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IF HUMAN RIGHTS ARE GROUNDED IN THE INHERENT DIGNITY OF THE INDIVIDUAL, HOW CAN DEROGATION EVER BE JUSTIFIED?

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Introduction

This study will be presented in three sections to cover each aspect of the question. First, it will be necessary to establish if human rights are grounded in the inherent dignity of the individual and what dignity means.

Secondly the study will focus on derogations. This will include the definition of 'derogation', which treaties permit them, what rights can be derogated from, when derogations can occur and finally the scope and manner of derogations. This will include reference to case law and human rights theory.

Thirdly it will examine if derogations can be justified when applying the premise of human rights being grounded in the inherent dignity of the individual. Presenting relevant theory and applying it to examples of derogations will allow for an answer to the question.

Are human rights grounded in the inherent dignity of the individual?

The UN Charter does not explicitly assert that human rights are grounded in the inherent dignity of the individual.² The Universal Declaration of Human Rights (UDHR) also

¹ The Author completed his post graduate degree in International Human Rights Law from Oxford Brookes University and had previously conducted research for UNICEF.

² See Preamble of *The Charter of the United Nations 1945*: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

makes no assertion that human rights are grounded in the inherent dignity of the individual, rather stating inherent dignity is part of the foundation for peace, justice and freedom.³ The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) provide the first text stating that human rights derive from the inherent dignity of the individual.⁴ Furthermore in 2005 the UN General Assembly released a declaration urging heads of State and Government to “Reaffirm their commitment to human dignity by action to... ensure respect for human rights and fundamental freedoms”.⁵

The American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (ACHPR) assert that human rights stem from and are based upon attributes of the human personality.⁶ The European Convention on Human Rights (ECHR) does not provide an origin for human rights but rather recognises them to be the foundation of justice and peace.⁷

The ICCPR and ICESCR are international and, despite regional treaty differences, apply to all member States. The aforementioned declaration from the UN General Assembly also applies to all member States, although a declaration is not binding, unlike treaty law which is binding. Dignity is a malleable and culturally relative term (Donnelly 1982: 303-315), it has evolved as a concept over time, with many different definitions (McCrudden 2008: 655, 656-663). A legal definition is lacking, although it is espoused as something that States should seek to protect (McCrudden 2008: 664,671). The use of the term 'human dignity' has been documented to be intentionally lacking an objective

³ See Preamble of the *Universal Declaration of Human Rights 1948*: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

⁴ See Preamble of *International Covenant on Civil and Political Rights* (1976) 999 UNTS 171 (hereafter ICCPR), and also of *International Covenant on Economic, Social and Cultural Rights* (1976) 993 UNTS 3 (hereafter ICESCR): “these rights derive from the inherent dignity of the human person”.

⁵ Kofi A. Annan (2005), “In larger freedom: towards development, security and human rights for all”, *Report of the Secretary-General*, UN Doc. A/59/565, 21 March 2005.

⁶ *American Convention on Human Rights*, ‘Pact of San Jose, Costa Rica’ Nov. 22, 1969, OASTS 36 (hereafter ACHR) preamble, *African Charter on Human and Peoples’ Rights* Oct. 21, 1986. 21 ILM 58 (hereafter ACHPR) preamble.

⁷ See Preamble of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended) (hereafter ECHR)

definition, especially regarding human rights treaties; a term open for cultural interpretation, allowing for consensus when drafting a treaty (McCrudden 2008:678). For the purpose of this study, in fitting with today's *Zeitgeist*, dignity will mean 'being worthy of respect'.⁸

What is a derogation and which treaties permit them?

A derogation is a “lessening or restriction of the authority, strength, or power of a law, right or obligation.”⁹ The ICESCR and the ACHPR contain no provision regarding derogation. Article 4 of the ICCPR,¹⁰ Article 27 of the ACHR¹¹ and Article 15 of the ECHR¹² allow for a derogation from certain treaty obligations.

What rights may be derogated from?

The ICCPR, ECHR and ACHR list the right to life, freedom from torture, freedom from slavery and freedom from *ex-post facto* laws as non-derogable rights.¹³ The ICCPR and ACHR also list right to a legal personality and freedom of thought, conscience and religion as non-derogable rights.¹⁴ Non-derogable means these rights may not be subject to any lessening or restriction of their authority, strength, or power.¹⁵ In 2014 The UN Committee Against Torture expressed concern over allegations of torture and ill treatment during the state of emergency in Thailand, and asserted that prohibition of torture was non-derogable.¹⁶

⁸ Maurice Waite (ed.), *Oxford English Dictionary* (7th ed., Oxford University Press 2012) 230.

