵ With the rather limited research on this area there has been a group of common characteristics that are common to the competing definitions of terrorism, which related to the act of terrorism rather than to the nature of the perpetrator.⁷⁶

Like the previously discussed dilemma of the non existence of a unified international definition of terrorism, there is still no agreed upon definition of “state terrorism”. The majority of “international terrorism” provisions do not address state terrorism as such.⁷⁷ In this regard, two points have to be explored. The first one is that one justification for excluding “state terrorism” from definitions of international terrorism is that the state should be held accountable for its wrongful or criminal acts through other branches of law, such as human rights, humanitarian law or the law on the use of force, where the responsibility of non-state actors are more limited. The second point is that the exclusion of “state terrorism” should be distinguished from both the state responsibility for terrorism carried out by private actors, and the state responsibility for sponsorship or support for terrorism on the other hand. Hence, many instruments addressing international terrorism explicitly provide for state responsibility in respect of the latter.

While some scholars defined “state terrorism” as the sum of terrorist acts committed by one state against another state or its nationals or the acts done by either the state or commissioned or adapted by it. In a wider context it can be used to describe widespread acts of cruelty committed by a State against its own people (Hitler, Stalin, Pol Pot, Saddam

⁷⁵ R Blakeley, ‘State Terrorism and Neo-liberalism: The North in the South’, Routledge Publishing, 2009, p. 20, Para 2.

⁷⁶ Ibid.

⁷⁷ Duffy, 2005, pp.35-36.

Hussein, et al.⁷⁸

In their introduction on War and “State Terrorism”, Mark Selden and Alvin So had more precise and narrow definition of terrorism as they argue that “States are in fact uniquely imbued with the capacity to commit not only acts of war but also acts of terrorism as they go to seeking to monopolize violence for their own purposes”.⁷⁹ Thus a definition of terrorism is should read as:

A systematic state violence against civilians in violation of international agreements, state edicts and precedents established by international courts designed to protect the rights of civilians.⁸⁰

While certain acts of violence committed by individuals or groups against states or their subjects are often labeled as terrorism, violent acts by the state against civilian populations have rarely been conceived as terrorism.⁸¹ The lack of a unified definition of state terrorism has contributed immensely to the continuing and systematic “terror” committed by states especially in the time of war that will lead to the targeting of civilians.

International Definitions of Terrorism:

2.4 The U.N and a definition of terrorism

Albeit the U.N S.C has so far failed to define terrorism⁸², there have been numerous attempts to adopt a convention on terrorism with a clear definition by the U.N. These attempts did not pay off so far due to disagreements on issues of liberation movements and the

⁷⁸ A Aust, *Handbook of International Law*, 2nd edn, Cambridge University Press, New York, p. 265, Para 2.

⁷⁹ M Selden & A. So, ‘War and State Terrorism’, in M Selden & A. So (eds.), *War and State Terrorism: The United States, Japan & the Asia-Pacific in the Long Twentieth Century*, Rowman & Littlefield Publishers, 2004, pp.3-4.

⁸⁰ Ibid, at p. 6, Para.,2.

⁸¹ Ibid.

⁸² A. Benavides & S Gultekin, ‘Responding to Terrorist Attacks Within the Labyrinth of Independent Governments: Collaborating and Quarrelling’, in H Durmaz, B Sevinc, A.S. Yayla & S Ekici (eds.), *Understanding and Responding to Terrorism*, IOS Press, Amsterdam, 2007, in cooperation with NATO Public Diplomacy Division, p. 354, Para 1.

activities of State forces.⁸³ On the one hand and another reason is that the U.N members are not one entity, they have different agendas, interests, backgrounds, perspectives, values and cultures. Not to mention the big gap between the rich North and the less privileged South is an important factor.

The first attempt to define terrorism was that by the League of Nations in 1937 this definition was provoked by ethnic violence especially in Europe in 1930s. Thus, the League of Nations came with this definition in November 1937, when the Convention for the Prevention and Punishment of Terrorism was opened for signature.⁸⁴ Article 1(2) of the Convention reads:

In the present Convention, the expression “acts of terrorism” means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.

Another problem in defining terrorism is that “one person’s terrorist in another person’s freedom fighter”, as for some countries especially the leftist and Islamic ones a “Western” definition of terrorism might implicate resistance groups, religious or revolutionary factions that are categorized by some of the Western Countries as terrorist organizations.⁸⁵ Hence, such attempts have been so far ‘unsuccessful’. One main factor is that of the quandary of distinguishing between terrorism and the right to resist occupation. In its 17th meeting the General Assembly of the United Nations called for a unified definition of terrorism especially

⁸³ U.N General Assembly, ‘Report of the Ad Hoc Committee’, 12th Session of the 25- 26 February and the 6 March 2008, Official Records, Sixty-third session, Supp. No. 37 (A/63/37).

⁸⁴ Williamson, 2009, p. 50, Para 2, see, also footnote 72 same book, with reference to article 1 (2) of the Convention.

The Convention for the Prevention and Punishment of Terrorism, League of Nations O.J. 23 (1938), League of Nations Doc, C.546 (I).M.383 (I).1937.V (1938) 16 November 1937. Note, this convention never entered into force, because it did not receive the necessary signatures or ratifications, retrieved 5 September 2010, available online at: <http://www.jur.uib.no/Ansatte/joreh/temasider/internasionalisering/Convention%20on%20terrorism%201937.pdf>.

⁸⁵ For more details check The U.S Department of State website, where a list of designated “terrorist” groups are provided and updated regularly, retrieved July 17 2010, available online at: <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

in the wake of the 9/11 terrorist attacks on the United States. The Qatari representative to the U.N told the general assembly:

“...the absence of a definition seriously undermined international efforts to tackle a grave threat to humanity. The comprehensive legal definition to be formulated must distinguish between terrorism and legitimate struggle. It should also take into account all forms of terrorism, including State terrorism, the threat of nuclear weapons or those of mass destruction.”⁸⁶

Even the special Rapporteur on the Promotion and Protection of Human Rights in defining the concept of terrorism tried to make “a dual conceptual distinction between state and non-state (or sub-State or individual) terrorism- which is a generally acceptable component of the debate on terrorism in both the world of academia and the ordinary parlance.”⁸⁷ Not only because it is rather impossible to draw a distinction between freedom fighters and terrorists in the eyes of many, Terrorism and the struggle for self-determination also whether state sponsored terrorism is terrorism or not. The Special Rapporteur admits that finding a definition of terrorism has become a political rather than legal debate.

International bodies like the Human Rights Committee of the United Nations has always called for a narrower definition of terrorism, because a broad definition would be used to justify restrictions on acts not directly associated with terrorism. The Human Rights Committee in its Concluding observations on Chile⁸⁸ has expressed its concern regarding the Chilean Counter-Terrorism Act No. 18.314 definition of terrorism. From the Committee’s view the Chilean definition of terrorism is ‘excessively broad’. Accordingly, the Committee observed that “the definition has allowed charges of terrorism to be brought against members of community groups in connection with protests or demands for protection of their land

⁸⁶ U.N G.A, Press Release of the 56th General Assembly Plenary 17th Meeting, 03 October 2001, GA/9925 (2001)

⁸⁷ K. K. Koufa, Special Rapporteur, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism*, final report for the U.N Sub-Commission on the Promotion and Protection of Human Rights, 56th session, U.N doc. E/CN.4/Sub.2/2004/40, for the Economic and Social Council, 25 June 2004, p. 7, Para 2.

⁸⁸ See, concluding observations of the U.N Human Rights Committee on *Chile*, Eighty-Ninth Session, CCPR/C/CHL/CO/5, adopted 18 May 2007, p. 3, 2nd Para.

rights and was not specifically designated to include offences or crimes of terrorist nature” and thus stated that:

The State party should adopt a narrower definition of crimes of terrorism, so as to ensure that it is not applied to individuals for political, religious or ideological reasons. Such a definition should be limited to offences which can justifiably be equated with terrorism and its serious consequences, and must ensure that the procedural guarantees established in the Covenant are upheld.⁸⁹

2.5 E. U definition of Terrorism

Because of the greater homogeneity between European States and interests, there was an early attempt by the CoE to deal with terrorism on a collective European level. As early as 1977 when member states of the CoE signed the *European Convention on the Suppression of Terrorism*.⁹⁰ Albeit it did not offer a comprehensive definition of terrorism because of its procedural nature it still had drawn up on “a list of terrorist acts defined either autonomously or by reference to international conventions”.⁹¹

Later and most recently in its decision of the 13th of June 2002 the Council of the European Union adopted a framework decision on combating terrorism, this decision listed a number of offences that can be referred as terrorist offences. This definition which criminalizes a wide range of offences related to terrorist groups is a very good example of a new trend of pro-actively criminalizing forms of conduct that may lead to the commission of terrorist offences.⁹² The decision reads as follows:⁹³

⁸⁹ Ibid.

⁹⁰ Council of Europe, The European Convention on the Suppression of Terrorism, adopted on 27 January 1977, Strasbourg, CETS No.: 17828, entered into force 4 August 1978.

