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Justification of Derogations of Human Rights in Emergency Situations

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List of abbreviation

ECHR - European Convention on Human Rights

FISA - Foreign Intelligence Surveillance Act

IACHR - Inter- American Convention on Human Rights

ICCPR - International Covenant on Civil and Political Rights

IRA - Irish Republican Army

NGO – Non-governmental organization

SIAC - Special Immigration Appeals Commission

UN – United Nations

US PATRIOT Act - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act

Abstract

Human rights are protected by international, regional and local laws. Generally, restrictions of human rights by states or individuals are prohibited. However, in exceptional cases states are allowed to derogate from certain rights for a limited period of time. Since not every conflict or riot may be considered as a reason to declare a state of emergency, the states have to fulfill requirements established by International and regional instruments to derogate in accordance with a law.

Therefore, to make derogation in accordance with the law, the requirements established by International Covenant on Civil and Political Rights, such as public emergency that threaten the life of nation, official declaration of state of emergency, non- discrimination and consistency with the obligations under International Law, have to be met.

International standards of derogation as well as emergency laws of United States of America, Israel and United Kingdom will be analyzed from theoretical and practical side. In addition to that, theories of derogation of Niccolo Machiavelli, Jean Jacques Rousseau and Carl Schmitt will be reviewed to compare ancient and modern understanding of emergency situation as well as derogation.

Introduction

The rights of human being are protected worldwide by Constitution and other laws of countries as well as by numerous Conventions, Covenants and Treaties. Moreover, protection of human rights is granted not only on local and regional but also on international level. Generally, laws prohibit restrictions of human rights by states or individuals if a purpose of such restrictions is not legitimate and measures taken are not necessary and proportional. Exceptional situation when states are allowed to derogate from certain rights for a limited period of time is a state of emergency. Case *A. and others v. United Kingdom*[1] is an example when a right to liberty may be restricted due to crisis in the country. Nevertheless, states are still obliged to fulfill certain requirements to grant an appropriate treatment of individuals whose rights are restricted. The requirements of derogation are listed in Article 4 of International Covenant on Civil and Political Rights.[2] In addition to that, Paris Minimum Standards of Human Rights Norms in a State of Emergency[3] and Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights[4] also contain conditions that must be met to make temporal restrictions on certain human rights in accordance with international standards. Moreover, the state officials and other authorities are liable for improper treatment of those, whose rights are restricted if it based on race, sex, cultural identity or on any other discriminatory grounds. There must be valid reasons to impose restrictions on a particular human right. Therefore, the countries must be sure that derogations are justified.

[1] A. and others v. United Kingdom (Application No. 3455/05), judgment of 19 February 2009, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403#{"itemid":["001-91403"]}

[2] International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, article 4 http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[3] Richard B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, The American Journal of International Law, Vol. 36: 225, 1998

[4] Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) http://www1.umn.edu/humanrts/instree/siracusaprinciples.html

The question that might concern everyone is to what extent derogations in emergency situations justify the imposition of restrictions on human rights? Although derogations of certain rights are allowed by national and international law such as International Covenant on Civil and Political Rights, European Convention on Human Rights and Inter- American Convention on Human Rights, nevertheless, these rights cannot be fully restricted because there would not be reasonable justifications and it would be contrary to the principles of proportionality and necessity. All these criteria as well as the fulfillment of states' commitments will be examined on the basis of case study of USA, UK and Israel.

These countries were chosen due to the fact that each of them, at least once, has declared the state of emergency and therefore, domestic legislation of United States of America, United Kingdom and Israel will be compared and analyzed to identify the peculiarities, reasons and justifications of declaration of emergency situation as well as derogations from certain human rights. USA, being a target of terroristic attacks, especially after event 9/11 adopted a law, the main function of which is elimination of threats to security of the state and prevention such kind of attacks in the future. UK also made a declaration of emergency situation, however, unlike in case of USA, the justifications of united Kingdom were based on hypothetical assumptions (A. and others vs. UK). Finally, Israel, being in state of emergency for 63 years[5] and constantly prolonging it, must have reasonable grounds to make such decision. An example of Israel might help to clarify the problem of overdue of derogations since in general, the state of emergency cannot exist for a long time and thus, the derogations cannot be applicable for a long period of time.

The thesis consists of three chapters. The first one is a theoretical framework that includes definition/elements/ conditions of state of emergency as well as of derogation since

[5] Haaretz Newspaper, http://www.haaretz.com/print-edition/news/israel-extends-63-year-state-of-emergency-over-ice-cream-and-show-tickets-1.363640 (accessed May 24, 2011)

they could not exist independently of each other. The main legal instruments such as International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights (ECHR) and Inter- American Convention on Human Rights (IACHR) are going to be compared to identify whether there are peculiarities in ECHR and IACHR and how they are different from ICCPR.

Also, second chapter will include brief introduction of emergency laws of countries (USA, UK and Israel) to look whether they are able to face the extraordinary events and to cope with such crisis. Finally, third chapter is all about practical application of the emergency laws and courts' reasoning regarding the procedure of declaration of emergency situation and imposition of derogations.

Definition of emergency situation, its elements as well as a way how it must be declared is crucial because it serves as a pattern that helps in qualification of a situation as an emergency one. In present time, conflicts between and within states happen more often. However not every conflict or riot may be considered as a reason to declare a state of emergency since there are requirements that must be fulfilled. Nevertheless, cases when the states impose restrictions of human rights without reasonable grounds are not rare. There are variety grounds that are used to justify the declaration of emergency, such as available information regarding intentions of terrorists or simply fear of population (as it was in UK after 9/11). Further, these and other grounds will be reviewed more attentively.

Therefore, conditions of declaration of emergency situation as well as imposition of derogations will be analyzed in details in Chapter I. Article 4 of International Covenant on Civil and Political Rights allows derogations in exceptional situations. The requirements, that are going to be discussed later in the thesis, are taken from this article of ICCPR since the

Covenant has 167 parties[6] and 74 signatories[7] and therefore, may be considered as accepted by almost all countries. The states which make a decision to derogate from certain rights must meet the requirements such as public emergency which threatens the life of the nation, official proclamation of a state of emergency, necessity, non- discrimination and compliance with international obligations.[8] All these conditions will be discusses in a detailed way later on.

In addition, difference between derogations and limitations are also going to be discussed to make a distinction between these two. Both derogations and limitations allow a country to limit certain rights of people due to the difficult situation in the state. However, there are difference in the procedure of imposition of limitations which are going to be reflected in " Derogations vs. Limitations" subpart of the thesis.

Types of emergencies is another subsection of the Chapter I. Joan Fitzpatrick in her book "Human Rights in Crisis: The international System for Protecting Rights During States of Emergency introduces two types of emergency situations (de facto and de jure[9]) which she divided into number of subtypes. Indeed, not all of these subtypes may be considered as relevant to meaning of the emergency situation. However, it will be interesting to review them to challenge the validity of the arguments of the states that fit into one or another pattern of subtypes.

Theory of derogations is the next subchapter. This part of the thesis is going to analyze reasons why states derogate and violate its commitments to protect human rights, undertaken by them. Moreover, since international instruments allow derogations of human

[6] International Covenant on Civil and Political Rights, New York, 16 December 1966, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en
[7] *Ibid.*
[8] *Ibid.*
[9] Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*, University of Pennsylvania Press, 1994, p.8-9

rights, it is interesting to find out the purpose of such permissions. One may argue that it is done to control the actions of the states and to provide the minimum standards of human rights protection.

Therefore, the justifications of derogation as well as reasonableness of declaration of state of emergency are one of the main factors that must be taken into consideration when declaring the state of emergency.

Chapter I

Theoretical framework of derogations in time of emergency

The concepts of emergency situation and derogation. Since the emergency situation is one of the requirements of derogation, it is logical to analyze two concepts together. "The concept of emergency is conceptually rooted in the notion of a sudden and unexpected occurrence, the effects of which are to make necessary unusual legal and political responses."[10] In other words, certain actions that would constitute abuse of human rights in normal life are not considered as such during the crisis in the country. Indeed, these measures are of exceptional and temporal character and must not be used when the emergency situation ceases to exist. Treaties and national legislation allow derogating from certain rights. According to article 4(2) of ICCPR[11] there is a list of non – derogable rights and all rights that are not in that list can be derogated from. However, it does not mean that they may be arbitrary abused. There are specific requirements that must be applied in time of emergency to make sure that all actions of the state authorities are in accordance with a law and do not go beyond of their competence and what is most important, are taken on the basis of necessity.

It is quite difficult to give a definition of the emergency situation. Each country has its own understanding of what could be considered as a state of emergency. For instance what was accepted as an emergency situation in *A. and the others vs. United Kingdom*[12] case, even though the threat was not real, might not be accepted in another case. One of the possible

[10] Antoine Buyse, Michael Hamilton (edited), *Transitional Jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights* , Cambridge; New York: Cambridge University Press, 2011, p.27
[11] International Covenant on Civil and Political Rights, article 4 (2) http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[12] A. and others v. United Kingdom (Application No. 3455/05), judgment of 19 February 2009, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403#{"itemid":["001-91403"]}

justifications in that case, might be unstable post 9/11 situation and a concern of security in the world.

Therefore, a definition of emergency situation in constitutions and national laws of countries may and does vary. That is why a definition given in International Covenant on Civil and Political Rights, Inter – American Convention on Human Rights and European Convention on Human Rights must be taken into consideration when deciding whether the situation in the country corresponds to the requirements given in the treaty.[13] The notion of emergency, defined by these three documents reflect general, broad understanding of emergency (ICCPR) as well as more specific regional peculiarities (ECHR, IACHR), thus by ratifying them , the countries express agreement to notion, elements and requirements written in the documents.

Clarifications regarding the meaning of article 4 of ICCPR are given in General Comment # 29 which in defining the state of emergency indicates that even though there is an armed conflict or a threat of terrorist attack, it does not necessarily mean that the imposition of restrictions on certain rights of people is justified.[14] The threat to security of the state must be of very serious character to declare a state of emergency or to make a decision regarding derogation from particular rights. It might be quite problematic to decide whether the situation in the country is of such serious character that extraordinary measures are the only way to protect security of the state. For instance, the arguments of UK authorities in *A. and the others vs. United Kingdom* case that there was "a threat to life of nation" was accepted by the court despite the fact that there was no reason to believe that the United Kingdom will be attacked by terrorists.[15] Even though the Great Britain was attacked, it does not necessarily

[13] Louise Doswald – Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, May 2011, p.82
[14] *Ibid.*
[15] Oliver De Schutter, *International Human Rights Law*, Cambridge University Press, 2010, p. 526

mean that the state of emergency could be declared since not any kind of attacks are considered as a treat to the life of nation. However, the court made a decision, taking into consideration the margin of appreciation, that declaration of emergency was justified even if there was no imminent threat. Nevertheless, one may doubt that the same decision would be held nowadays.

However, one thing that the state officials must keep in mind is that the restriction of the rights must be imposed only if there is no other ways to restore the security or that there is a strong and reasonable belief that other measures will not be effective and will endanger the life of nation. Since the state of emergency is of temporary character, the restrictions imposed during it must be lifted right after the end of the emergency situation.[16]

State authorities (the President, Parliament or any other authority), according to the Constitution, make a decision regarding declaration of the state of emergency as well as regarding derogation. They are able to evaluate the situation in the country relying on information available to them and base the decision to declare emergency situation or necessity to derogate on so called margin of appreciation.

Margin of appreciation. Since the state authorities possess more complete and reliable information regarding the situation in the country rather than international observers (commissions and NGOs), the decision to declare the state of emergency and restrict the rights based on margin of appreciation may be used as a justification of derogations. The authorities of the state may use it by claiming that they are better informed of what is happening on their territory and therefore, the actions taken by the state are the only way to protect security of the country and people.[17] Thus, the state may claim that there was

[16] Louise Doswald – Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, May 2011 p.83
[17] *Ibid.*, p.69-70

emergency situation by using this clause. *A and others vs. UK* is an example of margin of appreciation used by authorities of Great Britain to argue that the danger of terrorist attacks existed at that time. Thus, margin of appreciation is quite strong argument of the state authorities when it comes to question appropriateness of measures imposed because nobody could know the situation in the country better than its authorities.

Types of emergency situations. The practice of previous years/decades shows that there are several types of emergency situations. In general, a state of emergency may be divided into two big categories – de jure and de facto emergency. However, since de facto emergency does not have any relation to declaration of state of emergency and derogation, this type of emergency will not be discussed.

De jure emergency is quite usual nowadays since there is a tendency to declare the state of emergency even though, in fact, there is no need to impose such radical measures. Such kind of measures may be explained by fear of unexpected terrorist attacks- the concern that intensively discussed by the international and national communities especially after the events of 9/11 in USA. However, the legacy of such declarations is under question. Usually, the state of emergency is declared when the situation in the country raises serious concerns regarding normal functioning of state institutions and everyday life of its citizens. Nevertheless, after 9/11 states such as USA and UK made a decision to declare the state of emergency without any apparent threat that may justify such measures.

In its turn, de jure emergency may be divided into two subcategories – proper and improper.[18] De jure emergency may be classified as a proper one when, for instance, all

[18] Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*, University of Pennsylvania Press, 1994, p.8-9

requirements of International Covenant on Civil and Political Rights are met. It is considered as a model subtype of emergency that all states are recommended to follow.

However, the meaning of proper emergency situation is not in decreasing number or an absence of restrictions of human rights, as one may think, since in case of crisis there is little or no chances that the human rights restrictions will be avoided.[19] Each and every emergency situation does include restriction of human rights whether they are allowed by the law or not. The meaning of proper emergency is in reasonableness and proportionality of certain measures, including extraordinary ones, which could justify the decision of authorities to protect the country by using such measures.

In other words, this type of emergency can be considered as an ideal, when the situation in the country corresponds to understanding of emergency, indicated in international or regional instruments, when all requirements of declaration are met by the state and what is most important, the restriction of right(s) are proportional to the threat. Thus, the proper emergency could be considered from theoretical rather than practical side.