⁹ Jonathan Law (ed.), *Oxford Dictionary of Law* (7th ed., Oxford University Press 2013) 166.

¹⁰ ICCPR, Article 4.

¹¹ ACHR, Article 27.

¹² ECHR, Article 15.

¹³ ICCPR, Article 4(2); ECHR, Article 15(2); ACHR, Article 27(2).

¹⁴ ICCPR, Article 4(2); ACHR, Article 27(2).

¹⁵ Jonathan Law, *supra* n.9, at p.166.

¹⁶ *UN Committee Against Torture*, Jun. 20, 2014 *Concluding observations on the initial report of Thailand* UN Doc CAT/C/THA/CO/1 at pp.19-21.

The ACHR lists 5 other non-derogable rights¹⁷ not recognised by the other 2 treaties. The ACHR also states that freedom from forced labour is a non-derogable right. The ICCPR and ECHR do not grant non-derogable status to their provisions regarding freedom from forced labour.¹⁸ Due to this conflict further reasoning is needed. The ICCPR and ECHR articles concerning freedom from forced labour include sub articles stating that the term 'forced labour' shall not include *inter alia* military service or “any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community”.¹⁹ Thus any derogation from freedom from forced labour would concern, according to the International Labour Organisation, freedom from “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”²⁰ The UN Special Rapporteur on contemporary forms of slavery, including its causes and consequences has asserted that forced labour is a form of contemporary slavery and that the UN is called upon to help restore the dignity of victims.²¹ Thus it can be argued, in light of 'human rights being grounded in the inherent dignity of the individual', that the ICCPR and ECHR should, as done in the ACHR, make 'freedom from forced labour' non-derogable.

The ICCPR and ECHR allow for no derogation from provisions concerning the abolition of the death penalty contained in protocols 6 and 13 of the ECHR, and the second optional Protocol of the ICCPR.²² It is worth noting however that Amnesty International reported 22 States practising the death penalty in 2014, including by

¹⁷ ACHR, Article 27(2) including: Rights of the Family, Right to a Name, Rights of the Child, Right to a Nationality, Right to Participate in Government.

¹⁸ ICCPR, Article 8(3) and 4(2); ECHR Article 15(2).

¹⁹ ICCPR, Article 8(3)(c) and ECHR Article 4(3).

²⁰ *International Law Commission* (14th session) Jun. 28, 1930, *Convention concerning Forced or Compulsory Labour*: May 01, 1932, Geneva, Article 2.

²¹ United Nations Human Rights Office of the High Commissioner: Special Rapporteur on contemporary forms of slavery, including its causes and consequences.[Online: Web] Accessed 01 April 2016, URL:<http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SRSlaveryIndex.aspx>

²² ECHR,*supra* n. 7, Protocol 6 and 13, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414 Article 6(2).

means of beheading, hanging, lethal injection and shooting.²³

Certain rights are also listed as being international norms and thus may also not be subject to derogation. These include *inter alia*: Individuals deprived of their liberty shall be treated with humanity and respect for their inherent dignity, protection of minorities, prohibition of taking hostages, prohibition of war propaganda and incitement to discrimination.²⁴ Finally judicial rights are recognised as being inherent in the protection of rights, thus becoming non-derogable themselves when concerned with non-derogable rights, e.g. if a State is to impose the death penalty.²⁵

The recognition of these rights as international norms also means that regional treaties, such as the ACHR and ECHR, may not permit derogation from them. If they exist as norms then treaty law may not allow them to be derogated from.²⁶

Apart from the above mentioned and one other exception,²⁷ all of the rights listed in the ICCPR may be subject to derogation. All rights listed in the ACHR and the ECHR not listed as non-derogable rights or recognised as international norms may also be derogated from. Finally each treaty also declares that member States, during times of derogation, do not violate any other obligations under international law.²⁸

When can derogations occur?

The ICCPR states that derogation is permissible during a “time of public emergency which threatens the life of the nation and the existence of which is officially

²³ Amnesty International: (2015) *Death Sentences and Executions 2014*. [Online: Web] Accessed 01 April, 2016, URL: https://www.amnesty.org.uk/sites/default/files/death_sentences_and_executions_2014_en.pdf.

²⁴ UN Human Rights Committee 'General Comment No. 29 States of Emergency (Article 4)' (Aug. 31, 2001) UN Doc CCPR/C/21/Rev.1/Add.11 at p.13

²⁵ *Ibid* 15,16.