⁹¹ E Dumitriu, ‘The E.U’s Definition of Terrorism: The Council Framework Decision on Combating Terrorism’, *The German Law Journal*, vol. 05, no. 05, p. 586 Para 2. Retrieved 20 September 2010, available online at: http://www.germanlawjournal.com/pdfs/Vol05No05/PDF_Vol_05_No_05_585-602_special_issue_Dumitriu.pdf.

⁹² M Lehto, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts*, Martinus Nijhoff Publishers, The Hague, 2010, p. 306, Para 1.

⁹³ The Council of the European Union, Council Framework Decision of 13th of June 2002 on Combating Terrorism, (2002/475/HA). The council have adopted this decision after Having regard to the Treaty establishing the European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof, Having regard to the proposal from the Commission,

Article 1

Terrorist offences and fundamental rights and principles

All members of the European:

“Having regard to the Opinion of the European Parliament.

And as indicated in this decision (10):

This Framework Decision respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they emerge from the constitutional traditions common to the Member States as principles of Community law. The Union observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.

In offences relating to a terrorist groups, article (2) of the Frame Work Decision provides:

1. For the purposes of this Framework Decision, ‘terrorist group’ shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. ‘Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

2. Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:

(a) directing a terrorist group;

(b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.

In Offences linked to terrorist activities, article (3) of the Frame Work Decision provides:

Each Member State shall take the necessary measures to ensure that terrorist-linked offences include the following acts:

(a) aggravated theft with a view to committing one of the acts listed in Article 1(1);

(b) extortion with a view to the perpetration of one of the acts listed in Article 1(1);

(c) drawing up false administrative documents with a view to committing one of the acts listed in Article 1(1)(a) to (h) and Article 2(2)(b).

In Offences linked to Inciting, aiding or abetting, and attempting, article (4) of the Frame Work Decision Provides:

1. Each Member State shall take the necessary measures to ensure that inciting or aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable.

2. Each Member State shall take the necessary measures to ensure that attempting to commit an offence referred to in Article 1(1) and Article 3, with the exception of possession as provided for in Article 1(1)(f) and the offence referred to in Article 1(1)(i), is made punishable”.

shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

— seriously intimidating a population, or

— unduly compelling a Government or international organization to perform or abstain from performing any act, or

— seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences:

(a) attacks upon a person's life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility,

including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed in (a) to (h).

2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.⁹⁴

2.6 Definitions of terrorism in national laws

Finding a national definition of terrorism is important not only because a national law can contribute to the evolution of an international law definition.⁹⁵ But also because such a definition would help states to enact laws that are targeting terrorist activities and combating terrorism. A number of states tried to find a definition of terrorism to deal with the threat of terrorism on the national level; all of these countries at least tentatively have had problems with terrorism. For example, according to the U.S Department of State terrorism is:

Premeditated, politically motivated violence perpetrated against noncombatant targets by sub national groups or clandestine agents, usually intended to influence an audience.⁹⁶

According to some analysts the use of the term “politically motivated” is designed to

⁹⁴ Ibid.

⁹⁵ C Walter, ‘Defining Terrorism in National and International Law’ in C Walter, S Vöneky, V Röben & F Schorkopf (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Springer Publishing, Heidelberg, 2004, p. 25, Para1

⁹⁶ This definition is also contained in Title 22 of the United States Code, Section 2656f(d). This definition and others definitions related to terrorism as applied by the U.S government are available online at the official website of the U.S Department of State at: <http://www.state.gov/s/ct/rls/crt/2000/2419.htm> under, Patterns of Global Terrorism, Office of the Coordinator for Counterterrorism, last updated April 30, 2001, retrieved 16 August 2010.

distinguish between terrorism and murder for example; as murder is usually not politically motivated, even though this definition did not mention the so called “state-terrorism” which has been clarified above and also other acts of terror committed by states this definition remains as some critics described it as politically motivated and is specially designed to get the U.S and its allies off the hook from international condemnations by military acts committed by them against combatants or civilians at the time of war.⁹⁷

An earlier bid to define terrorism was made by the U.K government in 1989 in the temporary provisions of the Prevention of Terrorism Act of 1989, where it defined terrorism as:

“...the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.”⁹⁸

Even though this definition was one step in defining terrorism it came under a lot of criticism, some critics, said this definition did not include other forms of violence like religious, non-political and ideological motivated violence. That’s why the U.K government came up with new definition of terrorism to remedy all the defects in the previous one.⁹⁹

Section 1 of the UK Terrorism Act 2000 defines terrorism as follows:¹⁰⁰

- (1) In this Act "terrorism" means the use or threat of action where-
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it-
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or

⁹⁷ B Whitaker, ‘The Definition of Terrorism’, *the Guardian*, U.K, 7 May 2001, Para 5, retrieved 5 August 2010, available online at: <http://www.guardian.co.uk/world/2001/may/07/terrorism>.

⁹⁸ Q.C. Charlie Lord, ‘The Definition of Terrorism’, a Report presented to UK Parliament by *the Secretary of State for Home Department* by Command of Her Majesty, Crown Copyright 2007, p. 6, 3rd Para, retrieved 7 August 2010, available online at: <http://www.icj.org/IMG/UK-Carlile-DefTer.pdf>.

⁹⁹ Ibid.

¹⁰⁰ U.K Terrorism Act 2000.

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

...

(4) In this section-

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

Even though this definition has been criticized as both vague and overly broad, because it criminalizes lawful gatherings and demonstrations as well as many forms of behavior that while is unlawful, still cannot be regarded as terrorism.¹⁰¹ But yet it is still the only definition that the U.K government is using when dealing with terrorist related issues. And the only change made to the definition so far, **is the Amendment in the new Terrorist Act of 2006**

Chapter 11, section 34. And it reads as follows:

In section 1(1)(b) of the Terrorism Act 2000 (c. 11) (under which actions and threats designed to influence a government may be terrorism), after "government" insert "or an international governmental organization".

In the Middle East in a country like Egypt, article 86 of the Egyptian Penal Code, as modified by Act No. 97 of 1992, defines terrorism as:

Any use of force, violence, threats or intimidation to which an offender resorted to put into effect an individual or collective criminal plan designed to disrupt public order or endanger public safety and security by harming or terrorizing persons, jeopardizing their lives, freedoms and security, damaging the environment, damaging or seizing control of communications, preventing or obstructing the functioning of public authorities, houses of worship or academic institutions or rendering the Constitution, the laws or regulations inoperative.

This definition of terrorism came under a lot of criticism from the Human Rights Committee of the U.N as being very broad and general, as it increases the number of offences attracting the death penalty in a way that runs counter to the sense of article 6, paragraph(2) of the ICCPR, to which Egypt is party.¹⁰²

¹⁰¹ Article 19, Global Campaign for Free Expression, *Submission to the Inquiry on the Definition of Terrorism*, London, March 2006, p. 3, Para 3, retrieved 30 September 2010, available online at: <http://www.article19.org/pdfs/analysis/united-kingdom-review-of-terror-definition.pdf>.

¹⁰² See, Concluding Observations of the U.N HRC on *Egypt*, Seventy Sixth Session, CCPR/CO/76/EGY, adopted 28 November 2002, available online at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.76.EGY.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument). See, also, Report of the Secretary General of the U.N on the 56th session of the U.N G.A on Human rights and

Back to Europe, in France article 421-1 of the French Criminal Code lists some categories of common offences that constitute acts of terrorism when committed intentionally;¹⁰³

“In connection with an individual or collective undertaking the purpose of which is to seriously disturb the public order through intimidation or terror.”

Furthermore, article 421-2 extends the list of terrorist acts to include “Environmental terrorism”¹⁰⁴ which has been introduced as a self-standing terrorist act, with no reference to a pre-existing offence.

2.7 Conclusions

There is no question that terrorism represents a threat to the whole world. Not only to the West in the form of ‘non-state terrorism’ but also to the rest of the world as ‘state-terrorism’ as both forms of terrorism represent a major threat to world peace and security. The absence of an internationally unified definition of terrorism on the other hand, has contributed immensely to the misapplication of the term by both the ‘civilized’ and the ‘uncivilized’ nations. In finding a proper definition of terrorism and after examining the numerous definitions of the term either nationally or internationally, I find the E.U definition of terrorism to be the most comprehensive and acceptable definition that should be built on in finding a unified definition of the term, as it included all forms of violence that may constitute or lead to terrorism unlike other definitions adopted by national or international bodies. Moreover, this definition as adopted by the Council of the European Union has had the consent of more countries which represented in the Council than any other definition. With

terrorism, human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, item 131 (b) of the provisional agenda, 17 July 2001, Available online at: <http://www.un.org/documents/ga/docs/56/a56190.pdf>.