The situation in the country might fall under the bad de jure type of emergency if the authorities of the state decide to declare it when, in fact, there is no reason for such declaration.[20] From one side, concerns of the state officials may be justified by the fact of increased terrorist attacks after 9/11 event. Moreover, since terrorists may not warn or threat countries about upcoming attacks, the states may impose certain restrictions (in form of derogations) relying on a probability that such attacks may happen anytime. Indeed, the authorities of the state cannot be blamed to be overprotective when there is a serious (real) threat to the national security and order of the country.

[19] Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*, University of Pennsylvania Press, 1994, p.8
[20] *Ibid.*, p. 10

Nevertheless, usually the state authorities cannot evaluate a situation in the country as objective as possible. There are various reasons of this including attempts to justify the human rights violations by the crisis in the state. Unfortunately, the conflicts within and outside of the states cannot be avoided all the time even though not all of them may endanger the functioning of the state institutions and therefore, cannot be brought as an evidence of emergency in the country. As was mentioned in General Comment # 29, not every armed conflict might be considered as a serious threat to the nation to declare the state of emergency.[21] In case of bad de jure emergency, the conflict either is not of such intensity to make a decision of derogation or does not meet the conditions mentioned in International Covenant on Civil and Political Rights or other international and regional instruments.

In addition, arguments of the states that there is a possibility of attacks are not enough to restrict the rights of people since real and imminent threat is one of the requirements of ICCPR to establish the state of emergency. The prediction of future attacks is not a strong argument since such kind of predictions does not endanger the life of nation, in fact. Thus, the measures taken as if there was an imminent threat must not be considered as being in accordance with the principle of proportionality and necessity. Indeed, there could be exceptions such as argument of the state, that extraordinary measures are required to secure the state from potential threat of terrorist attacks, in *A and others vs. UK* case. The UK authorities insisted on the necessity of declaration of emergency situation and derogation relying on margin of appreciation. The arguments of the authorities convinced the Court on reasonableness of such declaration however, the necessity of established measures was questioned. Thus, even though the potential threat cannot normally be considered as a

[21] General Comment No. 29, States of Emergency (Article 4), paragraph 17, http://www.unhchr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361

reasonable ground for declaration of emergency, it might be used together with other evidences of necessity of such declaration.

However, from the other side, besides formal notification of the international community regarding the emergency situation in the country and intention to derogate from particular human rights, all those measures taken by the state may not be regarded as reasonable and necessary measures. Despite of the fact that the establishment of the existence or non –existence of emergency in the country must be done on case-by-case basis, there are certain requirements that are common for all states of emergency. International Covenant on Civil and Political Rights contains the general requirements that the states must be aware of when making a decision.

The question that may arise is why a state cannot use limitation clause instead of derogations when there is no evidence of state of emergency? The requirements of the former are less strict in comparison with the latter. In addition, the declaration of emergency is not necessary in that case. One of the possible reasons why the limitation clause is not used in such cases is that emergency situation together with the right of derogation empowers authorities and justifies the measures that otherwise will be considered as a serious violation of human rights.

Derogations vs. Limitations. The distinctions must be made between limitation and derogation since at first glance, the former and the latter are the same. However, there are certain features that are inherent only to each of them.

The main feature of limitation is that it "must be necessary in a democratic society."[22] It might be considered that limitations are used in peaceful times unlike derogations. In

[22] Louise Doswald – Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, May 2011, p. 71

addition, certain human rights could be a subject to limitations only if they are "prescribed by law"[23] and the purpose of such limitations is "public order, public health, public morals, national security and other."[24]"For instance, freedom of movement may be limited to certain degree if there is a "serious threat to the health"[25] of people. In other words, the limitation may be imposed on individuals' freedom to move from one place to another in order to prevent spread of decease among population.

Another example of limitation of freedom of movement is absence of necessary travel documents. A person will not be able to leave a country if he does not have a passport or permission (if a person is a minor) to go abroad. The same could be said regarding those who do not have a visa or for some reason are prohibited to enter a country. In this case, their freedom of movement is limited within boundaries of their home country.

Thus, "… a particular individual's needs and desires and everyone else's needs and desires needs to be arranged in a way that maximizes the safety for everyone to enjoy their freedoms."[26] In other words, exercise of certain rights by an individuals or group of individuals may interfere with the exercise of certain rights by other people and therefore, the limitation may be necessary so that the former and the latter could exercise their rights on equal basis.

The meaning of derogation is quite different. In general, it may be used only in exceptional situations.[27] In other words, the restriction on certain rights may be imposed only if the situation is of very serious character. Moreover, the derogation might be considered as

[23] Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex, 1985, part I (B (i))
[24] *Ibid.*
[25] *Ibid.*, part I (B(25)).
[26] Louise Doswald – Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, May 2011, p. 68
[27] *Ibid.*, p. 79

a measure that is unlawful in peaceful times[28] and cannot be justified by any circumstances other than the state of emergency. For instance, a right to liberty may be a subject to derogation if it is necessary to protect state institutions and population. *Agbar and Matar vs. IDF Commander in Judaea and Samaria, Military Appeals Court, General Security Service and Military Prosecutor* case may be taken as an example of derogation from right to liberty as well as imposition of strict measures to suspects (administrative detention rules for suspects). In this case suspects were not taken to the court but were held in administrative detention with possibility of further prolongation of term of detention. Indeed, such kind of measures are not legal in peaceful times but may be considered as such in time of crisis.

In addition, the grounds under which the derogation may be used are restricted to the only one – "time of public emergency that threatens the life of nation…"[29] Unlike in case of limitation where the right of a person may be limited depending on the circumstances of the case.

It is obvious that despite the fact that a state is allowed to restrict certain rights of its citizens, such kind of restrictions must not extend to international obligations of the state. The authorities must not violate the provisions of international law and justify it by the emergency situation in the country.[30] For instance, genocide, crimes against humanity, torture and other serious crimes, prohibited by international and domestic laws cannot be committed and justified during the time of emergency.

Therefore, the main aim of derogations is not to give extra power to fight with different type of crimes or to suppress certain groups of people but to "facilitate specific

[28]Louise Doswald – Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, May 2011, p. 79
[29] *Ibid.*
[30]*Ibid.*

responses… to a particular set of challenges for which other measures are not sufficient."[31] Thus, the restriction of certain human rights might be justified only if there are no other means that may be effective in conflict resolution during the emergency situation.

Theories of derogation. The question that arises when a state makes derogations is whether the interests of the state and its institutions (since the threat to institutions not people themselves is a prerequisite of the declaration of emergency situation and application of restrictions) are above the rights and interests of people? Why the state, signing and ratifying numerous treaties, makes commitments to protect human rights, goes contrary to its obligations in the very moment when the people need protection and guarantees of their human rights? This dilemma is trying to be solved by the international law by requiring states to make derogations only in exceptional situations and with restrictions regarding the degree of violation of certain human rights.

"The exception is… defined by the norm."[32] It is correct. In general, each rule may have an exception. Therefore, by analogy, a law that prohibits any kind of restrictions of a right may include exceptional cases when such prohibition may be disregarded due to unexpected event. International Covenant on Civil and Political Rights, European Convention on Human Rights and Inter – American Convention on Human Rights contains examples of such exception. The articles of these legal instruments allow derogations in exceptional situations. In this case, emergency situation must be considered as an exception of normal situation.

[31] Antonie Buyse, Michael Hamilton (edited), *Transitional \jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights,* Cambridge; New York: Cambridge University Press, 2011, p. 29
[32] Oren Gross, "The Normless and Exceptionless Exeption: Carl Schmitt's Theory of Emergency Powers and the "Norm – Exception" Dichotomy", Cardozo Law Review, Vol. 21:1825, 2000, p. 1835

People such as Niccolo Machiavelli, Jean Jacque Rousseau and Carl Schmitt give their understanding of derogations in time of emergency.

Niccolo Machiavelli. Throughout the history establishment of emergency situation as well as imposition of measures were subjects to strict conditions, the main purpose of which was to restore legal order that existed before. Niccolo Machiavelli's vision of establishment of emergency in ancient times is similar to the modern one.

In *"Discourses on Livy"* Machiavelli describes the main features of power given to an authority in extraordinary situation. First of all, according to him, time period of an authority, appointed to cope with extraordinary situation, must be specified.[33] This will eliminate a temptation of an authority to prolong the state of emergency to continue exercising power delegated to him. Fixed term is something that makes population to believe in temporal character of measures, especially when it comes to restrictions of human rights. Thus, the authority will have to work hard to eliminate existing crisis in the country and at the same time will not have time to enjoy his power. A combination of these two factors could be considered as preventive measures against prolongation of emergency and competences.

Machiavelli argues that appointed authority may impose any measures needed to end the existence of extraordinary situation however he does not have competence to change the laws or introduce new ones.[34] This argument is fair enough because primary purpose of the authority is to terminate the crisis in the country by implementing adequate measures rather than to legislate. Since time of emergency is an exception of temporal character, ordinary rules will not have an effect required to eliminate it and therefore, the authority is allowed to decide what kind of measures are needed. However, amendment of existing or introduction of

[33] Niccolo Machiavelli, *Discourses on Livy*, Federalist Paper Project, p. 62, http://thefederalistpapers.integratedmarket.netdna-cdn.com/wp-content/uploads/2013/08/Discourses-on-Livy.pdf
[34] *Ibid.*

new laws is quite dangerous since existing legal regime may be changed to strict one as a result of such actions. The authority must keep in mind that his purpose is return to ordinary situation rather than change in structure of the state.

Indeed, as soon as normal regime is established, all measures imposed in time of crisis must be abolished due to the fact that "…although for the time the irregularity may be useful, …as giving rise to a practice of violating the laws for good ends,… they may afterwards be violated for ends which are not good."[35] In other words, an intention to impose measures to end a crisis may result in harsh violations of human rights since there is a high risk of temptation to continue using extraordinary measures when emergency is ceased to exist. Such temptation may result in prolongation of non – existing emergency. In this case, the extraordinary measures do not meet the requirement of necessity since there are no reasonable grounds to continue its implementation. Thus, one may not disagree with a point of view of Machiavelli that the good intentions may be transformed into bad ones as a result of implementation of emergency measures in peaceful times.

Finally, Machiavelli thinks that "…the power to appoint [an authority in time of emergency] should rest with the consuls…."[36] It does make sense because a decision to empower someone to cope with crisis as well as decision to dismiss someone from the office is in competence of the same organ. This competence also allows to assess situation in the country and make a decision regarding existence of non – existence of state of emergency. If an authority is appointed by someone, there will be "…a check upon him and [he will be] kept in the right road."[37] In other words, the authority will be supervised by another organ

[35] Niccolo Machiavelli, *Discourses on Livy*, Federalist Paper Project, p. 63, http://thefederalistpapers.integratedmarket.netdna-cdn.com/wp-content/uploads/2013/08/Discourses-on-Livy.pdf
[36] *Ibid.*
[37] *Ibid.*,p. 64

that will prevent abuse of power and assess the necessity and reasonableness of imposed measures.

Making a parallel between ancient and modern understanding of emergency situation, one may conclude that there is little or no difference between them. Consideration of emergency as an exceptional case, when despite the general rule, derogations of rights are allowed, is still relevant and incorporated into national and international laws. The same could be said regarding limitation imposed on declaration of state of emergency. Moreover, the laws of emergency situation indicate who is going to be empowered to make restrictions during the time of emergency. Therefore, only those who are entitled to impose such kind of measures must be considered as acting within the legal framework. Even though the model of dictatorship in ancient Rome is similar to the modern conditions of declaration of state of emergency situation and derogations there are still some differences. The measures of state authorities during the emergency situation are subject to restrictions. For instance, genocide, war crimes and crimes against humanities cannot be committed as well as justified in time of crisis. In other words, grave violations of human rights are prohibited by international law and cannot be tolerated in any case. In addition, restrictions cannot be imposed on non – derogable rights such as a right to life, freedom from torture and other rights listed in article 4 of ICCPR.[38] Thus, modern emergency law gives more safeguards to people than it was in ancient Rome.

Jean Jacques Rousseau. The main idea of Jean Jacque Rousseau is that there are two regimes that could be introduced in time of emergency. The first one could be used when attention of the government in time of emergency is enough to cope with the crisis and the

[38] International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, article 4 http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

power to impose measures will be exercised by several members of the government.[39] In this case, decision to declare the state of emergency as well as restriction, if necessary, certain human rights is in competence of members of government. The problem that may arise when making a decision in time of crisis is a consensus regarding one or another measure to be imposed. It may probably take some time until the authorities agree upon restrictions.

The second regime allows to appoint an individual who will have power to suspend laws that cannot be used in time of emergency.[40] This regime requires serious interference in legal order since number of laws will be terminated and thus, the protection of certain human rights will be reconsidered. Indeed, it is done to protect the security of the state.

The advantage of this regime is that an authority empowered to make decisions in emergency situation does not have a right to adopt new laws.[41] It can be considered as a safeguard that during the state of emergency, the human rights will not be subjected to harsh restrictions. Moreover, in opinion of Rousseau, the authority must be appointed for a specific time period without a possibility of further prolongation of his term.[42] This makes his job more effective since he will not try to create reasons for prolongation of state of emergency and thus, will be more objective in assessing the situation in the country. In addition, it may be considered as a guarantee that the measures imposed are of temporal character and the population will be sure that the restrictions will end within fixed time period. Thus, one cannot disagree with an argument of Rousseau that "[t]he dictator had only time to provide against the need that had caused him to be chosen; he had none to think of further project."[43]

[39] Jean Jacques Rousseau, *The Social Contract or Principles of Political Right*, 1762, translated by G.D.H. Cole, p. 99
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*, p. 101
[43] *Ibid.*

It is fair enough since the main goal of authorities during the time of emergency is to restore security and return to the legal order that existed before.

The position of Jean Jacque Rousseau regarding a fixed term of authorities' rule without an opportunity to prolong it is quite similar to Machiavelli's. Therefore, the ideas of emergency, derogations and justifications of strict measures are not new. No one doubts the possibility of restriction of certain rights in time of crisis. However, power of authorities, who are permitted to act in more abusive way in case of state of emergency, may not be considered as an absolute. Authorities are always limited by laws of emergency, Constitution and international law.