²⁶ See Bantekas, Ilias & Oette, Lutz (2013), *International Human Rights Law and Practice* 74-75, 327-328, Cambridge: Cambridge University Press, See also N. Shaw, Malcolm (2013), *International Law*, 6th edn., 124-125, Cambridge: Cambridge University Press 2013 and J. Criddle, Evan & Fox-Decent, Evan (2012), *Human Rights, Emergencies, and the Rule of Law Human Rights Quarterly*, 39 41.

²⁷ Right to not be imprisoned because of failing to meet a contractual obligation ‘ ICCPR, Article 4.

²⁸ ICCPR, Article 4(1); ACHR, Article 27(1); ECHR, Article 15(1).

proclaimed.”²⁹ This is further defined in General Comment 29: In “other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.”³⁰ Clarification has been presented in the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles).³¹ 'Public emergency which threatens the life of a nation' is one that: “Affects the whole of the population and either the whole or part of the territory of the State, and threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant.”³² Internal conflict and unrest which do not meet the aforementioned criteria or economic difficulties per se cannot justify derogations.³³

The ECHR states that derogation is allowed during times of war or other public emergencies threatening the life of the nation.³⁴ The ACHR, in Article 27 allows for derogation in time of war, public danger, or other emergency that threatens the independence or security of a State Party.³⁵

It is necessary to understand that the situations States may face in declaring emergencies cannot be foreseen.³⁶ Scholars have argued that the suspension of legal order often paves the way for systematic human rights violations. Public emergencies were declared prior to genocide in Sudan's Darfur region³⁷ and also in Thailand reportedly to address

²⁹ ICCPR, Article 4(1).

³⁰ General Comment No. 29 States Of Emergency (Article 4), *supra* n.24 at p.3.

³¹ 'Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights' Annex (1984) UN Doc E/CN.4/1984/4.

³² *Ibid* 39 (a) (b).

³³ *Ibid* 40, 41.

³⁴ ECHR, Article 15(1).

³⁵ ACHR, Article 27(1).

³⁶ Evan J. Criddle & Evan Fox-Decent *supra* n.26, at p.44.

³⁷ *Ibid* 45.

anti-government protesters.³⁸ The UN Committee Against Torture stated that Thailand should assess the need for special laws “bearing in mind that the conditions for declaring an emergency and enacting emergency laws are strictly and narrowly defined and should be limited to exceptional circumstances.”³⁹ Furthermore Amnesty International asserted that a number of States which carried out the death penalty in 2014 did so in response to real or perceived threats to State security or public safety.⁴⁰

Scope and manner

The ICCPR and ACHR Articles concerning derogations make clear that any derogation of rights be done so without discrimination based on race, colour, sex, language, religion or social origin.⁴¹ The ECHR covers discrimination in a separate Article,⁴² and through case law, referencing the ICCPR, has made clear no derogation be made with discrimination.⁴³

The ICCPR, ECHR and ACHR assert that the obligations of the respective treaties are only derogated from to the extent strictly required by the exigencies of the situation.⁴⁴ Regarding the ICCPR this specifically relates to the duration, geographical coverage and material scope of the emergency.⁴⁵ In the *Case of Sakik and Others v. Turkey* the

³⁸ See “Protest hit Thailand declares state of emergency”, The Telegraph, Thailand [21 Jan 2014] Accessed Mar. 31, 2016 URL:<http://www.telegraph.co.uk/news/worldnews/asia/thailand/10586935/Protest-hit-Thailand-declares-state-of-emergency.html>. See also Gander, Kashmira (2014) “Thailand declares state of emergency in bid to quell Bangkok protests”, The Independent, Bangkok, [21 Jan 2014] Accessed 31 March 2016 URL:<http://www.independent.co.uk/news/world/asia/thailand-declares-state-of-emergency-to-deal-with-ongoing-anti-government-protests-9074790.html>

³⁹ See *supra* n.16.

⁴⁰ *Death Sentences and Executions 2014*, See *supra* n.23 at p.3.

⁴¹ ICCPR, Article 4(1); ACHR, Article 27(1).

⁴² “Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” ECHR, *supra* n.7 Article 14.

⁴³ *Case of A. and Others v. The United Kingdom* App no. 3455/05 (ECtHR, 19 February 2009)109, 191.

⁴⁴ ICCPR, Article 4(1),(2).

⁴⁵ General Comment No. 29 States Of Emergency (Article 4) *supra* n.24 at p.3.