¹⁰³ See, Working paper to the Commission of the European Communities, *Annex to the report from the Commission based on article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism* [COM(2004) 409 final], Brussels, 8 June 2004, SEC(2004) 688 ENG., p. 5, retrieved 11 September 2010, available online at: http://ec.europa.eu/justice/doc_centre/criminal/terrorism/doc/sec_2004_688_en.pdf

¹⁰⁴ Ibid, footnote 4, Article 421-2 of the French Criminal Code: “The introduction into the atmosphere, on the ground, in the soil or in waters, including territorial waters, of any substance liable to imperil human or animal health or the natural environment is an act of terrorism when it is committed intentionally in connection with an individual or collective undertaking whose aim is to seriously disturb public order through intimidation or terror”.

such momentum and with the cooperation between all members of the European Union as well as the rest of world we can lay the ground to unified action in the fight against terrorism.

Last of all, not only there has to be a unified definition of terrorism, whether committed by state, country, group or individual, those responsible for committing an act of terrorism, according to the new world definition of terrorism should be brought to justice and held accountable. But such conviction should go hand in hand with human rights treaties, conventions and principles.

CHAPTER III

LEGAL IMPLICATIONS OF EMERGENCY AND DEROGATION: STATE PRACTICE

According to human rights treaties, states may limit their liability for ensuring human rights, by either entering a reservation or a declaration when it ratifies a treaty, or as we have discussed earlier, a state may rely on one of the general derogation provisions and clauses in a specific human rights treaty. Or alternatively, a state relies on the permissible limitation of a right that is built into the definition of the right.¹⁰⁵ In international law and Human rights treaties and conventions such as the ICCPR the ECHR or ACHR¹⁰⁶, states have the right to derogate from certain rights in times of emergency or war, like what we have discussed in chapter one of this dissertation. Thus, states are allowed to limit certain rights, but when limiting these rights states are required to respect the legality principle, in doing that all the restrictions that states impose on these rights have to be “prescribed”, “provided” or “in accordance with the law.”¹⁰⁷ One more purpose of such extraordinary measures is to strike a

¹⁰⁵ Doebller, 2007, p. 79, Para 1.

¹⁰⁶ OAS, American Convention on Human Rights, adopted on 22 November 1969, San Jose, Costa Rica, entered into force 18 July 1978.

Article 27 of the American Convention on Human Rights provides:

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

(2). The foregoing provision does not authorize any suspension of the following articles: 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.

(3). 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 provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension”.

¹⁰⁷ A-L McCarthy, *The International Law of Human Rights and States Exceptions: With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs*, Martinus Nijhoff Publishers, The Hague, 1998, p. 50, Para 1.

balance between the national interests of the state and the rights of the individual, that's why the very purpose of human rights law is to ensure that such measures by the state do not shift the balance toward the state more than necessary.¹⁰⁸

In this Chapter I have chosen three countries, all of which are party to Human rights conventions and treaties. The purpose of that is to elaborate on practical application of derogation clauses and emergency powers. Also to examine what extent these countries have so far abided by them. And also to show both national and international reactions to the use of these derogation clauses and the justifications provided by these states thereof.

3.1 Derogation under the American Suspension Clause

Under the US Constitution, “the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”¹⁰⁹ Even though “the United States has not yet submitted any notification of derogation under the ICCPR”¹¹⁰, it nevertheless had used its derogation powers as early as 1944 under the American Suspension Clause. The U.S Supreme Court in the case of *Toyosaburo Korematsu v. the United States*¹¹¹ upheld an exclusion order, ordering the exclusion of all people of Japanese ancestry from areas prescribed pursuant to Civilian Exclusion Order No. 34 of the commanding General [323 U.S. 214, 216] of the Western Coast Command of the U.S Army.

By using the strict scrutiny test the court in this case argued that, when upholding the government's position, it has to be noted that a pressing public necessity may sometimes

¹⁰⁸ C Devine, C. R. Hansen, R Wilde & H Poole, *Human Rights: the Essential Reference*, Oryx Press, Phoenix, 1999, p. 115, first column.

¹⁰⁹ Section 9, Article I of the U.S. Constitution.

¹¹⁰ F. J. Hampson, ‘Detention, the War on Terror and International Law’ in H. M. Hensel (ed.), *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force*, Ashgate Publishing Ltd, Hampshire, 2007, p. 143, Para 2.

¹¹¹ U.S Supreme Court, *Korematsu v. United States*, Argued October 11, 1944, Decided December 18, 1944, 323. U.S.214, No. 22, (1944). [Hereinafter: *Korematsu v. United States*].

justify the existence of such restrictions.¹¹² The court further stated; that the Exclusion Order was issued after the U.S entered into war with Japan, and that “the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities...”¹¹³

It has to be noted here that this was the first time the U.S Supreme Court upholds a decision by the government to use its derogation powers under the American Suspension Clause. It is also worth mentioning that Mr. *Korematsu* later challenged his conviction order for evading detention and the conviction was overturned in November 1983 by San Francisco Federal District Court.¹¹⁴

By reviewing the U.S. Suspension Clause, it is clear that there are only two circumstances that call for suspension of the privilege of the writ of habeas corpus: invasion and rebellion. In my opinion the mere existence of invasion or rebellion is not a sufficient ground for suspension as in either circumstance; the suspension must be required by public safety. This is the reason why Mr. Justice Roberts of the U.S Supreme Court in his dissenting opinion remarking the inadequacy of the court’s decision on *Korematsu* by saying that:

“....convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.”¹¹⁵

In this respect I agree with *Roach’s* conclusion that the American suspension clause is

¹¹² Ibid., Para 2.

¹¹³ Ibid., Para 5.

¹¹⁴ The United States Congressional record, Proceedings and debates of the 109th Congress first session, volume 151-Part 4, March 11, 2005 to April 6, 2005, p. 5708, 3rd column.

¹¹⁵ Mr. Justice Roberts’s dissenting opinion, *Korematsu v. United States*.

restrictive in only allowing one right¹¹⁶ - the right to the privilege of the writ of habeas corpus - to be suspended and only for the dire emergencies presented by rebellions and invasions. These restrictions make it possible for judges to take a strong stand in resisting both implicit and explicit suspensions of habeas corpus.¹¹⁷ In *Hamdi v. Rumsfeld*¹¹⁸ which was described as a judicial restraint against unbounded executive power.¹¹⁹ As the United States government has chosen to detain the suspected terrorists in Guantanamo Bay which the Bush administration has been asserting to be beyond the scope of its jurisdiction by signing the Military Commissions Act of 2006 (MCA) by the U.S President George W. Bush. This Act came into existence after the Supreme Court's decision of *Hamdi v. Rumsfeld*,¹²⁰ where the Supreme Court of the United States in a judgment announced by Justice O'Connor writing for the plurality, came to the conclusion that "although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demand that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker". The challenged Military Commission Act of 2006 "establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission"¹²¹ where under the contested act "the President is authorized to establish military commissions under this chapter for offenses triable by military commission".

¹¹⁶ Roach, 2008, p. 246, Para 2.

¹¹⁷ Ibid.

¹¹⁸ U.S S.C, *Hamdi v. Rumsfeld*, Argued April 28, 2004, Decided June 28, 2004, 542 U.S. 507 (2004), No. 03-6696 (2004). [Hereinafter: *Hamdi v. Rumsfeld*].

¹¹⁹ A Kaplan, 'Where is Guantánamo?' in J A. Radway, K K. Gaines, B Shank & P Eschen (eds.), *American Studies: An Anthology*, Blackwell Publishing Ltd, Singapore 2009, p. 453, Para 3.

¹²⁰ *Hamdi v. Rumsfeld*, p. 2, Para 2.

¹²¹ Sec. 948b of the U.S. Military Commissions Act of 2006.

Actually the disclaimer of jurisdiction goes against the very provision of the Cuban-American Treaty signed on February 23, 1903 by the American President Theodore Roosevelt and the first Cuban President Tomas Estrada Palma, under which Guantanamo Bay area and other surroundings areas were leased by Cuba “to the United States government for the time required for the purposes of coaling and naval stations, the following described areas of land and water situated in the Island of Cuba”, where in article three of the treaty it states that:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.¹²²

Ronald Dworkin in one of his articles explained this anomaly in this respect by saying:

The Bush administration, as part of its so-called "war on terror," created a unique category of prisoners that it claims have no such right because they are aliens, not citizens, and because they are held not in an American prison but in foreign territory. The administration labels them enemy combatants but refuses to treat them as prisoners of war with the protection that status gives. It calls them outlaws but refuses them the rights of anyone else accused of a crime. It keeps them locked up behind barbed wire and interrogates them under torture.¹²³

Guantanamo was carefully chosen to avoid entertaining petitions for *writs of habeas corpus* that captives were most likely to raise. However, the decision of the US Supreme Court in *Boumedianne v. Bush*¹²⁴ that Guantanamo was within US jurisdiction radically altered the US position of impunity in its fight against terror. Ronald Dworkin says that the *Boumediene* decision does not set the suspected foreign ‘terrorist’ free, but it declared for the first time that Guantanamo detainees have a

¹²²Article III the Cuban American Treaty signed in 1903, cited in Yale Law School, Lillian Goldman Law Library website, retrieved 7 July 2010, full text of the treaty is available at: http://avalon.law.yale.edu/20th_century/dip_cuba002.asp.