Carl Schmitt. Carl Schmitt introduced a new theory of emergency that was called a model of sovereign dictatorship, the main idea of which is the absolute character of power granted to state authorities.[44] In his opinion, no one may suppose what might happen in time of emergency, since it is an exception to a normal legal order and it cannot be governed by ordinary legal norms.[45] Indeed, a situation is considered as an extraordinary since it is quite hard to predict its further development. One may agree that in such case, the application of ordinary laws may not be effective to end the crisis. Thus, someone needs to be empowered to be able to impose extraordinary measures that may require restriction of certain human rights.

An authority that has a competence to declare the state of emergency and make steps to end it, is indicated in constitution or/ and in specific provision of emergency law. Schmitt's theory gives wide range of possibilities to state authorities. According to him, "[a]lthough [an

[44] Oren Gross, "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm – Exception" Dichotomy", Cardozo Law Review, Vol. 21:1825, 2000, p. 1840
[45]Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, George Schwab (trans.), University of Chicago Press, 2005,p. 6

authority] stands outside the normally valid legal system, he nevertheless belongs to it…."[46] Indeed, in time of emergency a state authority acts contrary to ordinary laws, certain provisions of which could be temporally ignored, and thus, he goes beyond those laws. However, his status as authority is not questioned since his measures are considered as a need to protect the state, permitted due to emergency situation. In other words, he is a guard of ordinary legal system even though he is temporally beyond that legal system.

Moreover, Schmitt suggests that in time of emergency the authority must have unlimited competence.[47] One may disagree with this argument. Even though there is no exact guidance of what has to be done during the state of emergency, due to its unexpected character, there are general rules that have to be fulfilled. These rules usually include the limitation on power of an authority in time, territory and scope. This can be considered as safeguard from creation of long – term crisis to continue enjoying unlimited power. Since the declaration and termination of the emergency depends on decision of state authority, the objectivity of assessment of situation may be questioned.

In addition, Carl Schmitt thinks that "…principally unlimited authority… means the suspension of the entire existing order."[48] This theory has pitfalls such as a danger of change of constitutional order or adoptions of laws that may otherwise be unconstitutional, repressive or discriminatory. In other words, actions of an absolute dictator might go beyond of initial purpose of his empowerment. Thus, what was considered as temporal measures directed to fight with ongoing crisis in the country may result in a new repressive regime.

In addition, restrictions that are imposed on the actions of authorities ensure that the measures will be within the framework and in accordance with laws of emergency. The same

[46] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, George Schwab (trans.), University of Chicago Press, 2005, p. 7
[47] *Ibid.*
[48] *Ibid.*,p.12

cannot be said in regards to the regime of unlimited power suggested by Schmitt. In this case, emergency situation would be used to justify restrictions and modifications of laws that are not necessary and reasonable to restore the security of the state and to return to normal legal order.

Schmitt's theory of emergency power is quite problematic in case of application to the real life situation. First of all, the issues of human rights and their protection have been developed since then and are currently of crucial importance, especially when the question of their restrictions is arising. Second, it is hard to imagine a system of human rights protection when there is an absolute power of state authorities. Considering the fact that they will be able to make a decision regarding declaration of emergency situation as well as to modify, change or adopt new laws any time they think it is relevant. Thus, unwillingness to fulfill commitments of the state towards the protection of human rights will be justified by a state of emergency and therefore, the measures that restrict rights would be considered as legal even if in fact they are not. Also, in case of absolute power of dictator, there is no guarantee that the measures will not be excessive and not only go beyond.

Indeed, it happens in cases of emergency situations that authorities go beyond of their competence but in this case, they will be held responsible for unreasonable actions and measures. However, considering theory of Schmitt, it is hard to believe that the dictator having absolute power will bear liability for discriminatory measures (as an example) towards a group of people. In addition, discriminatory measures that are against existing laws may be justified by modification or adoption of new laws.

In opinion of scholars, emergency situation must be considered as a test that the states must pass to prove the effectiveness of the laws that directed towards successful protection of

human rights.[49] One may not disagree with this statement. Indeed, the most laws are not written with regard to the possibility of occurrence of extraordinary situation in the country and thus, do not contain extraordinary measures to protect the security in the country. However, in fact, when the laws are challenged by the unexpected circumstances, majority of them might fail the test. Nevertheless, one must not forget that legislators are people and even doing their best they cannot predict the possibility of occurrence of an extraordinary event that may reveal weakness and imperfection of the legal system that is not able to face the crisis without invoking restrictions of human rights. The state of emergency tests to what extent the authorities are able to deal with the emergency without abusing the commitments of human rights protection.

Most of treaties allow the states to use derogation clauses. It seems quite unusual because the main objective of treaties is to protect human rights on national and international level. The question that arises is why should states sign treaties and make commitments to protect the rights of people when in time of crisis they are derogating? The possible answer is that the treaties, allowing derogations nevertheless impose obligations on the states that make it possible to grant people at least minimum standards of human rights protection.[50] Indeed, it is better to know what kind of rights are restricted and to control the application of these restrictions rather than to allow states arbitrary abuse human rights without having a chance to coordinate and monitor the degree of such measures.

Moreover, additional obligations such as fulfillment of requirements of declaration and limited scope of application of derogations as well as prohibition of derogation from rights listed as non – derogable may be considered as safeguards of human rights in state of

[49] Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss, "Emergency and Escape: Explaining Derogations from Human Rights Treaties", International Organization , Volume 65, Issue 04, October 2011, p.673
[50] *Ibid.*, p. 674

emergency. However, the coin has two sides, despite the positive moments of the derogation clauses in treaties there is disadvantage – treaties "…authorize[e] deviant behavior precisely when treaty compliance is needed most."[51] In state of crisis human rights need extra protection however, authorities on the contrary impose additional restrictive measures that may result in suppression of people and unreasonable restriction of their rights.

Therefore, local NGOs as well as international observers must pay more attention to the situation in the country which declared an emergency. Moreover, the measures taken to restrict rights of people must be critically assessed since they might be used against vulnerable groups such as ethnic, religious minorities as was done in case of *Korematsu*.

Declaration of emergency and derogation from human rights come from ancient times. Scholars such as Niccolo Machiavelli, Jean Jacques Rousseau and Carl Schmitt developed theories of derogation. Indeed, each of them had different point of view regarding circumstances under which derogations are allowed. However, the main feature that connects all three theories is that there must be extraordinary situation that cannot be controlled by ordinary law. Machiavelli and Rousseau argued that the authority empowered to end the state of emergency is allowed to impose strict measures however, the term of their office as well as term of the restrictions is of temporal character. Unlike these two scholars, Schmitt believed that absolute power should be given to an authority to cope with the crisis in the country. Implementation of his theory in real life would result in abusive character of measures and temptation to prolong the state of emergency.

[51] Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss, "Emergency and Escape: Explaining Derogations from Human Rights Treaties", International Organization , Volume 65, Issue 04, October 2011, p.674

In general, understanding of emergency situation as well as necessity of derogations are quite similar to those which exist in modern law. However, mechanism of human rights protection has been developed since then. Modern law does not justify commitment of genocide, war against humanity and war crimes in time of emergency, does not recognize violation of non - derogable rights and restrict the power of authorities in time of crisis. All the mentioned above is written in international and regional instruments such as ICCPR, ECHR and IACHR as well as in Constitution and local emergency laws. All these documents include requirements that must be fulfilled to declare the state of emergency and/or to made derogation from certain human rights.

Chapter II

Normative Framework

International/Regional instruments. Despite the fact that all three (International Covenant on Civil and Political Rights, European Convention on Human Rights and Inter – American Convention on Human Rights) legal instruments allow derogations in time of emergency, nevertheless, understanding of what could be considered as a state of emergency is quite different. Indeed, it may be explained by the fact that drafters took into consideration peculiarities of the situation in one or another region, in case of Inter- American Convention on Human Rights and European Convention on Human Rights. As for ICCPR, the language of the Covenant is more neutral in comparison with the other documents.

The main difference in all three instruments is that in defining the emergency situation, regional instruments included war as one of the reasons under which the declaration of emergency may be done and as a result allowed the derogation.[52] ICCPR gives broader, general grounds that might justify derogations. For states to restrict the rights of its citizens the evidence of "…public emergency which threatens the life of nation…"[53] must be provided along with other requirements. Since ICCPR have not defined concrete situations, any crisis that fits in the requirements listed in the Covenant may be considered as an emergency. One may conclude that such kind of difference between IACHR and ECHR in comparison to ICCPR might be a result of concern regarding security situation in those regions. More likely, drafters of regional Conventions took into consideration situation in the regions while discussing what should be regarded as a justification of state of emergency.

[52] Oren Gross, ""Once More unto the Breach": The Systematic Failure of Applying the European Convention on Human Right to Entrenched Emergencies, The Yale Journal of International Law, Volume 23: 436, 1998, p. 452
[53] *Ibid.*

From one side, the situations of state of emergency may and are diverse due to its unpredictable character, it is correct that there is no definition of emergency. Therefore, the events that are not in the defined list will be outside of the scope of article 4 of ICCPR and thus, despite the potential danger to the life of nation will not be invoked as justified reasons for derogations. However, from the other side, if the situation under which the derogations are allowed is not defined, there is a possibility that the state authorities may use any excuse to declare the emergency and suppress its opponents.

Both ECHR and IACHR put war in first place when defining the state of emergency which means that the situation should be very close to or of similar character to war time. Inclusion of war into the articles of the Conventions means that at the time of drafting of Conventions the issues of war were of high concern. However, since "…only a truly extraordinary crisis that lasts for a relatively brief period of time can be a derogation – justifying emergency."[54] It is hard to imagine that the war being considered as one of the reasons of derogations can last for a small time period. Indeed, the length of war may vary depending on circumstances such as ability of military forces to respond to attacks of enemies or on willingness of the parties to negotiate to restore peace. Therefore, undoubtedly the war endangers everyday life of people as well as a normal functioning of state institutions.

According to United Nations Special Rapporteur, the exclusion of "war" from article 4 of International Covenant on Civil and Political Rights as a ground from declaration of state of emergency was done to avoid an impression of acceptance of war by United Nations.[55] Despite the fact that in general, war is not mentioned as a ground for declaration of emergency situation, it nevertheless may be considered as such. Even though the war is not

[54] Oren Gross, ""Once More unto the Breach": The Systematic Failure of Applying the European Convention on Human Right to Entrenched Emergencies, The Yale Journal of International Law, Volume 23: 436, 1998, p. 455
[55] Report by the UN Sepcial Rapporteur, Mr. Leonardo Despouy, on the question of Human Rights and States of Emergency, http://www1.umn.edu/humanrts/demo/HumanRightsandStatesofEmergency_Despouy.pdf

tolerated by international community, there is no guarantee that states will not attack each other. Thus, such kind of actions undoubtedly endangers the life of nation, normal functioning of state institutions and therefore, could be considered as a reason for declaration of emergency situation and imposition of derogations. Since the list of situations under which the declaration of state of emergency allowed is open - ended, the establishment of emergency in case of war may not be excluded.

However, unlike International Covenant on Civil and Political Rights, European Convention on Human Rights does mention a war as one of the grounds under which derogations are allowed.

To look whether there are other differences between those three legal instruments, they should be compared.

International Covenant on Civil and Political Rights. Since ICCPR is one of the most important instruments used to protect human rights, it will be considered as the main document. Therefore, on the basis of its detailed analysis the other regional instruments will be compared. Thus, the elements of state of emergency must be identified.

Requirements of derogation. There are certain requirements that must be met to legally declare the emergency situation. Article 4 of ICCPR provides for such kind of conditions. According to the paragraph 1 of the Article 4, the derogation can be done "[i]n time of pubic emergency which threatens the life of nation and the existence of which is officially proclaimed…"[56] Indeed, not every threat to country may be justified as a legal ground for lawful derogation. Armed conflicts inside and outside the countries are frequent nowadays,

[56] International Covenant on Civil and Political Rights, article 4 http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

however, they may be considered as a justification of restriction of certain rights only in case if they meet a number of requirements that must be fulfilled to derogate.

1. Public emergency which threatens the life of nation. The Covenant clearly points out that derogation is allowed if there is "… public emergency which threatens the life of nation."[57] In other words, it is not enough to have extraordinary situation in the country to restrict the rights of people, but the situation must be of such gravity that it endangers the normal functioning of state institutions as well as life of people.

However, analyzing the articles of International and regional instruments one may come to conclusion that the "…nature of harm is not as important as the level of its intensity".[58] Indeed, none of the legal instruments mention the origin of the crisis as criteria of establishment of emergency and imposition of derogation. For instance, financial crisis could not itself be a reason for establishment of emergency. However, the consequences of the crisis – redundancy of worker and delay of salaries may result in violent actions that may be considered as a ground from establishment of emergency if they are intense enough.

Nevertheless, intensity of a conflict is also quite broad according to ICCPR and ECHR. Both instruments point out to "… the exigenc[y] of the situation…"[59] as to the degree under which the derogations are allowed. The interpretation that is given by ICCPR and ECHR is different. Unlike the former, the latter suggests that the intensity of the conflict must be equal the conditions of war. One may suppose that the States Parties to ICCPR exercise wider margin of appreciation to provide evidence that the degree of intensity of the conflict was of very serious character.

[57] International Covenant on Civil and Political Rights, article 4 , New York, 16 December 1966, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx,

[58] Julian M. Lehmann, "Limits to Counter- Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights", Essex Human Rights Review, Volume 8, No1, October 2011, Special Issue 2011, p. 107

[59] International Covenant on Civil and Political Rights, article 4, New York, 16 December 1966, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en,

As was pointed out in General Comment No. 29, "[n]ot every disturbance or catastrophe qualifies as a public emergency…."[60] The question that may arise is whether the internal disturbance might be considered as a situation that requires derogations and the measures implied to stop rebels (for instance) and restore the peace require the declaration of state of emergency? Decision on declaration or non – declaration of emergency situation is on official state authorities who possess more detailed information regarding the situation. Indeed, in case if they provide strong evidence that the derogation is necessary and its declaration will be an effective measure, then, the proclamation of emergency situation and application of derogations may be allowed.