European Court of Human Rights (ECtHR) asserted that it would be working against the object and purpose of Article 15 if “when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation”.⁴⁶

The ACHR also states that the derogation only last for a time period strictly required.⁴⁷ The ECHR provides less temporal restriction.⁴⁸ Though arguably if derogations are only permissible as is strictly required by the exigencies of the situation then temporal scope may be implicit, this has become apparent in the judgements of the ECtHR.⁴⁹

All three treaties are subject to monitoring systems. For the ICCPR and ACHR this includes submission and scrutiny of periodical State reports to the Human Rights Committee⁵⁰ and the Inter-American Commission on Human Rights⁵¹ respectively. The ACHR established The Inter-American Court of Human Rights⁵² that can exercise adjudicatory and advisory jurisdiction over member States.⁵³ The ECtHR rule on individual and state complaints regarding violations of the ECHR and produce binding judgements.⁵⁴ When derogations occur, all three treaties state that the Secretary-General of the relevant organisation must be informed, namely the UN, Council of Europe and Organisation of American States respectively.⁵⁵

⁴⁶ Case of Sakik and Others v. Turkey (Merits and Just Satisfaction) [26 November 1997] ECtHR VII 34-39.

⁴⁷ ACHR, Article 27(1).

⁴⁸ ICCPR, Article 4(3); ECHR, Article 15(3).

⁴⁹ See supra n.46 at p.39.

⁵⁰ UN Human Rights Committee, Aug. 04, 2004, *Rules of Procedure of the Human Rights Committee*, UN Doc. CCPR/C/3/Rev.7 66(1)(2).

⁵¹ ACHR, Article 41(b)(d).

⁵² ACHR, Chapter VIII.

⁵³ Organization of American States (1979), *Statute of the Inter-American Court of Human Rights*, La Paz Bolivia, Resolution No. 448; Article 2.

⁵⁴ ECHR, Article 46.

⁵⁵ ICCPR, Article 4(3), ACHR, Article 27(3), ECHR, Article 15(3).

Theory of just derogations

To justify: “The end justifies the means if the result is right and the means used to reach it are acceptable”.⁵⁶

When viewed in light of human rights being grounded in the inherent dignity of the individual, Immanuel Kant's moral reasoning that the individual be seen as an ends in him/herself and not merely a means to an end, must be applied.⁵⁷ The moral theory of human rights in natural law asserts that because human rights are rooted in the dignity of persons they are timeless and universal (Amstutz, 2005: 85).⁵⁸ Furthermore the German philosopher Radbruch asserted that unjust laws have to be opposed by virtue of a higher, natural law.⁵⁹ Thus a justifiable end via the means of a derogation must, not only be legal in a positivist sense but, also be rooted in the protection or promotion of natural human dignity.

With regard to acceptable means, as explored earlier, derogations cannot violate norms or non-derogable rights and are only permitted as required by the exigencies of the situation. Within these criteria, derogations should also aim at maintaining public order, allowing for the fullest enjoyment of human rights during an emergency,⁶⁰ and continue to protect and promote human rights.⁶¹

'Public order' is defined in the Siracusa Principles as “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.” Respect for human rights is part of public order and “State organs or agents responsible for the maintenance of public order shall be subject to controls in the exercise of their

⁵⁶ Peter H. Collin, *Dictionary of Law* (4th ed., Bloomsbury 2004) 169.

⁵⁷ Immanuel Kant, *Groundwork for the Metaphysics of Morals*, Allen Wood (ed.) and (trans.), Yale University Press 2002) at p.48, Evan J. Criddle & Evan Fox-Decent, *supra* n.30 at p. 52

⁵⁸ Mark R. Amstutz (2005), *International Ethics: Concepts, theories, and cases in global politics* (2nd ed., Rowman & Littlefield Publishers 2005) 85.

⁵⁹ See *supra* n. 30 at p.54.

⁶⁰ Evan J. Criddle & Evan Fox-Decent, *see supra* n.26 at pp.42 and 47

⁶¹ Hurst Hannum, “Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding” [2006] *Human Rights Quarterly*, 1 56.

power through the parliament, courts, or other competent independent bodies”.⁶²

These aspirations will be applied to two examples for further examination.