¹²³ R Dworkin, ‘Why it was a Great Victory’, *The New York Times Review of Books*, vol. 55, no. 13, August 14, 2008, Para 3. [Hereinafter: Dworkin, 2008], retrieved 10 July 2010, available online at: <http://www.nybooks.com/articles/archives/2008/aug/14/why-it-was-a-great-victory>

¹²⁴ U.S S.C, *Boumediene v. Bush*, Argued December 5, 2007, Decided June 12 2008, 553 U.S. (2008), No. 06-1195, (2008). [Hereinafter: *Boumediene v. Bush*].

constitutional right to challenge their detention before American courts.¹²⁵

Dworkin further says that even prior to *Magna Carta*, detainees had the right to demand that the custodians of their persons show cause for their detention by filing a petition for a writ of habeas corpus. During its fight against “terrorism”, the Bush Administration came up with a new category of prisoners without right to the writ claiming that these persons are first: not American citizens and second: they are detained outside of US territory. Being considered as enemy combatants, they are without status and rights of prisoners of war. The fear is being labeled under such category those suspects would be kept behind barbed walls and while probably interrogated under torture. The Court called this shameful and demanded that it stops, convincing lawyers and scholars that the Constitution equally protects citizens and aliens against state tyranny.¹²⁶

Dworkin expresses the surprise of a public disillusioned by the way the U.S Supreme Court decided the previous cases involving suspected terrorists who were locked up in Guantanamo Bay without charge as they “are detained as enemy combatants in Guantanamo”¹²⁷ beginning from *Hamdi vs. Rumsfeld*.¹²⁸ Although *Boumediene* was a hairline decision, it was nevertheless, in the words of Dworkin, a great victory, especially for the human rights movement. On the other hand, and according to Aryeh Neier in one of his articles, “the violations committed and legitimized under the war on terror has led to the belief that after the September 11, 2001 terrorist attacks, things got even worse, with, among others the holding of suspected terrorists as captives in Guantanamo bay, without charge or trial and in some cases under torture or without access to lawyer relatives and families”.¹²⁹

¹²⁵ Dworkin, 2008, Para 4.

¹²⁶ Ibid., Para 5.

¹²⁷ Ibid.

¹²⁸ *Hamdi v. Rumsfeld*

¹²⁹ A Neier, ‘How Not to Promote Democracy and Human Rights’ in R. A. Wilson (ed.), *Human Rights in the*

It appears that both Dworkin and Neier assert that the war on terror must always adhere to the principles of human rights and even suspected terrorists have a claim to these rights as shown by the *Boumedianne* decision. This is shared by *Roach* who examined the global reaction and responses to 9/11 terrorist attacks on the United States, and the wave of legislative responses that followed, derogating from some fundamental human rights. He questions whether the law can restrain the emergency state, and expresses disagreement that the state may at times act outside the law when its very existence is threatened.¹³⁰ Then appear the question of laws ability to constrain state in an emergency providing sophisticated analysis of issues that are raised by emergency powers. *Roach* concludes to say that States have violated human rights in the name of the war on terror.¹³¹

3.2 Derogation under the Canadian Charter

Section 33 of the Canadian Charter¹³² is much more permissive than the suspension clause of the American constitution. It allows federal or provincial legislatures to enact laws notwithstanding fundamental freedoms, legal rights or equality rights for renewable five year period. The Canadian override would allow Parliament to suspend habeas corpus, and even to

“*War on Terror*”, Cambridge University Press, New York, 2005, p. 140 Para 3.

¹³⁰ Roach, 2008, p. 246, Para 3.

¹³¹ Ibid.

¹³² Section 33 also referred to as the “notwithstanding clause” of the Canadian Charter of Rights and Freedoms provides:

(1) “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4)”.

authorize torture or internment based on race or religion for renewable five-year periods.¹³³ One may say that authorization of torture or internment whether based on race or religion would not be violated under the Charter assuming that an override clause meets the requirements of section 33, it is also immune to judicial review under the Charter no matter how extreme the statutory provision it protects? Can a person in Canada be arbitrarily arrested, detained, and tortured to death by the public authorities under anti-terrorist legislation, so long as appropriate override clauses are present? Unfortunately the answer is; yes says Slaterry Brian of York University. He argues that rights such as the right to life, liberty and security of the person, the right not to be arbitrarily detained, the right to habeas corpus, the right to be tried within a reasonable time, and the right not to be subjected to cruel and unusual treatment are all subject to declarations under section 33, where an override clause exists.¹³⁴

There is no requirement that there be an emergency or that the measures be strictly necessary in the circumstances.¹³⁵ The Canadian courts have only reviewed the use of the override on one occasion. The Supreme Court of Canada upheld Quebec's use of an omnibus override as a protest against the 1982 inclusion of the charter in the Canadian Constitution over Quebec's dissent. The Court noted that the legislature might not be able to know what particular Charter right might be relevant in a particular case. A unanimous Court declared that "section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in the particular case".¹³⁶ And that the requirement of an apparent link or relationship

¹³³ Roach, 2008, p. 249, Para 2.

¹³⁴ B Slaterry, 'The Canadian Charter of Rights and Freedoms- Override Clauses Under Section 33- Whether Subject to Judicial Review Under Section 1' *Canadian Bar Review*, vol. 61, 1983, p. 392, Para 2, retrieved 28 September 2010, available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1567574.

¹³⁵ Roach, 2008, p. 249, Para 2.

¹³⁶ Supreme Court of Canada, *Ford v. Quebec*, 1987: November 16, 17, 18; 1988: December 15, 2 S.C.R. 712,

between the overriding Act and the guaranteed rights or freedoms to be overridden seems to be a substantive ground of review. “It appears to require that the legislature identify the provisions of the Act in question which might otherwise infringe specified guaranteed rights or freedoms. That would seem to require a *prima facie* justification of the decision to exercise the override authority rather than merely a certain formal expression of it”.¹³⁷ Even though Section 33 has never been used by the federal Parliament,¹³⁸ the only guarantee that the public authorities would not use their overriding powers would not only rely on how the legislatures would use Section 33 with restraint but also on Supreme Court’s assertion to declare null and any legislation or government action that violates human rights.¹³⁹

3.3 The United Kingdom

The UK has been dealing with terrorism for decades; it is therefore, not a new phenomenon. Moreover, the UK was not only one of the first countries to join the European convention on Human rights¹⁴⁰, but also one of the founding members of E.U. The United Kingdom’s *Terrorism Act 2000*, defines terrorism as “requiring proof of religious or political motives. The political or religious motive approach has been followed with some variations in other jurisdictions including Australia, Canada, Hong Kong and New Zealand”.¹⁴¹

In the wake of the aftermath of the events of the 11th of September, 2001 in the United

File No. 20306 (1988). Para 33.

¹³⁷ Ibid.

¹³⁸ Canadian Heritage website, *Section 32-33: Application of the Canadian Charter*, retrieved 15 September 2010, available online at: <http://www.pch.gc.ca/ddp-hrd/canada/guide/appl-eng.cfm>.

¹³⁹ J. W. Doig, ‘New Constitutions and Vulnerable Groups: Brian Dickson’s Strategies in Interpreting the 1982 Charter’ in S Tierney (ed.), *Multiculturalism and the Canadian Constitution*, University of British Columbia Press, Vancouver, 2007, p. 166.

¹⁴⁰ U.K Law online, on the *ECHR*, the University of Leeds website, UK, retrieved 12 September 2010, 2nd Para, available online at: <http://www.leeds.ac.uk/law/hamlyn/echr.htm>.

¹⁴¹ Cited in V Ramraj, M Hor & K Roach, *Global Anti Terrorism Law and Policy*, Cambridge University Press, New York, 2005, pp. 2-3.

States and the 7th of July, 2005 terrifying bombings of the London Underground, The UK government has been trying to increase its anti-terrorist measures, laws and policies. Regrettably, some of these responses to terrorism including a number of new legislations which Human Rights bodies found not so human represent a violation of human rights treaties and conventions to which the UK government is party.

For the purposes of my thesis, I am trying to assess whether or not the U.K responses to terrorism especially the *Anti terrorism Act 2000*. And particularly, section 44 of the Act which gives the authorities or police extended powers to stop and search vehicles or pedestrians is compatible with the ECHR.

In this regard the ECtHR in its judgment of January 2010 found that there had been a violation of article (8)¹⁴² of the ECHR by the British government, which in other words made Section 44 of the Terrorism Act 2000 incompatible with the convention. In the case of *Gillian and Quinton v. the United Kingdom*¹⁴³ “the court observed that although the length of time during which two British nationals were stopped and searched on their way to join a demonstration did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. And obliged to remain where they were and submit to the search, had they refused they would have been liable to arrest, detention at a police station and criminal charges”.¹⁴⁴ Furthermore, “each of the applicants was stopped by a police officer and obliged to submit to a search under section 44 of the 2000 Act. For the reasons above, the Court considers that these searches constituted interferences with their

¹⁴² Article 8 of the ECHR provides:

1. “Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

¹⁴³ ECtHR, *Gillian and Quinton v. the United Kingdom*, judgment of 12 January 2010, Application no. 4158/05, to be published, (2010).