Thus, establishment of existence of emergency situation should be considered on a case – by – case basis since what is considered as a grave threat to the country in one case (under particular situation that existed at that particular moment) may not be considered as such in another.

Also, there is no clear explanation of what constitute the 'life of nation'. One may think that there must be a danger to the population of the state. Again, the question which arises is whether each and every person in the country should be endangered or just group of people? Neither Covenant nor General Comment mentions the criteria under which the term 'nation' will be defined. More or less understandable explanation is given by Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (1985) subparagraph b. According to it, the 'nation' is referred to institutions of the state - if the "existence or basic functioning of institutions indispensable to ensure and protect the rights, recognized in the Covenant."[61] The conclusion that could be drawn from this sentence is that state institutions

[60] General Comment No. 29, States of Emergency (Article 4), paragraph 3, http://www.unhchr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361

[61] Oliver De Schutter, *International Human Rights Law*, Cambridge University Press, 2010, p. 518

rather than people themselves may be considered as 'nation' in the context of emergency situation.

On the other side, 'life of nation' has completely different meaning when it comes to problems of terrorism. Terroristic attack of September 11, 2001 is an example of attack that fits into requirement of threat to life of nation. Indeed, it did not result in difficulties of functioning of state institutions but an attack on commercial center that resulted in death of US citizens was enough to introduce strict measures against those suspected of being involved in terrorist attacks and even to declare the state of emergency (in USA and UK). Unfortunately, there is difficulty in defining what kind of acts could be considered as terroristic. Nevertheless, there is general notion of terrorism that was introduced by UN General Assembly according to which it is "[c]riminal acts intended or calculated to provoke a state of terror in general public, group of persons or particular persons…."[62] Thus, danger to the life of people may also be used as one of the grounds to declare the state of emergency.

Therefore, not only a threat to the institutions of the country but also a threat to population may be considered as serious enough to make a decision regarding the declaration of emergency situation. However, the existence of such kind of threat is still not enough to lawfully exercise the possibility of derogation.

2. Official declaration of state of emergency. The next requirement that makes the possibility of declaration more realistic is an official statement that there is a situation of state of emergency. This subpart also has its own rules and procedures. To make the proclamation 'official', the government of the state must act in accordance with the laws of the country. The notification of the Parliament of the state and what is equally important – international community as well about its intention to derogate from certain provision as well as a

[62] Oren Gross and Fionnuala Ni Aolain, *Law in Time of Crisis. Emergency Powers in Theory and Practice*, Cambridge University Press 2006, pp. 369-370

declaration of state of emergency is required. The procedure of notification of Parliament varies from country to country. In addition, states must have laws that include 'instructions' regarding the procedure of declaration. The absence of official proclamation of the state of emergency may challenge lawfulness of derogation as it was in case *Brannigan and McBride v. United Kingdom*.[63] Therefore, the notification of the international community about the temporal restrictions of certain human rights is very important to make the actions in accordance with laws (local and international). Article 4 of ICCPR requires the states to "inform the other states …, through the intermediary of the Secretary – General of the United Nations of the provisions from which it has derogated…."[64] It is clear, from this paragraph, that the declaration will be considered as an official one if the states and UN was informed about the decision to proclaim the state of emergency.

However, just a notification of the international community still is not enough to make the declaration of emergency situation legal. There is something that was not mentioned – the form of the notification. It is very important to be aware of the form of declaration because otherwise, if the state did not comply with the form of the notification, the declaration might not be considered in accordance with law and that could lead to refusal to accept the so - called de facto declaration. The General Comment #29 paragraph 17 gives more or less precise answer. According to it, the notification must contain "full information about the measures taken and a clear explanation of the reasons… with full documentation…."[65] It means that oral notification must be supported by documents which provide information regarding actions taken to cope with ongoing situation in the country. In addition to the measures that were or are going to be taken, the state must provide evidence

[63] Brannigan and McBride v. United Kingdom case, Application Nos. 14553/89 and 14554/89, judgment of 25 May 1993, para. 68
[64] International Covenant on Civil and Political Rights, article 4 http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[65] General Comment No. 29, States of Emergency (Article 4), paragraph 17, http://www.unhchr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361

that such measures are necessary and it is the only way to deal with the crisis. In other words, notification of declaration of state of emergency presupposes that information must be provided in oral form and supported by written documentation.

3. Non – discrimination. The second part of article 4(1) of ICCPR points out that the state may derogate only if such measures "…do not involve discrimination…"[66] It means that no matter what was the reason for declaration of the state of emergency, justifications of decision to derogate must not be based solely on the discriminatory grounds. The prohibition of discrimination during the emergency situation is common for derogations of any (allowed) right on the basis of sex, religion, political or other views as well as on the race and color of a person.[67] It is done to make sure that the state of emergency is not used to suppress a particular group of people just because they belong to one of the categories that were mentioned above.

Therefore, any restriction of rights of people based on one or more discriminatory grounds even in times of emergency must not be considered as lawful. In some cases it is quite easy to identify whether the measures, imposed are of discriminatory character. It could be done by checking to what extent the rights of particular group of people are limited in comparison with the limitations imposed on the rights of rest of population.

Nevertheless, in case of indirect discrimination it will be much harder to bring evidences of the fact of discrimination. There is no one common for all rules how to identify the fact of direct/indirect discrimination and therefore, each claim should be considered on the case –by –case basis.

[66] International Covenant on Civil and Political Rights, article 4
http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[67] Louise Doswald – Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, May 2011, p. 70

Indeed, there might be cases when the discrimination between nationals and the particular group of people may be made, however, in such cases, the authorities must bring evidence that such kind of distinction was made because it was "strictly necessary".[68] The case of Korematsu v. United States is an example when discriminatory actions of USA officials were considered as in accordance with the law. However, the decision was subject to criticism since people of Japanese origin were asked to leave the military area not for the purpose of their safety but because of their origin. Moreover, there was no evidence that most of these people were not loyal to USA and had an intention to spy in favor of Japan.[69] Therefore, this case is an exception and may not be applied as a general rule because discrimination is not considered as a reasonable justification despite the conflict that might endanger the state, its citizens as well as institutions.

4. Consistent with the obligations under International Law. As General Comment No. 29 (paragraph 9) points out, the state cannot justify "a breach of the… other international obligations…"[70] The conclusion that may be drawn from this, is that even in case of derogations (but despite the fact that certain, non – legal in peaceful times, measures are imposed) all actions must be done in accordance with the laws and Constitution and must not violate international law in any case. The authorities of the country must keep in mind that their actions, directed towards the restoration of the peace and security, must not go beyond of what is allowed under the law. For instance, the obligation of the state to take all necessary steps to make sure that peremptory norms[71] of international law are not violated. In other words, commitment of genocide, crimes against humanity, discrimination of any kinds

[68] Louise Doswald – Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, May 2011, p. 70
[69] Korematsu vs. USA, 323 U.S. 214 (1944), http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=323&invol=214
[70] General Comment No. 29, States of Emergency (Article 4), paragraph 9, http://www.unhchr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361
[71] Louise Doswald – Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, May 2011, p.89

as well as propaganda of any kind of hatred and arbitrary deprivation of liberty[72] must not be justified by the state of emergency.

European Convention on Human Rights. In general, the characteristics of public emergency are the same in both ICCPR and ECHR. However, there are a number of differences. First of all, it is inclusion of war into article 15 of ECHR as a justification of derogations. War is an example of crisis in the countries that are fighting with each other. In this case, the intensity of violent actions from both sides against each other is of high degree that definitely endangers not only the life of people but also the functioning of state institutions. Despite the fact that war is not necessarily of unexpected or sudden character (since due to actions of states) it is possible to predict the declaration of war. Duration of war may also vary depending on ability of military forces to fight back or on willingness of the parties to negotiate to restore peace. However, the restrictions of human rights in time of war may be necessary to save lives of people. For instance, the restriction of freedom of movement and right to liberty are justified. In case of former, people were not free to enter dangerous zones of country where the military actions are taking place. In case of latter, individuals may be deprived of their liberty if there are evidence that they might endanger the situation in the country.

In addition, inclusion of war into ECHR may be explained by the fact that the Convention was drafted after the Second World War[73] and at that time the possibility of new conflicts was quite high and the relevance of such inclusion was not questioned. On the other side, the exclusion of war out of the article 4 of ICCPR is explained by the fact that one of the

[72] Louise Doswald – Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, May 2011, p.89

[73] Frederick Cowell, "Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a derogation Clause in the ACHPR", Birkbeck Law Review, Volume 1(1), p. 143

purposes of establishment of the United Nations was prevention of war.[74] Even though the war is not mentioned in ICCPR, due to broad definition of emergency war may be considered as a legal ground for derogations if there are evidence that justify the restrictions of rights.

Also, requirement of non – discrimination differentiate ICCPR from ECHR. In case of former, article 4 mentions grounds on the basis of which justification of derogation is not allowed.[75] It means that there must not be any discrimination of certain rights even in case of emergency. However, ECHR does not mention prohibition of discrimination in case of emergency.[76] It is quite surprising that ECHR does not included non – discrimination into the list of non – derogable rights. It may be misinterpreted in case of crisis and used as a tool to intentionally suppress particular group of people due to the fact that they belong to religious, political, ethnic or any other minority groups.

Time of emergency is very tough when all people on the territory of the state must be protected therefore allowance to discriminate goes against justice and reasonableness. Since discrimination is not allowed in peaceful times, the state of emergency must not justify them even during the crisis in the country. The gap in ECHR regarding non –discrimination is filled by article 14, according to which the discrimination is prohibited.[77] However, despite of this general provision of non – discrimination, article 14 of ECHR can be used only in conjunction with another conventional right that was violated. Thus, it would be highly advisable to include the non- discrimination provision in the art. 15 of ECHR.

[74] Frederick Cowell, "Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a derogation Clause in the ACHPR", Birkbeck Law Review, Volume 1(1), p. 145
[75] *Ibid,* p. 120
[76] *Ibid*
[77] *Ibid.* p.147

Another difference is that article 15 of ECHR do not mention the time period within which the derogation of the right is allowed.[78] However, since emergency cannot last for a long time because it is of unexpected character it might be the reason why drafters did not include the time period in the article. Nevertheless, inclusion of limitations on time period of emergency into the article would eliminate possible disputes as to the length of the state of emergency.

Moreover, none of the instruments set up specific time period within which the states are allowed to restrict certain rights. The argument that such limitation "…is a basic safeguard…"[79] from intentional abuse of human rights is very reasonable. Such kind of measure would require the states to work hard to restore the normal order in the country as soon as possible and would not give freedom in determination the duration of imposition of emergency.

Due to unpredictable nature of any crisis, there is an option to extend the time period of derogation in case of necessity but only after a revision of situation.[80] Even though the idea is reasonable enough nevertheless, there is a problem – the review of the situation will take time and in case of conflict the immediate measures may be needed. After expiration of the time limit and until the moment of decision of its extension, the state must not use any measures that might somehow restrict the rights of people. Thus, the risk of threat to the people and state institutions will remain. For instance, if the decision to extend the state of emergency is in competence of parliament, it will take time while parliamentarians will come to consensus as to the issue of extension of emergency.

[78] R. St. J. Macdonald, "Derogations under Article 15 of the European Convention on Human Rights", Columbia Journal of Transnational Law, Volume 36: 225, 1998, p. 262
[79] *Ibid.*, p. 263
[80] *Ibid.*

Article 15 of ECHR also differs from article 4 of ICCPR because of absence of requirement of official proclamation of emergency. However, despite the fact that this requirement is missing in part 1 of the article, nevertheless, in part three, there is an obligation to inform "…the Secretary General of the Council of Europe… of the measures…and reasons…"[81] Therefore,, this part of the paragraph suggests that regional bodies as well as the individuals on the territory of the state are aware of the establishment of emergency and imposition of derogations since to invoke the derogations, state officials must bring evidence that the restrictions are necessary.

In addition, temporal character of the emergency is not also specified in ECHR. One may suppose that since the situation which requires extraordinary character is of a short-term character since otherwise the necessity of imposition of extraordinary measures is not reasonable.

American Convention on Human Rights. Unlike ICCPR, Inter- American Convention on Human Rights and European Convention on Human Rights give more or less precise definition of emergency. Thus, for instance, in case of former, "…time of war, public danger, or other emergency that threatens the independence or security of State Party…"[82] is considered as grounds for declaration of emergency and derogations from rights. The Member States to American Convention have exhaustive list of events that may be used as a reasonable grounds when it comes to make a decision to declare the state of emergency and to derogate.

[81] European Convention on Human Rights, article 15, http://www.echr.coe.int/Documents/Convention_ENG.pdf
[82] Inter-American Convention on Human Rights, article 27, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf

Indeed, in case of war or public danger extraordinary measures are necessary and reasonable. In addition, the Inter- American Convention on Human Rights allows to derogate in case if independence and security of the state are endangered. Thus, despite the fact that IACHR clearly points out when the restrictions can be imposed, nevertheless, the state authorities are still able to qualify an event as threatening the independence or security of the state. In other words, demonstrations of workers (for instance) which resulted in violent acts that endangers the security of the country might be considered as a ground for declaration of emergency and imposition of restriction.