Examples of derogations

Case 1

In 2003 the US Secretary of Defence authorised techniques used on detainees in Guantanamo Bay, that were deemed to be degrading treatment and possibly torture.⁶³ The emergency was argued to be the war on terror, found not to be an armed conflict by the Commission on Human Rights (CHR) who also noted that the Secretary-General of the UN had not been notified of any derogation.⁶⁴ The US was found to have derogated from Article 7: degrading treatment, Article 9: arbitrary detention, Article 14: fair trial before an independent tribunal, Article 10: right of detainees and Article 18: freedom of religion or belief. Means of derogation included, according to the CHR; “The executive branch of the United States Government operates as judge, prosecutor and defence counsel of the Guantánamo Bay detainees”.⁶⁵ Furthermore the CHR found that the US Administration made attempts to redefine ‘torture’ allowing for interrogation techniques that were described by individuals as having caused them severe pain or suffering.⁶⁶

The questionable nature of the emergency coupled with the fact that the UN Secretary-General was not informed of any derogation makes the use of derogation illegal under the obligations of the ICCPR, to which the USA is a member state.⁶⁷ Article 7 is a non-derogable right⁶⁸ as well as an international norm.⁶⁹ Article 18 is listed as a non-

⁶² UN Doc E/CN.4/1984/4, *see supra* 35 at pp.22-24.

⁶³ UNCHR, *Situation of Detainees at Guantanamo Bay*, February 27, 2006, UN Doc E/CN.4/2006/120 50, 51

⁶⁴ *Ibid* at p.83.

⁶⁵ *Ibid* 84,85,87, 89, 91.

⁶⁶ *Ibid* 86,87.

⁶⁷ United Nations Treaty Collection, 'International Covenant on Civil and Political Rights', [Online: Web] Accessed 18 March 2014, URL: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

⁶⁸ ICCPR, Article 4.

derogable right.⁷⁰ Judicial rights when concerned with non-derogable rights, i.e. the use of degrading treatment, become non-derogable themselves.⁷¹ These derogations were illegal regardless of the exigencies of the situation.

The intelligence gained from the detainees could be argued to prevent terrorist attacks and save lives. The argument that States have the obligation to protect their citizens' right to life and therefore may strip suspected terrorists of their rights is however an incorrect interpretation.⁷² Jurisprudence suggests that States' obligation to protect the right to life includes investigating threats and providing protection when threats are immediate and known about. Furthermore States have the duty to investigate, prosecute and provide remedies to victims and their families.⁷³

The means undertaken by the US were found to be derogating from norms and non-derogable rights, and not required by the exigencies of the situation.⁷⁴ The CHR found certain derogations as unjustifiable means to maintain public order⁷⁵ and that derogations, specifically from Article 18, cannot be justified as needed to maintain such order.⁷⁶ The Inter-American Commission on Human Rights in their *Report on Terrorism and Human Rights* stated that components of the right to a fair trial cannot be suspended including *inter alia* "the right to a fair trial by a competent, independent and impartial court"⁷⁷ a right the UN found the US to have derogated from.⁷⁸ The CHR recommended

⁶⁹ Situation of Detainees at Guantanamo Bay, *see supra* n.67, at p.42.

⁷⁰ ICCPR, Article 4.

⁷¹ General Comment No. 29 States of Emergency (Article 4), *See Supra* n.24, at p.15.

⁷² Ilias Bantekas & Lutz Oette, *see supra* n.30 at p. 620

⁷³ *Case 12.308* (Manoel Leal De Oliveira, Brazil) [March 17 2010] Report No 37/10 Publication Article 51 86

⁷⁴ Situation of Detainees at Guantanamo Bay, *Supra* n.67 at 42.

⁷⁵ *Ibid* at 14.

⁷⁶ *Ibid* 58.

⁷⁷ Inter-American Commission on Human Rights *Report on Terrorism and Human Rights* (22 October 2002) OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 247.

⁷⁸ Situation of Detainees at Guantanamo Bay, *see supra* n.63, at pp/.50-51.

that the US train personnel of detention facilities to respect international human rights standards.⁷⁹

These means adopted by the US were illegal and did not protect or promote human rights. These derogations cannot be justified.

Case 2

The UK derogated from certain judicial rights; Article 5(3),⁸⁰ (5)⁸¹ of the ECHR in *Brannigan and McBride v United Kingdom*.⁸² These two rights are not listed as non-derogable by the ECHR⁸³ or ICCPR.⁸⁴ The threat of terrorism relating to N.Ireland constituted an emergency⁸⁵ and suspected terrorists were detained for up to 7 days without judicial intervention.⁸⁶ The ECtHR had previously ruled it unlawful to detain individuals for 4 days without judicial intervention, this was however during a time when the UK had not officially derogated.⁸⁷ This time they had officially derogated.⁸⁸

The ECtHR stated that a margin of appreciation be applied as the UK Government is better positioned to understand the nature of the emergency than an international

⁷⁹ *Ibid* 101.