¹⁴⁴ Ibid, Para 57.

right to respect for private life under Article 8. Such an interference is justified by the terms of paragraph 2 of Article 8 only if it is ‘in accordance with the law’, pursues one or more of the legitimate aims referred to in paragraph 2 and is ‘necessary in a democratic society’ in order to achieve the aim or aims”.¹⁴⁵ Thus, the Court concluded that the powers of authorization and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, “in accordance with the law” and it follows that there has been a violation of Article 8 of the ECHR.¹⁴⁶

Section 44 of the *Terrorism Act 2000* provides:

An authorisation under this subsection authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search:

- (a) the vehicle;
- (b) the driver of the vehicle;
- (c) a passenger in the vehicle;
- (d) anything in or on the vehicle or carried by the driver or a passenger.

(2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search:

- (a) the pedestrian;
- (b) anything carried by him.

(3) An authorisation under subsection (1) or (2) may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.

(4) An authorisation may be given—

- (a) where the specified area or place is the whole or part of a police area outside Northern Ireland other than one mentioned in paragraph (b) or (c), by a police officer for the area who is of at least the rank of assistant chief constable;
- (b) where the specified area or place is the whole or part of the metropolitan police district, by a police officer for the district who is of at least the rank of commander of the metropolitan police;
- (c) where the specified area or place is the whole or part of the City of London, by a police officer for the City who is of at least the rank of commander in the City of London police force;
- (d) where the specified area or place is the whole or part of Northern Ireland, by a member of the Royal Ulster Constabulary who is of at least the rank of assistant chief constable.

(5) If an authorisation is given orally, the person giving it shall confirm it in writing as soon as is reasonably practicable.

Another dilemma the UK government had to deal with while enacting and implementing its new anti-terrorist laws and policies is the problem of non-UK nationals who

¹⁴⁵ Ibid, Para 65.

¹⁴⁶ Ibid, Para 87.

were suspected of being terrorists. The UK government has enacted the so called *Anti Terrorism Act 2000*, and the so called *Anti Terrorism, Crime and Security Act 2001*, also derogating from Article 5(1)(f) of the ECHR making a derogation order, by giving notice to the Secretary General of the CoE under Article 15(3) of the ECHR.¹⁴⁷ By taking such step the UK government would be the first E.U country to derogate from the ECHR because of its implementation of a new anti-terrorism law.¹⁴⁸

In the case of (*A and Others v. SSHD*)¹⁴⁹, The House of Lords declared that the indefinite detention without charge or trial of foreign national suspected of committing terrorist offences, pursuant to section. 23 of the *Anti Terrorism Crime and Security Act 2001*, is incompatible with article (5)¹⁵⁰ and article (14)¹⁵¹ of the ECHR.¹⁵² Conversely, one would

¹⁴⁷ See, Joint Committee on Human Rights, 'Second Report on Anti Terrorism, Crime and Security Bill', UK Parliament, 16 November 2001, retrieved 2 August 2010, available online at: <http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/037/3703.htm>

¹⁴⁸ VH Henning, 'Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on human Rights?', *American University International Law Rev.* 17:1263, 2002, p. 1266, Para 1, retrieved 10 August 2010, available online at: <http://www.wcl.american.edu/journal/ilr/17/henning.pdf?rd=1>

¹⁴⁹ H.L., *A and Others v. SSHD*, Thursday 8 December 2005, UKHL 71, Session 2005-06, (2005).

¹⁵⁰ Article 5 of the ECHR provides:

1. "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 (a) the lawful detention of a person after conviction by a competent court;
 (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 (3). Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 (4). Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

argue that it could be much easier for the British government to just deport those who are not citizens of the UK to their national countries. But the problem is on the other hand is that many of those who are suspected of being terrorists come from countries, if deported would impose either the death penalty or be subject them to torture, inhumane or degrading treatment¹⁵³, which runs counter to human rights obligations of the U.K government and other members of the ECHR under articles (2)¹⁵⁴ & (3)¹⁵⁵ of the convention, taking into account that it is not possible to derogate from obligations under article (3) the convention¹⁵⁶, and also no derogation is allowed from Article 2, except in respect of deaths resulting from lawful acts of war.¹⁵⁷ Moreover, in the case of (*Soering v. the United Kingdom*)¹⁵⁸, the Court did not

(5). everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”.

¹⁵¹ Article 14 of the ECHR provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

¹⁵² Commonwealth Secretariat, *Comparative Study on Mandates of National Human Rights Institutions in the Commonwealth*, Commonwealth Secretariat, London, 2007, p. 82, see footnote 162, retrieved 22 August 2010, available online at: http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=173605.

¹⁵³ H Cullen ‘Comparing Attitudes to International Human Rights Petition Systems’ in C. P.M. Waters (ed.), *British and Canadian Perspectives on International Law*, Martinus Nijhoff Publishers, The Hague, 2006, p. 137, Para 2. [Hereinafter: Cullen, 2006].

¹⁵⁴ Article 2 of the ECHR provides:

(1). “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2). Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defense of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection”.

¹⁵⁵ Article 3 of the ECHR provides:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

¹⁵⁶ Cullen, 2006, p. 137, Para 2.

¹⁵⁷ See, article 15 Section 2 of the ECHR.

¹⁵⁸ ECtHR, *Soering v. the United Kingdom*, judgment of 07 July 1989, Application no. 14038/88, Series A No. 161 (1989).

permit the extradition of a German national who was detained in England pending extradition to the United States to face charges of murder in the Commonwealth of Virginia, because the “applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 of the ECHR. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration awaiting the execution.”¹⁵⁹ See also case of (*Chahal v. the U.K.*).¹⁶⁰

It is important to mention on the other hand that in May 2009 the UK Secretary of State for Justice of the Labor government Jack Straw was reported to have said that UK terror laws built up in the wake of September the 11th 2001 and the attacks on London in July 2005 should be reviewed and may need to be scaled back, he also added:¹⁶¹

“There is a case for going through all counterterrorism legislation and working out whether we need it. It was there for a temporary period.”

In my opinion this is a very significant statement made by the Secretary of Justice, and one would hope that it will only be a first step toward reviewing all UK’s anti terrorism laws and policies that run counter to human rights principles. And then practical steps should also follow, to ensure that all the rights that are protected under human rights conventions are well respected and protected.

3.4 The Middle-East

I have chosen to write mainly and more comprehensively about two different countries, of different cultures and backgrounds and also political agendas. The state of Israel

¹⁵⁹ Ibid, Para 111.

¹⁶⁰ ECtHR, *Chahal v. the United Kingdom*, judgment of 15 November 1996, Application no. 22414/93, Reports 1996-V, (1996).

¹⁶¹ A Hirsch & A Travis, ‘Terror Laws Built up after 9/11 and 7/7 May be Scaled Back, says Jack Straw’, *The Guardian*, UK, 13 May, 2009, retrieved 21 August 2010, available online at: <http://www.guardian.co.uk/politics/2009/may/13/terrorism-legislation-jack-straw>.

and Turkish Republic; are amongst the most influential and powerful countries in the region and both have a relatively a well established political structure and very influential and strong judiciary. While on the other hand, there are other countries in the Middle-East where a state of emergency has been declared, for example, Algeria since 1992¹⁶² also in Egypt since 1967¹⁶³ and Syria since 1963.¹⁶⁴ This state of emergency has been maintained for extended periods. I will however talk more comprehensively about Israel and Turkey, by analyzing the impact of such emergency and its implications on these respective countries and were applicable I will also examine national and international reactions to the declaration of such emergency in both countries.

In Israel, where it has been under a State of Emergency since May 1948¹⁶⁵, where there also has been a growing and ongoing fight, violence and struggle between Israel and the Palestinians. Although some would label it as “terrorism”, the Palestinians have been fighting to establish their own independent Arab state on the land that Israel has occupied since the Six-Day War in 1967.¹⁶⁶ This struggle has been on the global agenda for decades.

In Turkey on the other hand, there has been an ongoing struggle between the government of Turkey and the Kurdish separatist and military movements, especially in the South-East of the country, where the majority of citizens are of Kurdish ethnicity and a significant number of those aspire to secede from the Turkish republic and have their own

¹⁶² See, Human Rights Watch, ‘Country Summary’, *Human Rights Watch report on Algeria*, January 2010, retrieved 13 July 2010, available online at: <http://www.hrw.org/en/node/87706>.

¹⁶³ See, ‘Extending State of Emergency Violates Rights’ *Human Rights Watch report on Egypt*, May 2008, retrieved 13 July 2010, available online at: <http://www.hrw.org/en/news/2008/05/27/egypt-extending-state-emergency-violates-rights>.

¹⁶⁴ See, U.S State Department, *Background Note: Syria*, updated, 8 September 2010, retrieved 20 September 2010, available online at: <http://www.state.gov/r/pa/ei/bgn/3580.htm>.