Inter- American Convention on Human Rights as well as ICCPR and ECHR establishes conditions of lawful declaration of emergency and imposition of restrictions from specific rights. Article 27 of Inter- American Convention narrows down situations that may justify the restriction of human rights. IACHR as well as ECHR lists war as a reason of derogation in its article in addition to public danger that may also be recognized as a reasonable ground for derogation.[83] One may suppose that public danger refers to the threat to state institutions. Unlike ECHR, IACHR mentions prohibition of discrimination and lists the grounds which the state cannot use to derogate. These are "…race, color, sex, language, religion, or social origin."[84] The same grounds are listed in article 4 of ICCPR. Article 27 allows derogations in specific cases. For instance, unlike IACHR, neither ICCPR nor ECHR mention that an event must "…threate[n] the independence or security of a state party."[85] Unfortunately for state parties, only in case if independence or security of the state is in danger, the derogations are allowed. The problem here is that "… existence of war may not necessarily constitute…a threat [to independence… [and that] a war may take place at a

[83] Inter-American Convention on Human Rights, article 27, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf
[84] *Ibid.*
[85] *Ibid.*

great distance from the territory of a country…"[86] This is actually correct. Classical type of war, when one state is directly attacking another is very rare nowadays. However, more 'popular' type of conflicts – conflicts arising inside the states.

Nevertheless, the actions may not always be taken in the capital of the country where the most of institutions are located. Therefore, in case if a crisis is not on the whole territory of a state but rather on a part of it (in one of its regions), the actions of perpetrators do not necessary affect or endanger the independence of the state. As for security issues, the Convention is probably talking about security of state institutions rather than the security of its citizens. Since the security of latter may be in danger due to various reasons which are not connected to independence of the country.

Therefore, it is very hard to invoke the derogation in case if neither independence nor security of the state is endangered.

According to dissenting opinion in *Lawless* case, a situation when constitutional order does not exist anymore is to be considered as a public emergency.[87] However, when talking about emergency, neither ICCPR nor ECHR as well as none of other legal instruments does not clarify what must be considered as a life of nation. Thus, from one side, when it comes to life of nation, the security of state institutions is considered at first place since a state guarantees the protection of human rights through its institutions and Constitution. Nevertheless, from the other side, a threat to security of people may also be considered as a threat to life of nation, as it was done after 9/11 event in USA. Therefore, restrictions imposed on the rights of human beings are directed to save their lives on the equal grounds as the protection of state institutions.

[86] Claudio Grossman, "AA Framework of the Examination of States of Emergency Under the American Convention on Human Rights", American University International Law Review, Volume 1, issue1, Article 4, 1986, p. 43

[87] Oren Gross, ""Once More unto the Breach": The Systematic Failure of Applying the European Convention on Human Right to Entrenched Emergencies, The Yale Journal of International Law, Volume 23: 436, 1998, p. 456

National Legislation. General requirements of emergency declaration that the states are obliged are introduced by International Covenant on Civil and Political Rights as well as by regional instruments such as European Convention on Human Rights and Inter – American convention on Human Rights. National legislation, on the other side, specifies who has the power to declare the state of emergency, who decides that the situation in the country is critical that the derogations may be the only way to overcome crisis. All these and other conditions are included in national law on emergency.

The legislation of United States, United Kingdom and Israel will be reviewed to learn what kind of measures may be done in time of emergency as well as who may be empowered to act in a strict way.

United States. The emergency law of USA is National Emergencies Act that specifies the procedure of emergency declaration.[88] The right to declare emergency situation in USA is exercised by the President but the right to impose measures is granted by Congress.[89] Thus, the President decides whether the situation in the country is of such serious character that it requires the declaration and it is in competence of Congress to allow authorities to take necessary steps to restore normal legal order.

Also, the Act establishes a time limit within which the emergency situation may be established. Thus, emergency situation is terminated after one year.[90] Whether one- year time period may be considered as a reasonable time depends on situation in the country. From one side, this limit may be considered as a maximum time period on which emergency may be declared. In addition, it ensures that the restrictions of human rights are of temporal character.

[88] Harold C. Relyea, National Emergency Powers, CRS Report for Congress, updated August 30, 2007, p. 12
[89] US Code, Declaration of national emergency by President; publication in Federal Register; effect on other laws; superseding legislation, Title 50,Chapter 34, Subchapter II, § 1621 (a) (in effect on March 27, 2014) http://www.gpo.gov/fdsys/pkg/USCODE-2009-title50/html/USCODE-2009-title50-chap34.htm
[90] *Ibid.*

However, from the other side, emergency may be prolonged by US President.[91] Indeed, to prolong the emergency, there should be reasonable grounds that would prove that such kind of measures are necessary and the only way to overcome crisis. Unfortunately, there are no safeguards that the President will not use his privilege to prolong the state of emergency.

The National Emergency Act requires a Congress to meet every six month and to make a decision regarding termination of state of emergency by voting.[92] This could have been considered as a safeguard that the situation in the country will be evaluated by the Congress and not solely by the President. Unfortunately, there is no possibility for Congress to influence on decision of the President to prolong the state of emergency. Formally, the Congress could terminate the declaration of emergency situation without agreement of the President, it could be done by joint resolution, however, the President may decide to veto the resolution or to declare a new state of emergency.[93] Thus, the National Emergency Act, in fact, empowers the President to make a consideration regarding the declaration of emergency and weakens the competence of Congress to influence on the decision of the President. One may doubt reasonableness of delegation of power to terminate the emergency to Congress if its decision has little or no value for the President. Thus, the decision to declare and prolong the state of emergency is in competence of US President.

In addition to National Emergency Law, a new act was adopted after the tragedy of September 11, 2001. The act was titled as Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (US PATRIOT

[91] US Code, Declaration of national emergency by President; publication in Federal Register; effect on other laws; superseding legislation, Title 50,Chapter 34, Subchapter II, § 1621 (a) (in effect on March 27, 2014) http://www.gpo.gov/fdsys/pkg/USCODE-2009-title50/html/USCODE-2009-title50-chap34.htm

[92] Bruce Ackerman, *The Emergency Constitution*, The Yale Law Journal, Vol.113, No. 5, March 2004, pp. 1079-1080

[93] *Ibid.*, pp. 1080- 1081

Act).[94] Indeed, the US population expected establishment of quick measures from the US authorities to be sure that nothing like this will happen again. Although, in fact, only "…few members of Congress had time to read the summaries of the Bill, let alone the fine print of the document…"[95] the PATRIOT Act was adopted one month after 9/11 event and this was welcomed by the US population which were for any kind of strict measures to feel state protection against terrorists. As a result of adoption of the Act, the key changes were made to Foreign Intelligence Surveillance Act (FISA) of 1978.[96] The surveillance warrant is an example of amendments that were introduced after adoption of PATRIOT Act. For instance, the purpose of FISA warrants was the protection of state security, now the purpose of the warrant, in addition to national security, could be information retrieval for criminal investigation.[97] The question that may arise is why initial purpose of the warrant has been changed? This is an example when the measures required by the state of emergency are used for the purposes other than security of the state. Moreover, such kind of measures cannot be considered as reasonable ones since it goes beyond of initial aim of the Act. Thus, by breaking national law, an individual may be subjected to the same rules of surveillance as those of being suspected of espionage or connections with terrorist organizations. More likely that US population closed eyes on such kind of measures due to the crisis and fear in the country back in 2001. However, it is unlikely that they are satisfied with outcomes of these measures now.

Immigration law was also subjected to change. Unfortunately for immigrants coming to US the rules of detention were also modified. According to the PATRIOT Act, immigrants could be detained for indefinite period of time, also they could be detained for non – terrorist

[94] Phillip A. Thomas, 9/11: USA and UK, Fordham International Law Journal, Volume 26, Issue 4, article 11, 2002, p.1209
[95] *Ibid.*, p. 1210
[96] *Ibid.*, p. 1211
[97] Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, Journal of Constitutional Law, Vol. 6:5, May 2004, p.1038

offences and in case if the state of their citizenship do not accept them, they could be detained for life.[98] There is no reason to believe that violation of immigration rules requires harsh measures, in form of life imprisonment. One may suppose that changes in immigration law were done to be sure that terrorists will not cross the border by pretending to be immigrants. Nevertheless, the detention for life imprisonment of those with non- terrorist offences has no connection with the protection of national security and therefore, they must not be treated on the same level as terrorists.

In addition to that, the issue of racial discrimination arises when it comes to the fact that "[t]he Justice Department …announced a plan for investigators to interview… Middle Eastern males… who had arrived in the United States after January, 2000."[99] Again, as it was in *Korematsu vs. USA* case, certain number of people had to be checked just on the basis of their origin to one or another nation.

Israel. Israel may be considered as one of exceptional cases when it comes to limitation of time period of emergency situation. Indeed, from one side, the example of this state goes against required criteria of temporal character of emergency. The state of emergency was declared by Israel in 1948 in accordance with the Law and Administration Ordinance[100] and this declaration is still in force since threats to the security of the country has not been diminished. However, on the other side, such kind of prolongation is justified by the existing threat to the security of state institutions as well as to the life of people.

Nevertheless, despite such unusual (for most of other countries) situation Israel is trying to remain within legal framework and to balance the rule of law together with the necessity of protection of state security. Thus, according to the Basic Law, the Knesset is

[98] Phillip A. Thomas, 9/11: USA and UK, Fordham International Law Journal, Volume 26, Issue 4, article 11, 2002, p.1212
[99] *Ibid.*, p.1213
[100] Adam Mizock, The Legality of the Fifty-Two Year State of Emergency in Israel, University of California Davis Journal of International Law & Policy, volume 7:2, 2001, p.226

required to vote each year to renew the declaration of emergency situation.[101] Therefore, each year the situation in the country is subject to analysis and discussion and voting is based on the information provided to the Knesset and the decision regarding the state of emergency depends on the result of such voting. In addition to that, the regulations in relation to emergency situation are also annually reviewed by Ministry of Justice to make sure that only necessary measures are left.[102] It might be considered as safeguard that restricted rights are limited for a defined time period and are subject of annual review which may result in abolishment of such restrictions.

One of emergency laws of Israel before its independence was the Defense (Emergency) Regulations that were used to fight against terrorism.[103]According to these regulations, British authorities could take strict measures, such as the destruction of houses of suspects, against anyone who was considered liable for actions against security of Israeli territory.[104] Were these measures proportional or not is quite a controversial issue. From one side, the measures taken to prevent further violent actions are legitimized due to the ongoing crisis in the country. Nevertheless, from the other side, measures must not go against the principle of proportionality. Destruction of houses of suspects upon military orders may not be proportional since an individual being a suspect is not guilty nonetheless until the very moment when the decision of the court is announced.

Therefore, the destruction of the property even in time of emergency is not proportional to the threat that the individual may or may not cause. Indeed, after obtaining of independence and ratification of ICCPR, the law governing the state of emergency was

[101] Alan Baker and Ady Schonmann, *Presenting Israel's Case before International Human Rights* Bodies, Justice Magazine, The International Association of Jewish Lawyers and Jurists, No. 19, Winter 1998, p.25
[102] *Ibid.*
[103] Stephen J. Schulhofer, Checks and Balances in Wartime: American, British and Israeli Experiences, Michigan Law Review, Volume 102, No 8, August 2004, p.1920
[104] *Ibid.*

changed and other rules were established. After ratification of International Covenant on Civil and Political Rights in 1991, Israel again declared emergency situation to comply with requirements of the Covenant.[105] In case of Israel, it is a bit easier to provide evidence that there is ongoing emergency in the country since the situation on the borders of the state is not stable and various cities are suddenly attacked.

Indeed, there was an attempt to terminate the state of emergency when "[i]n September 2000, the High Court ordered the government to prepare a detailed program and timetable to end the state of emergency."[106] The transition from emergency to ordinary laws could have been done by slow substitution of harsh measures to less extraordinary ones.

However, this attempt did not result in termination of emergency since otherwise "…fundamental services such as security provision and electrical power could be undermined…."[107] Unfortunately the idea of High Court to end the state of emergency cannot be brought to life at this period of time.

Declaration of emergency situation in 1948 resulted in imposition of restrictions that allowed authorities to detain individuals, who they believed to be dangerous, without having sufficient evidence to prove it.[108] This action of state authorities is quite controversial. On one hand, situation in Israel being of exceptional character might be considered as justifiable as well as measures taken by the authorities. In other words, the necessity of extraordinary measures may not be doubted since the country has been a subject of everyday attacks.

[105] Adam Mizock, The Legality of the Fifty-Two Year State of Emergency in Israel, University of California Davis Journal of International Law & Policy, volume 7:2, 2001, p.228
[106] *Ibid.*, p.229
[107] *Ibid.*
[108] John Quigley, Israel's Forty – Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations?, Michigan Journal of International Law, Volume 15, winter 1994, p. 493- 494

Nevertheless, on the other hand, detention of a person "… without the need for amassing evidence sufficient to convince a court of the person's guilt"[109] might not be seem as reasonable. It is very important to be sure that the person captured is responsible for unlawful action because otherwise lawfulness of detention might be questioned.

The issue of administrative detention requires additional attention because there are some controversies regarding such kind of measures to suspects. Moreover, there are two different provisions application of which depends on the territory on which an individual is detained.

The first one is provision of Emergency (Detention) Law which is applicable in Israel and the second one is the Administrative Detentions (Temporary Provision) Order which is applicable in the territories.[110] The difference in administrative detention of suspects in Israel and in the territories is in time period within which the judicial review can be done.[111] The order of administrative detention of an individual in Israel is reviewed within 48 hours after detention but the same review in the territories can be done only within 8 days after detention.[112] It means that treatment of suspects living in Israel is more favorable than of those living outside.

It reminds the position of USA and UK authorities that nationals are less likely to commit terrorist acts rather than non- nationals. It seems that like those two countries, Israel imposes strict measures on non- citizens and more favorable measures on its citizens. The maximum period of detention is six month which may be prolonged by Minister of Defense

[109] John Quigley, Israel's Forty – Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations?, Michigan Journal of International Law, Volume 15, winter 1994, p.494
[110] Agbar and Matar vs. IDF Commander in Judaea and Samaria, Military Appeals Court, General Security Service and Military Prosecutor, Supreme Court, HCJ 9441/07, December 20, 2007, para. 7 (1), para. 7 (2.b), http://www.shali-law.co.il/index.php?option=com_content&view=article&id=140&Itemid=37
[111] *Ibid.*, para. 7 (2.c),
[112] *Ibid.*

for additional six month according to Emergency (Detention) Law.[113] The maximum period of time does not mean that all suspects are going to be detained for 6 month. This time limit may be considered as a safeguard that an individual will not be detained for indefinite time. Although, the state authority has a power to extend the administrative detention, it cannot be done without reasonable grounds to believe that it is the only way to protect the state and its population from destructive actions of suspect and no other measures will be effective.