¹⁶⁵ Adalah, Legal Centre for Arab Minority Rights in Israel, ‘Report Submitted to the UN HRC - Information Sheet no 1, State of Emergency’, *Israel*, 22 July 2003, retrieved 19 July 2010, available online at: http://www.adalah.org/intladvocacy/unhrc_03_emergency.pdf.

¹⁶⁶ J Teitelbaum, ‘The Palestine Liberation Organization’ in I Rabinovich & H Shaked (eds.), *Middle East Contemporary Survey*, Volume XI: 1987, Westview Press, Boulder, p. 235, Para 1.

ethnic state.¹⁶⁷

3.5 Israel

As mentioned earlier the state of Israel has been under a State of Emergency since May 1948. Under Article 38(b) of the amended Basic Law, a state of emergency can be declared for a period of one year after which it must be reviewed, and if the situation demands it, it can be extended. The Israeli Knesset has routinely extended the state of emergency, without seriously considering whether Israel's situation warrants such an extension. Hence, Israel has remained under a constant state of emergency for the last 62 years.¹⁶⁸ Moreover, In October 1991 Israel has made a Reservation declaring its derogation from article (9)¹⁶⁹ of the I.C.C.P.R.¹⁷⁰

¹⁶⁷ M Gunter, 'The Kurdish Question and International Law' in F Ibrahim & G Gürbey (eds.), *The Kurdish Conflict in Turkey: Obstacles and Chances for Peace and Democracy*, ST. Martin's Press, New York, 2000, p. 54, Para 4.

¹⁶⁸ Ibid, page 1, last Para.

¹⁶⁹ Article 9 of the ICCPR provides:

- (1). "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
- (2). Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- (3). Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
- (4). Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- (5). Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".

¹⁷⁰ Israel's Reservation to the ICCPR, 3 October 1991;

"Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens. These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defense of the State and for the protection of life and property, including the exercise of powers of arrest and detention. In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."

Since 1967, and even before that date, there have been an increasing number of Palestinian detainees in Israeli jails; the number has augmented since the starting of the first Palestinian Intifada.¹⁷¹ In 1987, between this year and the year of 1994 there has been an estimated number of 100,000 Palestinians detained by Israeli forces, of those arrested reliable sources have indicated that some 4,000 to 6000 are subjected to interrogation each year.¹⁷² Israel's two main interrogation agencies in the occupied territories the IDF¹⁷³ and GSS¹⁷⁴ have been engaging in "a systematic pattern of ill-treatment and torture- according to internationally recognized definitions of the terms- when trying to extract information or confessions from Palestinian security suspects".¹⁷⁵

An official Israeli report which was authorized by a Parliamentary Committee, "has acknowledged for the first time that the Israeli security service tortured detainees during the first Palestinian Intifada, between 1988 and 1992". The report said that GSS has routinely gone beyond the "moderate physical pressure" authorized by a 1987 commission headed by then-Supreme Court Justice Moshe Landau.¹⁷⁶ The report, which was written by former State Comptroller Miriam Ben-Porat, indicated that the agents systematically overstepped even

¹⁷¹ Is the Arabic word for "uprising", this term has been used since 1987 marking the start of the first Palestinian uprising against Israeli occupation of the West bank and the Gaza Strip.

¹⁷² Human Rights Watch/Middle East, 'Torture and Ill-Treatment', *Israel's Interrogation of Palestinians from The Occupied Territories*, Human Rights Watch, New York, June 1994, Summary and Recommendations, x, Para 1-2. [Hereinafter: Human Rights Watch, Israel, 1994].

¹⁷³ Israel Defense Force.

¹⁷⁴ Israel's General Security Service. Also known as *Shin Bet* or *Shabak*.

¹⁷⁵ Human rights Watch, Israel, 1994, Summary & Recommendations, x, Para 1-2.

¹⁷⁶ A governmental commission of inquiry into the methods of investigation of the general security service Regarding Hostile Terrorist Activity. An official Israeli report, also known as "the Landau report", in this report the Landau Commission, which was established in 1987, concluded that: "The means of pressure against interrogees should principally take the form of non-violent psychological pressure through a vigorous extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, the exertion of a moderate of physical pressure cannot be avoided", for more details see, *Anja Katarina Weilert, Grundlagen und Grenzen des Folterver botes in verschiedenen Rechtskreisen, Beitrage zum auslandischen öffentlichen Recht und Völkerrecht*, Vol. 200, 2009, 425-431, by Max-Planck-Geseellschaft zur förderung der Wissenschaften e.V. Accessible online at: <http://www.mpil.de/shared/data/pdf/beitr200.pdf>.

these limits set by the Landau commission, especially at the interrogation facility in the Gaza Strip.¹⁷⁷

Moreover, the Former Israeli Prime minister Yithak Rabin, in a radio interview said that:¹⁷⁸

"Restricting the functions of the Shabak (GSS) is a big mistake.
There is nothing wrong with using violent shaking against Prisoners
... it has been used on 8000 prisoners."¹⁷⁹

Regrettably, the use of torture by Israeli security services against Palestinian detainees did not stop. As the Israeli High Court ruling on 6 September 1999 dealt with some forms of torture methods used by Israeli security services, "which were permissible under the Landau report as 'moderate physical pressure' like, violent shaking, tying against small chairs, handcuffing and sleep deprivation. The court ruled that the using of violent shaking and painful tying against small chairs are prohibited".¹⁸⁰

Despite this prohibition on violent shaking the High Court decision stated that hooding or placing a "filthy" sack over the head of the interrogee, especially where it does not deprive the interrogee of ventilation or normal breathing, does not cause pain and as such does not constitute a method of torture. The Court further determined that subsection "to noise or playing loud music as a security measure, to which everyone present including the guards were subjected to it, is not a form of torture", and that "lengthy periods of detention prior to interrogation, where detainees might be deprived of sleep, is justified by the pressing need to

¹⁷⁷ BBCNEWS, Israel, *Israel Admits Torture*, Wednesday, 9 February 2000, retrieved 11 July 2010, available online at: http://news.bbc.co.uk/2/hi/middle_east/637293.stm.

¹⁷⁸ R Qatamish & N Sha'ban, *Torture of Palestinian Political Prisoners in Israeli Prisons*, trans. D Zayed, ADDAMEER Prisoners Support and Human Rights Association, West Bank October 2003, P. 37, Para 3, [Hereinafter: ADDAMEER, West Bank, 2003], retrieved 2 August 2010, available online at: <http://www.addameer.org/resources/reports/torture-eng.pdf>

¹⁷⁹ Yithak Rabin in an interview on Kol Israel radio station, 29 July 1995, cited in ADDAMEER, West Bank, 2003, p. 37, Para 2.

¹⁸⁰ ADDAMEER, *the Methods of Torture Described before the High Court*, ADDAMEER, West Bank, retrieved 2 August 2010, available online at: <http://www.addameer.org/detention/torture.html>, under, methods of torture described before the Israeli High Court.

prevent future ‘terrorist’ attacks and loss of life.”¹⁸¹ In other words, thus, I would say that torture has been legitimized by the Israeli High Court.

The Human Rights Committee of the United Nations in its concluding observations in 2003 has criticized the government of Israel and stated that:

Israel appears, “...to derogate from Covenant provisions other than article 9, derogation from which was notified by the State party upon ratification. In the Committee’s opinion, these derogations extend beyond what would be permissible under those provisions of the Covenant which allow for the limitation of rights (e.g. articles 12, paragraph 3; 19, paragraph 3 and; 21, paragraph 3). As to measures derogating from article 9 itself, the Committee is concerned about the frequent use of various forms of administrative detention, particularly for Palestinians from the Occupied Territories, entailing restrictions on access to counsel and to the disclosure of full reasons of the detention. These features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 more extensively than what in the Committee’s view is permissible pursuant to article 4...”¹⁸²

On the other hand, after the U.S under the Bush administration declared the so called “Global War” on terrorism and after the invasion of Afghanistan in 2001, the government of Israel like other governments of the world was inspired by such a declaration from the most powerful country in the world and therefore, has tried to use this war to legitimize suspension of certain fundamental rights. To achieve its own goal in its war on Palestinian groups like Fatah, Hamas and other Palestinian factions that use a military resistance against Israel. As a concrete example, in 2002 the Israeli Knesset proposed and later enacted a law that would expand an existing law which allows for the unlimited detention of persons classified as ‘illegal combatants’ by the Israeli Defense Forces Chief of Staff, and of persons who are members of an organization classified as an ‘illegal combatant organization’.¹⁸³ Analysts and

¹⁸¹ A. L. Wisotsky, ‘Israeli Interrogation Methods Legitimized by Court’, the Centre for Human Rights and Humanitarian Law at Washington College of Law, American University website, 1997, Para 7-8, retrieved 5 September 2010, available online at: <http://www.wcl.american.edu/hrbrief/v4i3/israel43.htm>.

¹⁸² See, concluding observations of U.N Human Rights Committee on *Israel*, 78th Session, CCPR/CO/78/ISR, adopted 21 August 2003.

¹⁸³ Israel, Incarceration of Unlawful Combatants Law no. 5762-2002. For analysis see, Public Committee against Torture, *PCATI calls on the Knesset not to pass the proposed amendment to the Detention of Illegal Combatants Law*, Israel, 19 May 2008, retrieved 5 August 2010, available online at: <http://www.stoptorture.org.il/en/node/1280>.

human rights organization like B'TSELEM¹⁸⁴ argued that this law was enacted to bypass the Supreme Court's decision given in 2000 that the state is not allowed to hold Lebanese citizens in administrative detention as 'bargaining chips' for the return of Israeli captives, when the detainees represent no danger to the state.¹⁸⁵ Moreover this law has been described by some leading Israeli scholar and legal expert Mordechai Kremnitzer to be inconsistent not only with the limitations imposed by Israel's Basic Laws which seek to insure minimal interference with human liberty, but also with international conventions to which Israel is party.¹⁸⁶

Further, the Public Committee against Torture in Israel announced that "there are five persons being held in detention in Israel under the above mentioned law. Such law would "allow the detention of hundreds of combatants during military operations in the occupied territories". The evident purpose of the law is to make it possible to quickly and easily detain a large number of people without due process, including the denial of representation by an attorney, the obligation to bring the detainee before a judge and the obligation to prove that an offence was committed. In practice, the law allows for detention without trial and without effective limitation on the length of detention until the end of hostilities between the state of Israel and its enemies, or in other words unlimited detention that can in practice become life

¹⁸⁴ The Israeli Information Centre for Human Rights in the Occupied Territories.

¹⁸⁵ See, *B'TSELEM*, Israel, In April 2000, the Supreme Court ruled that the law pursuant to which these civilians were being held does not allow the administrative detention of persons who "do not endanger state security. Since the Lebanese civilians were being held as bargaining chips, and the state never claimed that the individuals themselves endanger security in any way, the court ordered their release. Following the judgment, Israel released 13 of the Lebanese civilians. Israel refused to release the remaining two, Mustafa Dirani and Sheikh 'Abd al-Karim 'Obeid. To enable the state to continue to hold them as bargaining chips, the government drafted a proposed law allowing such detention and side-step the Supreme Court's decision". At the same time and in order to legitimize the detention of" Dirani and 'Obeid, the state changed its argument and contended that they endanger state security, thus allowing their administrative detention under existing law. The Tel-Aviv District Court has repeatedly accepted the state's argument and approves Dirani and 'Obeid's detention once every several months on those grounds. Despite this, the government has not withdrawn the proposed law". For more analysis, see, full *Position Paper on the Proposed Law: Imprisonment of Illegal Combatants, a prepared by B'TSELEM*, Israel, retrieved 6 August 2010, available online at: http://www.btselem.org/english/administrative_detention/israeli_law.asp.

¹⁸⁶ M Kremnitzer & E.K Moodrik, *Policy Paper no. 58 – Unlawful Combatants or Unlawful Legislation? On the Unlawful Combatants Law 2002*, The Israel Democracy Institute website, 2005, retrieved 20 October 2010, available online at: http://www.idi.org.il/sites/english/PublicationsCatalog/Pages/PP_58/PP_58.aspx.

imprisonment”¹⁸⁷ as the end of hostilities in that region is a far reaching goal. The Committee further argues that the law would not only be limited to residents of enemy states, but may be applied as well to anyone including residents of the Occupied Territories and even to Israeli citizens.

According to B’tselem the enacted Law is currently used to detain without trial Palestinians from the Gaza Strip. Although the state has not yet used it on a large scale, it still enables the state to hold the detainees for an unlimited period of time, and without effective judicial review.¹⁸⁸ In light of the presumptions specified in the Law, the protections afforded by the Law to internees are even less than the few provided to detainees under the Administrative Detention Order applying in the West Bank.¹⁸⁹

3.6 Turkey

In a conflict that claimed the lives of more than 40,000 people¹⁹⁰ The Turkish government has been involved in a war against the PKK¹⁹¹ and other associated groups for

¹⁸⁷ Public committee Against Torture, Israel, *PCATI calls on the Knesset not to pass the proposed amendment to the Detention of Illegal Combatants Law*, 19th May 2008, available online at: <http://www.stoptorture.org.il/en/node/1280>.

¹⁸⁸ See, B’TSELEM, *Criticism of the Internment of Unlawful Combatants Law*, Israel, retrieved 6 August 2010, available online at: http://www.btselem.org/english/administrative_detention/Criticism_on_the_Illegal_Combatants_Law.asp.

¹⁸⁹ See, Israel Defense Force, Order Regarding Administrative Detention (Temporary Order) [Combined Version] (Judea and Samaria) (No. 1591), 5767 – 2007, 7 March 2007, which replaces the Administrative Detention (Temporary Order) (Judea and Samaria) (No. 1226), 5748 – 1988, cited from, B’TSELEM website, retrieved 5 August 2010, available online at: http://www.btselem.org/Download/Administrative_Detention_Military_Order_1591_Eng.pdf, under *The basis for administrative detention in Israeli law*; “Administrative detention in the West Bank, not including East Jerusalem, is currently carried out pursuant to the new Temporary Order Regarding administrative detention, the new Order empowers military commanders in the West Bank to detain a person for a maximum period of six months, when there is ‘a reasonable basis for believing that the security of the region or public security’ requires it. The military commanders may extend the detention order for an additional period of up to six months. The Order does not specify a maximum cumulative period for administratively detaining a person, enabling the detention to be extended repeatedly”, Available at: http://www.btselem.org/english/administrative_detention/israeli_law.asp, retrieved 7 August 2010. And for more comprehensive analysis on Administrative detention in the Occupied Territories, see also, ADDAMEER, Prisoners Support and Human Rights Association, West Bank, *Administrative Detention*, available at: http://www.addameer.org/detention/admin_deten.html, retrieved 7 August 2010.

¹⁹⁰ Head J, ‘Turkey’s Kurdish War Reignites’, *BBC News*, 3 July 2010, retrieved 4 September 2010, available online at: <http://www.bbc.co.uk/news/10492696>.

more than 26 years. This Kurdish separatist insurgency, and by the mid-1990s had nearly assumed the character of a civil war in the southeastern part of the country¹⁹², where also a number of human rights violations have been reported in relation to the conflict.

In this respect Turkey has officially derogated from the ECHR from 1990 to 2002, this derogation was limited to the Kurdish-majority provinces in remote southeastern regions¹⁹³, the last two provinces where a state of emergency was declared and later lifted in 2002, were Diyarbakir and Sirnak in the predominantly Kurdish area of south east of the country. In this respect, Turkey had been accused of misusing its derogation powers after it had filed derogation notice to the Secretary General of the CoE.

In a decision by the ECtHR, the court held that Turkey has violated article 5(3),(4),(5)¹⁹⁴ of the convention. Furthermore, in the case of *Sakik and Others v. Turkey*¹⁹⁵ the

¹⁹¹ O'Toole P, 'The PKK', *BBC News*, Turkey, *Kurdistan Workers Party*, a "Kurdish military organization, designated as a terrorist organization by Turkey, the EU and the US. Has Marxist-Leninist roots, was formed in the late 1970s and launched an armed struggle against the Turkish government in 1984, calling for an independent Kurdish state within Turkey by 1990s, the organization rolled back on its demands for an independent Kurdish state, recently the organization has been calling for more autonomy for the Kurds. And to involve it in the country's political process, allow more cultural rights for the country's estimated 15 million Kurds and release imprisoned PKK members. But the government of Turkey, which, like a number of Western countries, regards the PKK as a terrorist organization, is so far refusing to negotiate with it and has offered only a limited amnesty to its members. Since 2004 till present, the PKK resumed its violent campaign, which has escalated steadily over the past two years despite several other short-lived, unilateral ceasefires". Last Updated: Monday, 15 October 2007, retrieved 19 September 2010, available online at: <http://news.bbc.co.uk/2/hi/europe/7044760.stm>.

¹⁹² Federal Research Division of the Library of Congress, *Turkey: A Country Study*, Kessinger Publishing, Washington DC, 1995, p. 364, Para 1.

¹⁹³ L. R. Helfer, E. M. Hafner-Burton, C. J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, *Duke Law*, Duke Law Scholarship Repository Working Papers, Duke University website, 2010, footnote, 53. [Hereinafter: Helfer, Hafner & Faris, 2010], retrieved 9 August 2010, available online at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1027&context=working_papers.