However, the detention period of time only seems as definite. According to the same law, "… there is no limit upon the number extensions."[114] This provision of the Law may turn the time of detention of an individual into indefinite one if the decision of its prolongation will be made. Again, such kind of decision cannot be done without any justifications, however, the reasons of prolongation might not be told to the suspect due to the reason of national security. The same rule applies in the territories under Administrative Detentions (Temporary Provision) Order. The only difference is that unlike in Israel, in territories the order to detain and the decision to prolong detention is in competence of military commander or a person authorized by him.[115]

In addition to these two laws, Israel adopted a new law that allows detention of unlawful combatants. Internment of Unlawful Combatants Law was enacted by Knesset in 2002 after the decision of Israel's Supreme Court that Lebanese nationals cannot be held in detention as "bargaining chips" for exchange of Israeli military prisoners since the former do not endanger the situation in the state.[116] It means that after adoption of the law, Israel state

[113] Agbar and Matar vs. IDF Commander in Judaea and Samaria, Military Appeals Court, General Security Service and Military Prosecutor, Supreme Court, HCJ 9441/07, December 20, 2007, para. 7 (2.a), http://www.shali-law.co.il/index.php?option=com_content&view=article&id=140&Itemid=37
[114] *Ibid.*
[115] *Ibid.*, para. 7 (1), para. 7 (2.b), http://www.shali-law.co.il/index.php?option=com_content&view=article&id=140&Itemid=37
[116] Without Trial. Administrative Detention of Palestinians by Israel and the Internment of Unlawful Combatants Law, Hamoked Center for the Defence of the Individual, October 2009, http://www.btselem.org/download/200910_without_trial_eng.pdf , p. 51

authorities are empowered to detain not only nationals and individuals living on the territories but also non- national suspects. The law is applied to specific group of people – unlawful combatants.

According to Incarceration (Internment) of Unlawful Combatants Law, a term *unlawful combatant* refers to an individual "…who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force preparing hostile acts against…Israel."[117] It means that it is a person who is not a prisoner of war but commits violent acts against Israel as well as a person who does not acts in violent way against the state but is a member of terrorist organization. Incarceration can be done if the state authorities provide a reasonable ground to believe that an individual "…is an unlawful combatant and that his release will harm State security…."[118] Thus, it is a duty of state authorities to provide evidence that a particular individual is an unlawful combatant. However, identification of this category of individuals might be quite problematic since they may look like ordinary civilians. The reasonable ground criteria, which is used to determine unlawful combatants, is based on case by case basis. Indeed, the order of incarceration issued against an individual may be quashed by Chief of General Staff if there is evidence that the person captured is not an unlawful combatant.[119]

Also, the Law provides a judicial review which may be done "…no later than fourteen days after the date of granting the incarceration order…."[120] Thus, the individual may challenge his status of unlawful combatant in District Count of Israel. The Court may hold decision in favor of the individual if the evidence brought before the Court by the individual will point out on his innocence. In case if the Court admits that a person may endanger the

[117] Incarceration of Unlawful Combatants Law, adopted in 2002, https://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf , art.2.
[118] *Ibid.*, art. 3 (a)
[119] *Ibid.*, art. 4
[120] *Ibid.*, art. 5(a)

state of Israel and that the incarceration order was issued on reasonable grounds then, the person has a right to appeal the decision in Supreme Court "…within thirty days…."[121] Thus, the individual has another chance to challenge the incarceration order.

The main difference of all three laws is that Emergency (Detention) Law and the Administrative Detentions (Temporary Provision) Orders are used to detain those who live in Israel and on its territories, and the Incarceration of Unlawful Combatants Law applies against the foreigners who are considered as unlawful combatants under the Law. Moreover, unlike two previous laws, the Incarceration of Unlawful Combatants Law does not provide a time limit for incarceration of an individual. The prisoner may be released only in two cases. The first one is when Chief of General Staff makes a decision that the requirements under which an individual was considered as an unlawful combatant are not met or there is evidence that may justify the release of the prisoner.[122] The second one is when the incarceration order is challenged by the individual in Court. In this case, it is the Court (District and Supreme) that may "…quash the incarceration order."[123] This difference restricts the right to liberty of foreigners more strictly.

Thus, suspects who possess Israeli citizenship, those who live on territories and foreign suspects are treated differently. Even though all three laws are of preventive character, nevertheless, citizens of Israel are treated more favorable in comparison with suspects who live on territories. In its turn the latter are in better position than foreigners.

The United Kingdom. After an attack on 9/11 in United States, population of Great Britain expected actions from UK government to ensure that there are extra measures that will prevent the same attacks on the country, even if they are based on some restrictions of

[121] Incarceration of Unlawful Combatants Law, adopted in 2002, https://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf , art.5 (d)
[122] *Ibid.*, art. 4
[123] *Ibid.*, art. 5 (a) ,(d)

human rights. Interestingly, the United Kingdom was the only country which derogated from European Convention on Human Rights (from right to liberty and prohibition of detention without trial) due to event 9/11.[124]

In 2001 the United Kingdom adopted Anti- Terrorist, Crime and Security Act and as a result, derogated from article 5 (1) (f) of European Convention on Human Rights since this act empowers United Kingdom to detain foreigners suspected in terrorist activity and thus, is in contradiction with the article5 of ECHR.[125] Anti- Terrorist, Crime and Security Act contains provision regarding detention of suspects. According to the Act, suspected individuals may be detained indefinitely and without trial[126] This means that not only the right to liberty is restricted but also presumption of innocence is ignored. In addition to that, the provision is of discriminatory character since it "…applies to persons subject to immigration control…"[127] It means that measures are not going to be applied to all other individuals who do not fit in the above mentioned category. In other words, only immigrants will be subjected to strict control by the state authorities but the same measures will not be applied to citizens. Therefore, the rules of detention would be applicable only to immigrants since they may prepare acts of violence against the state. In this case, just being an immigrant (from a particular country) may result in arrest and detention if the authorities of the state suspect an individual in terrorist activities. The same can be said regarding the members of religious or ethnic minority groups. Thus, emergency declared due to the threat to a nation de facto may be a tool to suppress members of minority or religious group.

[124] Phillip A. Thomas, 9/11: USA and UK, Fordham International Law Journal, Volume 26, Issue 4, article 11, 2002, p.1217
[125] Virginia Helen 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 Review, vol. 17, No. 6, 2002 pp.1265-1266, pp. 1269 - 1270
[126] *Ibid.*
[127] *Ibid.*

It is obvious that in cases of state of emergency usually the rights and freedoms of minorities are affected. The vulnerable group may include "aliens, members of ethnic or religious minorities."[128] There is no doubt that their rights and/or freedoms will be restricted since they are 'targeted' first as potential suspects. For instance, according to emergency law, the time period of detention might be increased due to the extraordinary situation in the country and in general any suspect may be detained for this time period.

In case of Great Britain, the Act differentiated citizens and non-citizens of the country thus, restricting the rights of latter. Aliens, being a minority group are not able to defend themselves properly. In addition, when the Act was adopted and number of suspected non-nationals were deprived of their liberty, their other rights, such as right to religion, legal representation were violated as well. For instance, detainees were "… denied prayer facilities,… were not given access to lawyers or to their families…"[129] Thus, in fact, the restriction of right to liberty , due to derogation, caused restriction of other rights that has nothing to do with security of the state.

Unfortunately, such measures are taken against those aliens who cannot leave the country due to certain reasons such as impossibility of extradition or expulsion. The case of *A and others vs. UK* can be taken as an example since it was not possible for several suspects to leave the country. Therefore, the price that a country may pay for strict measures in time of emergency is "… loss of confidence in the rule of law from law – abiding people who feel victimized by an incorrectly presumed association with terrorists."[130] Unfortunately, by using harsh methods to fight against terrorism, the authorities may lose the trust of citizens. Indeed, the decision of Great Britain is understandable, taking into consideration the fact that

[128]Phillip A. Thomas, 9/11: USA and UK, Fordham International Law Journal, Volume 26, Issue 4, article 11, 2002, p.1208
[129] *Ibid.*, pp.1217- 1219
[130] *Ibid.*, p.1232

attack of 9/11 raised a concern regarding security situation in many countries. However, the arguments that were provided to declare the state of emergency may be questioned, since there has not been any actual threat. Thus, the authorities, in order to justify their actions, stated that "…strong support [of UK] for the US and Israel"[131] was a reason to believe that "… the United Kingdom has become a potential target."[132] Unfortunately, this argument could not be considered as convincing since there were no any other facts that would support the statement. In addition to that, the Home Secretary and members of other government authorities argued that there was no specific threat to Great Britain.[133] Therefore, the decision to implement the Act was not unanimous and was doubted by state authorities themselves. Moreover, the state secretary said that derogation was used to implement certain measures.[134]

There are several counter – arguments to the reason provided by the United Kingdom to establish the state of emergency.

First of all, the 9/11 terrorist attack was the only reason why Great Britain decided to adopt Anti- Terrorist Act.[135] This fact questions necessity of imposition of such measures. Since there is no reason to believe that United Kingdom is going to be the next country targeted by terrorists, there is no way to declare the state of emergency due to fear of potential attacks. The argument of Great Britain that "… the attack on the US was essentially an attack on the UK, in part because of its connections to the US, which makes it a potential target for future international terrorists"[136] is not a legal ground to make a declaration even by taking into consideration a margin of appreciation.

[131] Christopher Michaelsen, Derogating form International Human Rights Obligation in the 'War Against Terrorism'? – A British – Australian Perspective, Terrorism and Political Violence, vol. 17, 2005, p. 143
[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid*, p.144
[135] Phillip A. Thomas, 9/11: USA and UK, Fordham International Law Journal, Volume 26, Issue 4, article 11, 2002, p.1283
[136] *Ibid*, p.1284

Second, the tragic event that took place in United States does not mean that intention to threaten a life of US nation have any connection to other countries including United Kingdom. Since all other countries were not affected by this terrorist attack, there is no need to provide an analogy. The security of United Kingdom was not a target when the attack occurred in United States.

Also, belief that a friendship ties between US and Great Britain may threaten the security in UK might be considered as one of the reasons to impose strict measures. Nevertheless, since there was no evidence but only assumption that Great Britain may be considered as next target by terrorists, this argument is void.

Finally, following the logic of the authorities of United Kingdom, all countries that have any connection to United States must also be prepared for such kind of attacks and thus, may declare emergency situation however, only UK did. Since a state of emergency is considered as an exception to the general rule, it must be used only in case of actual and unavoidable danger. All assumptions and potential threats that do not have valid reasons to be considered as an imminent threat must not be used as grounds for derogations and declaration of state of emergency.

The necessity and reasonableness of such derogation may be questioned by the fact that "…there is no immediate intelligence pointing out to a specific threat to the United Kingdom…"[137] according to Home Secretary of Great Britain. From this fact, one may conclude that there was no need of such harsh measures. Moreover, derogation cannot be used as a preventive measure since it can be done only if all requirements, written in General Comments No. 29, were met. The Home Secretary made it clear that there was no evidence

[137] Phillip A. Thomas, 9/11: USA and UK, Fordham International Law Journal, Volume 26, Issue 4, article 11, 2002, p.1284

of imminent threat to the security of the country that may require imposition of emergency situation.

Thus, declaration of emergency and derogation from article 5 of European Convention on Human Rights by United Kingdom is very controversial issue.

Indeed, mistakes are common in all legal systems but in extraordinary situations a number of such kind of mistakes are increasing due to unstable situation in the country as well as due to different factors since authorities must show to population that the measures introduced are a primary tool to prevent terrorist attacks and that the results of such measures may compensate temporal restrictions of individuals' rights.

Comparing the situation in Great Britain after 9/11 event and in Northern Ireland in1939, when IRA committed acts of violence from Ireland on British territory[138], one may point out to the main reasons that could be accepted as valid grounds for declaration of state of emergency and derogation from specific rights.

In 1939, there was an actual threat to the security of United Kingdom since the main aim of IRA was "… to put an end to British sovereignty in Northern Ireland."[139] In addition to that, several terrorist acts occurred in 1954, 1956 and 1957 years which included attacks on Northern Ireland.[140] In the case of Lawless, there was a direct threat to the security of United Kingdom and due to extraordinary situation in the country, the Great Britain could derogate from certain human rights to protect its people and statehood. Indeed, the situation required extraordinary measures. However, the same cannot be said in case of derogations made by

[138] Case of Lawless v. Ireland (No. 3), European Court on Human Rights, Application No. 332/57, July 1, 1961, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57518#{"itemid":["001-57518"]}
[139] *Ibid.*
[140] *Ibid.*

United Kingdom after 9/11 event. There were no reasons to believe that the attacks of United States are a sign that the Great Britain is also a target for terrorist attacks.

From all mentioned above, one may conclude that in time of extraordinary situation there is a public pressure that requires extraordinary actions to ensure security in the country. Thus, state authorities who are making decision regarding emergency situation and derogations are forced by people to take steps. In case of 9/11, the decision of United Kingdom authorities to impose preventive measures, to ensure that such event would not occur in the country, was dictated by public pressure and thus, it might not be considered as an objective decision based on facts rather than on fear and predictions.

Indeed, 9/11 event was a starting point for many countries to review their anti – terrorist laws and to adopt new ones, if necessary, to make sure that there are mechanisms that will prevent such events on their territories. Therefore, the concern of United Kingdom regarding its well – being is also understandable. However, even taking into consideration the margin of appreciation, there is still no actual evidence that the potential threat to United Kingdom endangered the security in the country.

Thus, the desire of Great Britain to opt out of article 5 of European Convention on Human Rights to continue implementation of the Anti- Terrorist Act was a driving force to declare the state of emergency. In fact, it seems that a state of emergency was declared to prevent unnecessary talks of violation of article 5 of European Convention on Human Rights.[141] Therefore, one may question legality of declaration of state of emergency by United Kingdom since the fear of potential terrorist attacks is not enough to convince the public in necessity of such declaration.