¹⁹⁴ Article 5(3),(4),(5) of the ECHR on Right to liberty and security provides:

(3). "Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4). Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5). everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation".

court acknowledged that under ECHR states are prohibited from employing emergency powers beyond the temporal and geographic scope. And it further said that; when the Turkish government suspended human rights protections in territories outside those identified in the state's derogation notice. The court emphasized that such action would be working against the object and purpose of the ECHR's derogation provision, "if when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation".¹⁹⁶

In other cases the court also found violations of the convention in relation to the abuse of emergency powers by the government of Turkey especially with regard to the southeastern provinces. In the case of *Aksoy v. Turkey*¹⁹⁷ the court found violation of article (3)¹⁹⁸, article 5(3)¹⁹⁹ and article (13)²⁰⁰ of the convention. As with regard to the violation of article 5(3) of the convention; the court stated that "the detention of the applicant for a fourteen days without judicial intervention. Was exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture. Moreover, the Government did not adduce any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable". Thus, such a long period of detention is incompatible with the convention. Moreover the court stated that, despite the

¹⁹⁵ ECtHR, *Sakik and Others v. Turkey*, judgment of 26 November 1997, Application no. 23878/94, 23879/94, 23880/94, 23881/94, 23882/94, 23883/94 (1994).

¹⁹⁶ E. J. Criddle & E. Fox-Decent, 'Human Rights, Emergencies, and the Rule of Law' p, 8, Para 3. Retrieved 11 August 2010, available online at: http://www.cpsa-acsp.ca/papers-2010/Criddle_Fox-Decent.pdf.

¹⁹⁷ ECtHR, *Aksoy v. Turkey*, judgment of 18 December 1996, Application no. 100/1995/606/694, Reports 1996-VI, (1996).

¹⁹⁸ Article 3 ECHR provides: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

¹⁹⁹ See footnote 145.

²⁰⁰ Article (13) of the ECHR provides:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

serious terrorist threat in South-East Turkey, the measure which allowed the applicant to be detained for at least fourteen days without being brought before a judge or other officer exercising judicial functions exceeded the Government's margin of appreciation and could not be said to be strictly required by the exigencies of the situation as according to article 15 of the convention.

Moreover, in the case of *Abdülşamet Yaman v. Turkey*²⁰¹, the court also found that the government of Turkey violated its derogation powers under article 15 of the ECHR. When “it extended its derogation powers to take effect to a part of Turkish territory not explicitly named in its notice of derogation.” The Court noted that “Legislative Decrees nos. 424, 425 and 430, which are referred to in the derogation of 6 August 1990 and the letter of 3 January 1991, applied, according to the descriptive summary of their content, only to the region where a state of emergency has been proclaimed, which, according to the derogation, does not include the city of Adana”. However, the applicant's arrest and detention took place in Adana on the order of the Adana public prosecutor.”²⁰² Therefore, the court concluded that there had been a violation, of article (3)²⁰³, article 5²⁰⁴ (3) (4) (5), article (13)²⁰⁵ and article (14)²⁰⁶ of the convention.

²⁰¹ ECtHR, *Abdülşamet Yaman v. Turkey*, judgment of 02 February 2005, Application no. 32446/96, to be published, (2005).

²⁰² Ibid. Para 68.

²⁰³ See footnote 155.

²⁰⁴ See footnote 150.

²⁰⁵ See footnote 200.

²⁰⁶ Article 14 of the ECHR provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

3.7 Conclusions

In times of emergencies states are allowed to derogate from certain rights, these derogation clauses are an exception to the general rule, which all human rights shall be protected. Thus, in exercising these exceptional rights, states are required to minimize the effects of such declaration to the minimum, as not to abuse their derogation powers and where only required by the exigencies of the situations.

Unfortunately, most if not all states have abused these rights, not only in the Middle East but even in Europe as we have discussed the UK example, albeit on a lesser scale but still, steps need to be done to ensure that governments are fulfilling their commitments according to international treaties and conventions. In addition, any derogation or emergencies declaration should be subject judicial review and international bodies have to intervene to ensure that the application of the law concerning derogation is in line with international standards and commitments when a state is party to an international convention. Furthermore, the international community has to ensure that certain emergency laws and derogation clauses are updated periodically and that they are not used as a mean of repression against the subjects of the state.

CONCLUSIONS

I strongly believe that every nation that proclaims the rule of law at home must respect it abroad and that every nation that insists on it abroad must enforce it at home. Indeed, the Millennium Declaration reaffirmed the commitment of all nations to the rule of law as the all-important framework for advancing human security and prosperity.

Kofi Annan²⁰⁷

The words of the Secretary General of the United Nations illustrate and summarize the main point of the present dissertation, namely, the conclusion that only by the real commitment to the rule of law; can nations advance their security and prosperity, even when facing exceptional circumstances that affect or threatens the nation. We can deal with these issues not by combating terrorism with state-terrorism. I am affirming the idea of dialogue between the state and its subjects also the dialogue between nations, with dialogue we can reach most of our goals to bring about security not only for the state but also for the people, all people.

In my dissertation, I have observed that states may resort to derogation or emergencies when the state is threatened by an emergency that might threaten the life of the nation, this situation only warrants the declaration of such an emergency and thus, make it lawful for the state to derogate from its obligation under any conventions which the state is party to and in line international law. Where the notion of derogation and its clauses in most of the conventions is very expansive and states may deem any situation to be a situation that threatens its very existence. While in a lot of cases it has been tested not to be so accurate in

²⁰⁷ U.N G.A, Report of the Secretary General, *integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields, follow-up to the outcome of the Millennium Summit, In Larger Freedom: Towards Development, Security and Human Rights for All*, 59th session, A/59/2005, 21 March 2005, Para 133.

accordance with the many different decisions of judicial bodies and especially those of the ECtHR. Thus, states have misused this broad term to justify restrictions and impositions of individuals.

I also have experimented the notion of terrorism and all different definitions adopted by the many countries in the world, and I have concluded that there is no universally agreed upon definition of terrorism, this is mainly due to the different cultural, political and ideological approaches and agendas of the different members of the United Nations. Regrettably, this situation has led to the overly broad definitions of terrorism that states use to restrict freedoms and civil liberties of the individuals. Also the implications that were triggered by the so called war on terrorism whether it was a real a threat or a hypothetical one that states use as scarecrow to repress their opponents or to strike down on civil liberties and democracies as demonstrated in the last chapter.

Moreover, I have delved into explaining and elaborating some practical examples from around the world on how did states use derogation clauses and emergency laws to deal with “terrorism” and the implications of such application of the powers, with examples from the U.S, Canada, the UK, Israel, Turkey and other countries from the Middle East. Furthermore, I have examined the reaction of judicial bodies and the jurisprudence of the ECtHR and the Israeli high court, local non-governmental organizations as well as U.N bodies to the state of emergency declared by these countries.

Also I concluded that such measures have to be subject to judicial review when a state has an independent judiciary, and observes the separation of powers doctrine and if existed such an independent judiciary has the duty of reviewing all legislations and policies that run counter to the constitution and to make sure that fundamental freedoms of the individual are protected.

As human beings we have our duties and responsibilities toward our society but at the

same time we have unalienable rights that have to be sheltered. We are entitled to such rights by virtue of being human beings. Accordingly, This illustrates the main Question of my thesis which is about, how could states strike a balance between their security needs and the needs of individuals to have their rights and liberties protected by respecting the rule of law and maintain that only the rule of law that will eventually prevail.

Last but not least, after discussing derogation and emergencies clauses with the different definitions of terrorism, also the national and international reactions to it. I think that it is very important that the international community, represented by the U.N intervenes and take all necessary and prompt measures to adopt an internationally agreed upon definition of terrorism, taking into consideration all the view points and perspective of all legal systems and expertise from around the world. Only by acting, uniting and combining our efforts we can limit the abusive application of the board definitions of terrorism by states and thus, protect and secure more freedoms and civil liberties of individuals. Moreover, the Human Rights bodies, and non-governmental organizations both on national and international levels, especially those of the U.N have to expand their supervisory roles in monitoring the abuses and violations of human rights law committed by states when exercising or overstepping their derogation powers or their counter terrorism laws and policies.

Appendix I: Table of All Derogations from the European, American Conventions and the ICCPR.²⁰⁸

State	Number of Derogations
Albania	1
Algeria	18
Argentina	6
Azerbaijan	9
Bolivia	5
Chile	15
Colombia	30
Ecuador	21
El Salvador	5
France	1
Georgia	4
Guatemala	1
Ireland	5
Israel	17
Jamaica	2
Namibia	1
Nepal	1
Nicaragua	16
Panama	1
Paraguay	2
Peru ²⁰⁹	264
Poland	4
Russia (Soviet Union)	18
Sri Lanka (Ceylon)	14
Sudan	14
Surinam	4
Trinidad & Tobago	2
Tunisia	7
Turkey	34
United Kingdom	52
Uruguay	1
Venezuela	10
Yugoslavia	1
Total	586

33 States

²⁰⁸ Helfer, Hafner & Faris, 2010, p. 50.

²⁰⁹ Ibid, the country has filed more derogations than any other state by a large order of magnitude. Peru has also filed multiple derogations in each year that it derogates. The derogations spike in the early 1990s, a time of significant domestic unrest following the election of President Alberto Fujimori that resulted, on April 5, 1992, in the *autogolpe* (or self-coup) in which Fujimori, with the support of the military, suspended the constitution, shut down the Congress, and purged the judiciary.

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