[141] Phillip A. Thomas, 9/11: USA and UK, Fordham International Law Journal, Volume 26, Issue 4, article 11, 2002, p.1270

Chapter III

Case Law

Previous chapters described the notion and conditions of emergency situation that have to be met to declare the state of emergency. Those requirements are written in ICCPR, General Comment No. 29 as well as in regional instruments such as ECHR and IACHR. In addition to that legal framework of USA, UK and Israel is analyzed as well as arguments of those countries in support of their decision to declare emergency situation and to derogate.

This Chapter is dedicated to the practical side of the laws, established to protect the nation in time of crisis. The conditions and reasons of declaration of emergency in theory and in practice may be different from those, established by international and regional instruments. In addition, the states may declare the state of emergency by providing quite controversial arguments as Great Britain did. Although the declaration of state of emergency as well as decision of derogation must be considered on case by case basis, there are nevertheless general requirements that must be met.

Thus, *A and others vs. UK, Korematsu vs. USA* and *Mahmad Mesbah Taa Agbar and Tariq Yusuf Nasser Abu Matar vs. IDF Commander in Judaea and Samaria, Military Appeals Court, General Security Service and Military Prosecutor* cases will be reviewed to analyze the reasonableness and necessity of human rights restriction in these cases.

A and others vs. UK

A and others vs. UK[142] case is about detention of eleven individuals suspected of having connections with terrorist organizations related to Al- Qaeda. These people were detained after the adoption of Anti-Terrorist Crime and Security Act in 2001. All eleven suspects were not citizens of Great Britain. The first, second, eighth, ninth were granted a leave on the ground of statelessness, marriage and refugee status respectively. The third and sixth applicants were residents of United Kingdom. The fourth and fifth applicants married French citizens. The seventh and eleventh applicants came to Great Britain using false documents, the latter as well as tenth were seeking asylum in the country.

All of them were suspected of being connected to and providing support to terrorist organization by Secretary of State due to adoption of Anti- Terrorist Crime and Security Act 2001[143] but had an opportunity to challenge the decision in Special Immigration Appeals Commission (SIAC). All applicants were deprived of their right to liberty as a result of emergency situation declared by Great Britain except the fourth applicant since he chose to leave the country for France.

The applicants challenged lawfulness of restriction of their right to liberty claiming among other that there was no emergency situation in United Kingdom since there was neither actual[144] nor imminent threat[145] to security of the state, the situation was not temporal and that other states did not make a decision to declare the state of emergency. In addition, they insisted that the newly adopted Anti- Terrorist Crime and Security Act was of discriminatory character as well as disproportional. To make a decision whether there was a

[142] A and others vs. UK, application no. 3455/05, February 19, 2009, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403#{"itemid":["001-91403"]}
[143] *Ibid.*, para. 11
[144] *Ibid.*, para. 175
[145] A and others vs. UK, application no. 3455/05, February 19, 2009, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403#{"itemid":["001-91403"]}

state of emergency (as was claimed by the Great Britain) or not the Court studied arguments of applicants.

The House of Lords agreed by majority that there was a *state of emergency*. They argued that there are number of non – nationals of UK who are able to coordinate attacks that would endanger the people as well as their property. Despite the fact that the Secretary of State doubted the existence of *imminent* threat, he emphasized that the terrorists are not going to warn the state before the attack and therefore, "…it may not be possible to identify a stage when they can be said to be imminent."[146] Thus, the state authorities of Great Britain argued that the lack of imminent threat might not prevent the declaration of emergency.

In an opinion of dissent, Lord Hoffman stated that there was no threat that would destroy the normal functioning of state institutions even though he did not exclude the possibility of terrorist attacks.

The Court stated "…that emergency situations have existed even though the institutions of the State did not appear to be imperiled to the extent envisaged by Lord Hoffman."[147]

According to the Court, the measures taken by the state in time of chaos after 9/11 are understandable since the state acted on the basis of information that was available at that time. In Court's opinion "[t]he requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it."[148]

From the above mentioned one may conclude that the state authorities must make an assessment whether a threat (even if it is a potential one) may be considered as a reasonable

[146] A and others vs. UK, application no. 3455/05, February 19, 2009, para.18, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403#{"itemid":["001-91403"]}
[147] *Ibid.*, para.179
[148] *Ibid*,, para. 177

ground to refer to it when declaring an emergency situation relying on the facts available at the time of such declaration.

The next element of declaration of state of emergency that was studied is *temporal character* of emergency. In opinion of the Court, the temporal character of the emergency is not the only element that is needed to be looked at. The Northern Ireland was taken as an example to show that the state of emergency may exist for a long time. Therefore, the argument of applicants that there is lack of temporal character of emergency is not enough to claim illegality of such declaration.

Margin of appreciation is usually allowed to assess seriousness of threat to make a decision regarding declaration of state of emergency. The argument of applicants that there was no need of declaration and imposition of such strict measures since other countries did not do the same was not supported by the Court. Its decision regarding this issue was in favor of UK due to the fact that taking into consideration the margin of appreciation each country is free to assess ricks of existence of emergency situation and to declare emergency or abstain from declaration. The Court agreed with UK that there was a state of emergency.

As a next step, the Court studied the appropriateness of measures imposed by the United Kingdom against non – nationals. The government argued that the restriction of right to liberty of non- nationals will reduce the risk of terrorist attacks and thus, stated that the measures were taken in interest of the state security and have nothing to do with immigration issues.

Therefore, the distinction between nationals and non – nationals is justified. However, the Court was not provided evidence that the threat coming from non- nationals higher that from nationals. In addition, the Court agreed with the opinion of House of Lords that since it was not immigration measures the distinction was not legitimate these measures

were of discriminatory character and the measures imposed on non – national suspects were disproportionate because the difference of treatment of nationals and non – nationals was unjustified.

Therefore, according to the court despite the fact that existence of emergency was proved, the measures imposed by the state authorities against non – nationals were not reasonable.

An outcome of *A and other vs. UK* case showed how the elements of emergency situation may be understood by the state authorities. The idea that the threat to the security must be imminent as it is suggested in ICCPR, ECHR and General Comment No. 29 may be understood quite widely than it is used in legal documents. Relying on margin of appreciation the country could insist on existence of state of emergency even though one of its elements – actual and imminent threat is absent. Since emergency is unpredictable, the existence of it could be established on case by case basis. In case of *A and other vs. UK*, the information that was available at that time was enough to assess the risks of terrorist attack and to make a decision of declaration of emergency. However, even though the existence of the state of emergency was established by the Court, the reasonableness of measures imposed as a result of such declaration by the United Kingdom was doubted by the Court due to its discriminative and disproportional character.

Korematsu vs. USA

Korematsu vs. United States[149] is a significant case since for the first time discrimination based on race was considered as constitutional and necessary by the Supreme Court of the United States.

Mr. Korematsu is American citizen of Japanese origin who violated Civilian Exclusion Order No. 34[150] which required all people of Japanese origin to leave West Cost since it was declared a military zone due to war with Japan. As a result, he was arrested for his disobedience. Mr. Korematsu claimed that Exclusion Order violated his rights granted by Fifth Amendment of US Constitution, according to which he cannot be "…deprived of life, liberty, or property, without due process of law…."[151] Since the issue of the case concerns racial discrimination, limitation of Korematsu's Constitutional rights must be tested by most rigid scrutiny.[152]

The authorities of the state argued that temporal isolation of people of Japanese origin was necessary due to the fact that some of those people were loyal to Japan and their presence on West Cost would endanger the security of the state. In addition, identification of individual suspects could not be done within a limited time period. Therefore, movement of Japanese from West Cost to so - called guarded "assembly centers"[153] was necessary to eliminate danger to state security.

The decision of military authorities of USA raised a question whether such kind of measures are constitutional since they are based on racial difference or not. According to several Court members, Mr. Korematsu was not given a choice where to move from military area. On the contrary, he had to do it through assembly center. Moreover, "[t]he power to

[149] Korematsu vs. United States, 323 U.S. 214 (1944), http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=323&invol=214
[150] *Ibid.*
[151] Fifth Amendment of US Constitution, http://finduslaw.com/us-constitution-5th-14th-amendments
[152] Korematsu vs. United States, 323 U.S. 214 (1944), http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=323&invol=214
[153] *Ibid.*

exclude [in accordance with Exclusion Order] includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected."[154] In other words, anyone who was not willing to leave military zone, would be forced to move and even detained. Indeed, the necessity of such kind of limitation of right to liberty might be questioned due to the fact that not all individuals of Japanese origin were disloyal to USA. In fact, Mr. Korematsu, was deprived of his liberty only due to the fact that he refused to leave his house. No evidence of his loyalty to Japan was provided and basically, he was convicted just because of his origin.

However, the Court, taking into consideration another similar case - *Hirabayashi case* made a decision that Korematsu was forced to leave military zone not because of his race but because the United States were " at war with the Japanese Empire."[155] Moreover, since some Japanese people were disloyal to USA and it was quite hard to differentiate who was who the military authorities had to impose such kind of strict measures to remove individuals of Japanese origin from West Cost due to urgent situation in the country. Thus, the Court decided that the Exclusion Order was constitutional.

However dissenting judges are of different opinion. In the view of Justice Roberts people of Japanese origin were asked to leave the military area not for the purpose of their safety but because of their origin. In addition, no evidence of disloyalty of Korematsu to the United States was brought before the Court. Moreover, individuals had to stay at Assembly Center and could not leave it without permission. Thus, such kind of measures was not necessary to prevent espionage. According to Justice Murphy, the actions of military authorities must have been reasonable to justify imposed measures. However, temporal movement of those individuals did not have reasonable grounds since there was no evidence

[154] Korematsu vs. United States, 323 U.S. 214 (1944), http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=323&invol=214
[155] *Ibid.*

that all of them had an intention to aid US enemy. In addition, there had to be a judicial process regarding the necessity and reasonableness of measures imposed by military authorities.

Finally, Justice Jackson was of the view that the petitioner was convicted not because of his action but because of his race. Moreover, Justice doubted that Korematsu would be arrested if he was of Italian or German origin.

The decision in *Korematsu vs. USA* case is quite confusing. Although the decision of state as well as military authorities is understandable due to the fact that they had to ensure that there was no way of Japanese invasion to the West Cost, nevertheless, the discrimination must not be tolerated in anyway.

Mahmad Mesbah Taa Agbar and Tariq Yusuf Nasser Abu Matar

vs.

IDF Commander in Judaea and Samaria, Military Appeals Court, General Security Service and Military Prosecutor

Mahmad Mesbah Taa Agbar and Tariq Yusuf Nasser Abu Matar vs. IDF Commander in Judaea and Samaria, Military Appeals Court, General Security Service and Military Prosecutor [156] are two cases that were merged into one due to similar facts and issues.

Mr. Mahmad Agbar, the first petitioner, and Mr. Tariq Matar, the second petitioner, were detained for six months due to their activities in terroristic organizations. In case of

[156] Agbar and Matar vs. IDF Commander in Judaea and Samaria, Military Appeals Court, General Security Service and Military Prosecutor, Supreme Court, HCJ 9441/07, December 20, 2007, http://www.shali-law.co.il/index.php?option=com_content&view=article&id=140&Itemid=37

second petitioner, administrative detention was subject to prolongation. Both petitioners could not be released because they might create "…a definite risk to the security on the territory…."[157]

There are two laws which allow administrative detention. The first one is Emergency Powers (Detention) Law. This law contains rules of detention within Israel. The second law is Administrative Detention Order that is valid in the territories (Judea and Samaria). Both laws allow detaining individuals suspected of being involved in terrorist activities to certain period of time specified in the respective provisions of the Laws. In this case, petitioners were detained in accordance with the Administrative Detention Order.

Both petitioners disagreed with the decision of military authorities to keep them in administrative detention. According to the first petitioner, there were violations of his rights since his detention was based on information that he did not have a chance to examine, the information was old and he was not given alternative ways to replace the detention.

Second petitioner denied membership in terroristic organization and stated that he did not plan terrorist attacks but wanted "…to honor the memory of one of the 'martyrs' in the school where he studied."[158] In addition, he stated that his age (at the time of his detention he did not reach 17) and the fact that he did not have any incidents related to security of the state.

Both petitioners claimed that the detention was not reasonable since there was no evidence that they would endanger the security of the state of Israel. On the contrary, military authorities argued that due to the connection to terrorist organizations – Hamas (first petitioner) and Popular Front (second petitioner), the measures that were taken against

[157] Agbar and Matar vs. IDF Commander in Judaea and Samaria, Military Appeals Court, General Security Service and Military Prosecutor, Supreme Court, HCJ 9441/07, December 20, 2007, para.1, http://www.shali-law.co.il/index.php?option=com_content&view=article&id=140&Itemid=37

[158] *Ibid.*, para. 2

petitioners are based on the ground of threat to security of the state and no other alternative measures could not be introduced.

In addition to pleadings of both parties, the Court "…reviewed the privileged material ex parte and conducted a dialogue with representatives of the State Attorney's office and the defense establishment."[159] The Court reminded that administrative detention must be used only in exceptional cases when alternative measures cannot be applicable. Indeed, the Court emphasized the fact that there are situations when administrative detention is the only way to protect the security of the state and is used as preventive measures.

Reviewing privileged evidence ex parte as well as hearing arguments of both parties the Court made a decision that the military authorities had reasonable grounds to believe that the security of Israel would be endangered in case of their release.

Despite the fact that all three cases were considered in different time period and under different circumstances there are several moments that are common for them.

First of all the laws that allowed to restrict the right of liberty in each case differentiated the individuals, in general, and petitioners, in particular. In case of *A and others vs. UK* Anti- Terrorist Crime and Security Act differentiated between nationals and non – nationals by restricting the right of liberty of latter. Even though the Court made a decision that the declaration of state of emergency was reasonable at that time, nevertheless the arguments of the authorities of Great Britain, that non – nationals are the ones who are able to endanger the security of the country, did not convince. Moreover, the decision of authorities to free two of eleven suspects by allowing them to leave the country doubted the

[159] Agbar and Matar vs. IDF Commander in Judaea and Samaria, Military Appeals Court, General Security Service and Military Prosecutor, Supreme Court, HCJ 9441/07, December 20, 2007, para. 4 (c), http://www.shali-law.co.il/index.php?option=com_content&view=article&id=140&Itemid=37

reasonableness of their detention. In case they were able to plan attacks on United Kingdom, it would be dangerous to let them go since there was no guarantees that they would not try to plan attacks being outside of the country. Thus, there were no evidence that non – nationals are more dangerous than nationals of United Kingdom.

In case of *Korematsu vs. USA*, one may see discrimination based on nationality. The decision of military authorities to isolate all individuals of Japanese origin from West Cost is questionable. Even in time of emergency any kind of discrimination is prohibited and may not be justified. However, the United States was of an opinion that it was done in the sake of state security and was necessary due to the danger of espionage from the side of Japanese who possessed the citizenship of USA. Indeed, it is obvious that the right of liberty of Mr. Korematsu was restricted because he was Japanese but not because there was evidence that he was disloyal. Again, no reasonable evidence was provided to support this argument. Nevertheless, the Court decided that the situation required strict measures and there was no other ways to ensure the security of the state.

Finally, in case of *Mahmad Mesbah Taa Agbar and Tariq Yusuf Nasser Abu Matar vs. IDF Commander in Judaea and Samaria, Military Appeals Court, General Security Service and Military Prosecutor* there were two different laws that applied on different parts of Israel. Although at first glance there was no differentiation between nationals and non – nationals since the Emergency Powers (Detention) Law was applicable in Israel and Administrative Detention Order on its territories. Thus, theoretically Israeli nationals suspected of being involved in terrorist activities would be treated on equal grounds as non – nationals. However, there are differences in time period of detention of suspect on Israeli territory and on its territories. Even if there were reasonable grounds of such kind of difference, nevertheless, the time period established for the suspects outside of Israel are less favorable than those, established in Israel.

Each of the cases reviewed in this Chapter proves that practical application of emergency laws might be far from the standards indicated in international and regional instruments and that even discrimination might be justified being contrary to the requirements established by international community.

Conclusion

There is only one way to justify derogation of specific human rights – emergency situation. However, a country may face difficulty in determining the existence of state of emergency since there is no exact definition of such situation. ICCPR as being widely accepted document provides a general notion of what can be accepted as an emergency situation. According to the Covenant as well as General Comment # 29, not every attack may be considered as a reasonable ground to declare the state of emergency and to derogate. It must be a serious attack that will threat the life of nation. Indeed, when making a decision regarding declaration, the margin of appreciation plays an important role since only the authorities of the state have complete information regarding the situation in the country and thus, the declaration depends upon their decision. The example of margin of appreciation is *A and others vs. UK* case.

Emergency situation may also be considered as de jure and de facto. The two subcategories of de jure emergency were analyzed due to the fact that they, unlike de facto emergency, are connected to declaration of emergency and derogation from specific rights. Good de jure emergency can be considered from theoretical point of view since fulfillment of all requirements specified in ICCPR or other regional instruments are have to be met. On contrary, bad de jure emergency can be considered from more practical side since as was in case *A and others vs. UK*, country might declare the state of emergency when there is no actual threat.

The main tools of human rights protection – International Covenant on Civil and Political Rights, European Convention on Human Rights and Inter-American Convention on Human Rights, contain provisions regarding the state of emergency. The emergency situation being of extraordinary character, nevertheless, must meet the requirements defined by

international/regional instruments (ICCPR, ECHR, IACHR) to be considered as declared in accordance with law. Only then, the decision regarding restrictions of certain human rights can be made.

Derogation from a right(s) may be used as a last resort (the only measure) that may secure a nation from a threat. All international and regional instruments (ICCPR, ECHR, IACHR) point out that derogation may be done only in exceptional situation such as a state of emergency. In its turn, there are number of requirements that must be met to consider the situation as emergency and to allow state authorities to derogate. In case of United Kingdom, the only reason for derogation was potential threat that theoretically may happen in any time. This is not in accordance with the standards, introduced by ICCPR or ECHR. Moreover, derogation cannot be used every time when a state decides to impose certain measures of preventive character.

The declaration of state of emergency and derogations have been used in times of Machiavelli, Rousseau and Schmitt. Each of them identified his own requirements that in their opinion have to be fulfilled to cope with an extraordinary situation. In all three theories of emergency, they argued that certain measures must be introduced to overcome the crisis. In opinion of Machiavelli and Rousseau, there must be limitation in power of state authorities who are appointed to introduce restrictive measures, fixed time period of emergency as well as impossibility of further prolongation of emergency regime. Carl Schmitt's point of view is also close to previous ones, however, he argued that the state authority chosen to cope with the state of emergency must have unlimited power. The disadvantage of his argument is that in case if an authority possessed unlimited power, there would be a danger of change of constitutional order or adoptions of laws that may otherwise be unconstitutional, repressive or discriminatory.

In general, the requirements identified in theories of these authors haven't been changed since then. However, countries present quite different arguments to make a declaration of emergency or to make derogation. To consider a declaration of emergency situation as being in accordance with a law, the following requirements have to be met: public emergency that threaten the life of nation, official declaration of state of emergency, non- discrimination and be consistent with the obligations under International Law. There could be difficulty in defining the term 'life of nation' since there is no clear notion of it. Siracusa Principles on the Limitation and Derogation Provisions relates 'the life of nation' to functioning of state institutions. However, 9/11 event points out on the fact that 'the life of nation' may refer to the life of people as well.

National law of countries has more specific provisions regarding the state of emergency. USA, UK and Israel are the countries that declared emergency situations providing controversial justifications of declaration of time of emergency and derogations from specific rights. By analyzing the National Emergencies Act of USA it is obvious that an attempt to balance powers of the President and Congress do not provide desired result. Indeed, the Congress could decide to end the state of emergency, however, if the President disagrees with this decision, then he use his right to veto or can declare a new time of emergency. Thus, despite the fact that the Congress may make decision regarding the state of emergency, it nevertheless has a limited power in comparison with the power of the President.

After 9/11 event, USA and UK quickly adopted US PATRIOT Act and Anti- Terrorist Crime and Security Act respectively. Both laws were introduced to public within very short time period. If USA has a reasonable ground to take extraordinary measures due to terrorist attack, the same cannot be said about Great Britain. The declaration of emergency situation by latter was justified by the fact that the country may be attacked due to its friendship with

USA and Israel. The Act adopted by UK raised questions of reasonableness and necessity of this law.

The situation in state of Israel is completely different since emergency situation in the country has been existed since its independence. Indeed, this goes contrary to the requirement of temporal character of the crisis, however, taking into consideration the situation in Israel, it is quite hard to imagine how the state could protect itself without imposed restrictions. Israel has three different laws the application of which depends on citizenship of suspects. Emergency Powers (Detention) Law and Administrative Detentions (Temporary Provision) Orders are used to detain suspects from Israel and its territories. Incarceration of Unlawful Combatants Law is used to incarcerate individuals considered as unlawful combatants under the Law. The main difference of these three laws is time limit. Two former laws indicate time period within which the suspects can be detained. The latter does not have such kind of limitation and therefore, unlawful combatants can be held for unlimited time.

The cases which were reviewed earlier point is an example that some requirements of declaration of emergency are not taken into account as was in case of *A and others vs.UK* (emergency was declared and specific rights were derogated) when there was no emergency situation as such. Case *Korematsu vs. USA* brings evidence that there was a discrimination based on nationality which must not be justified by extraordinary situation. Finally, Israeli case shows that time period of detention of nationals and non – nationals differs without bringing evidence of necessity of such difference.

Therefore, despite the fact that international, regional and domestic law do not prohibit derogations, states must provide evidence that the restriction of part of the right is necessary to protect its institutions and citizens from danger and that the decision to derogate

was made exclusively on the basis of necessity and reasonableness. In addition, as soon as the emergency situation ceases to exist, the measures imposed must be removed so that the people will be able to exercise all their rights to full extent.

List of references

1. Ackerman, Bruce, *The Emergency Constitution*, The Yale Law Journal, Vol.113, No. 5, March 2004
2. Baker, Alan and Schonmann, Ady, *Presenting Israel's Case before International Human Rights* Bodies, Justice Magazine, The International Association of Jewish Lawyers and Jurists, No. 19, Winter 1998
3. Buyse, Antonie, Hamilton,Michael (edited), *Transitional \jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights*, Cambridge; New York: Cambridge University Press, 2011
4. Cowell, Frederick, "Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a derogation Clause in the ACHPR", Birkbeck Law Review, Volume 1(1)
5. De Schutter, Oliver, International Human Rights Law, Cambridge University Press, 2010
6. Doswald – Beck, Louise, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, May 2011
7. Fitzpatrick, Joan, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*, University of Pennsylvania Press, 1994
8. Gross, Oren, ""Once More unto the Breach": The Systematic Failure of Applying the European Convention on Human Right to Entrenched Emergencies, The Yale Journal of International Law, Volume 23: 436, 1998
9. Gross, Oren and Aolain, Fionnuala Ni, *Law in Time of Crisis. Emergency Powers in Theory and Practice*, Cambridge University Press 2006
10. Gross, Oren, "The Normless and Exceptionless Exeption: Carl Schmitt's Theory of Emergency Powers and the "Norm – Exception" Dichotomy", Cardozo Law Review, Vol. 21:1825, 2000

11. Grossman, Claudio, "A Framework of the Examination of States of Emergency Under the American Convention on Human Rights", American University International Law Review, Volume 1, issue1, Article 4, 1986

12. Hafner-Burton, Emilie M., Laurence R. Helfer and Christopher J. Fariss, "Emergency and Escape: Explaining Derogations from Human Rights Treaties", International Organization , Volume 65, Issue 04, October 2011

13. Henning,Virginia Helen, 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 Review, vol. 17, No. 6, 2002

14. Haaretz Newspaper, http://www.haaretz.com/print-edition/news/israel-extends-63-year-state-of-emergency-over-ice-cream-and-show-tickets-1.363640

15. Lehmann, Julian M., "Limits to Counter- Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights", Essex Human Rights Review, Volume 8, No1, October 2011, Special Issue 2011

16. Lillich, Richard B., *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, The American Journal of International Law, Vol. 36: 225, 1998

17. Macdonald, R. St. J., "Derogations under Article 15 of the European Convention on Human Rights", Columbia Journal of Transnational Law, Volume 36: 225, 1998

18. Machiavelli, Niccolo, *Discourses on Livy*, Federalist Paper Project, http://thefederalistpapers.integratedmarket.netdna-cdn.com/wp-content/uploads/2013/08/Discourses-on-Livy.pdf

19. Michaelsen, Christopher, Derogating form International Human Rights Obligation in the 'War Against Terrorism'? – A British – Australian Perspective, Terrorism and Political Violence, vol. 17, 2005

20. Mizock, Adam, The Legality of the Fifty-Two Year State of Emergency in Israel, University of California Davis Journal of International Law & Policy, volume 7:2, 2001

21. Quigley, John, Israel's Forty – Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations?, Michigan Journal of International Law, Volume 15, winter 1994

22. Relyea, Harold C., National Emergency Powers, CRS Report for Congress, updated August 30, 2007

23. Rousseau, Jean Jacques, *The Social Contract or Principles of Political Right*, 1762, translated by G.D.H. Cole

24. Scheppele, Kim Lane, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, Journal of Constitutional Law, Vol. 6:5, May 2004

25. Schulhofer , Stephen J., Checks and Balances in Wartime: American, British and Israeli Experiences, Michigan Law Review, Volume 102, No 8, August 2004

26. Schmitt, Carl, *Political Theology: Four Chapters on the Concept of Sovereignty*, George Schwab (trans.), University of Chicago Press, 2005

27. Thomas, Phillip A., 9/11: USA and UK, Fordham International Law Journal, Volume 26, Issue 4, article 11, 2002

28. Without Trial. Administrative Detention of Palestinians by Israel and the Internment of Unlawful Combatants Law, Hamoked Center for the Defence of the Individual, October 2009, http://www.btselem.org/download/200910_without_trial_eng.pdf

Documents:

29. Incarceration of Unlawful Combatants Law, adopted in 2002, https://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf

30. International Covenant on Civil and Political Rights, New York, 16 December 1966, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en

31. Inter-American Convention on Human Rights, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf

32. European Convention on Human Rights, article 15, http://www.echr.coe.int/Documents/Convention_ENG.pdf

33. Fifth Amendment of US Constitution, http://finduslaw.com/us-constitution-5th-14th-amendments

34. General Comment No. 29, States of Emergency (Article 4), paragraph 9, http://www.unhchr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361

35. Report by the UN Sepcial Rapporteur, Mr. Leonardo Despouy, on the question of Human Rights and States of Emergency, http://www1.umn.edu/humanrts/demo/HumanRightsandStatesofEmergency_Despouy.pdf

36. Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) http://www1.umn.edu/humanrts/instree/siracusaprinciples.html

37. US Code, Declaration of national emergency by President; publication in Federal Register; effect on other laws; superseding legislation, Title 50,Chapter 34, Subchapter II, § 1621 (a) (in effect on March 27, 2014) http://www.gpo.gov/fdsys/pkg/USCODE-2009-title50/html/USCODE-2009-title50-chap34.htm

Cases:

38. A. and others v. United Kingdom (Application No. 3455/05), judgment of 19 February 2009

39. Brannigan and McBride v. United Kingdom case, Application Nos. 14553/89 and 14554/89, judgment of 25 May 1993

40. Korematsu v. United States, 323 U.S. 214 (1944)

41. Mahmad Mesbah Taa Agbar and Tariq Yusuf Nasser Abu Matar vs. IDF Commander in Judaea and Samaria, Military Appeals Court, General Security Service and Military Prosecutor, Supreme Court, HCJ 9441/07, December 20, 2007