⁸⁰ ECHR, Article 5(3): “Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

⁸¹ ECHR, Article 5(5): “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

⁸² Case of *Brannigan and McBride v. The United Kingdom* App no. 14553/89; 14554/89 ECHR, 25 May 1993

⁸³ ECHR, Article 15.

⁸⁴ ICCPR, Article 4.

⁸⁵ Case of *Brannigan and McBride v. The United Kingdom*, see *supra* n.86 at p.46.

⁸⁶ *Ibid* at 48.

⁸⁷ Case of *Brogan and Others v. The United Kingdom* App no. 11209/84; 11234/84; 11266/84; 11386/85 ECHR, 29 November 1998; 62

⁸⁸ Case of *Brannigan and McBride v. The United Kingdom*, see *supra* n.86, at p.31.

judge.⁸⁹ The Court found the derogation justified as the UK did not exceed their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.⁹⁰ It has been argued that the Court was somewhat lenient, offering a wide margin of appreciation.⁹¹ The Court also stated that the UN HRC did not declare a violation of Article 4 of the ICCPR had occurred.⁹²

The right to life is a non-derogable right,⁹³ and in both the ICCPR and ECHR is the first listed provision concerning rights.⁹⁴ The lives lost and injury suffered from terrorist attacks⁹⁵ was a threat to public order. Potential lives saved and the 1993 Anglo-Irish Pact⁹⁶ stand as testament that the ends were rooted in the protection of human dignity, i.e. the right to life. The means, by way of derogation, was lawfully ruled to have not

⁸⁹ *Ibid* 43.

⁹⁰ *Ibid* 66.

⁹¹ Marks, Susan (1993), "Terrorism and Derogation under the European Convention on Human Rights" *The Cambridge Law Journal*, 360 361.

⁹² Case of Brannigan and McBride v. The United Kingdom, *see supra* n.86, at p.69.

⁹³ ICCPR, Article 4; ECHR, Article 15.

⁹⁴ ICCPR, Article 6; ECHR, Article 2

⁹⁵ Cohen, Nick et al. (1993), "The Bishopsgate Bomb: One bomb: pounds 1bn devastation: Man dead after City blast - Two more explosions late last night", *The Independent*, [25 April 1993], Accessed 18 March 2014 URL:<http://www.independent.co.uk/news/the-bishopsgate-bomb-one-bomb-pounds-1bn-devastation-man-dead-after-city-blast--two-more-explosions-late-last-night-1457397.html>; SR, "1993: Child killed in Warrington bomb attack", British Broadcasting Corporation (20 March 1993) Accessed 18 March 2014 URL: http://news.bbc.co.uk/onthisday/hi/dates/stories/march/20/newsid_2544000/2544121.stm; Foster, Jonathan & McKittrick, David (1992), "IRA widens bomb campaign: Manchester shoppers hurt as attacks on commerce switch away from London", *The Independent*, [4 December 1992], Accessed 18 March 2014 URL:<http://www.independent.co.uk/news/ira-widens-bomb-campaign-manchester-shoppers-hurt-as-attacks-on-commerce-switch-away-from-london-1561326.html>; Staff Reporter, British Broadcasting Corporation (1983), "1983: Harrods bomb blast kills six" [17 December 1983], Accessed 18 March 2014, URL: http://news.bbc.co.uk/onthisday/hi/dates/stories/december/17/newsid_2538000/2538147.stm; Bingham, John (2013), "Margaret Thatcher: Seconds from death at the hands of an IRA bomber", *The Telegraph*, [8 April 2013], Accessed 18 March 2014, URL: <http://www.telegraph.co.uk/news/politics/margaret-thatcher/9979915/Margaret-Thatcher-Seconds-from-death-at-the-hands-of-an-IRA-bomber.html>.

⁹⁶ Staff Reporter, British Broadcasting Corporation (1993), '1993: Anglo-Irish pact paves way for peace' *British Broadcasting Corporation*, [15 December 1993], Accessed 18 March 2014 URL: http://news.bbc.co.uk/onthisday/hi/dates/stories/december/15/newsid_4032000/4032141.stm.

exceeded that required by the exigencies of the situation⁹⁷ and there was no derogation from norms or non-derogable rights. Furthermore the derogations, by combating terrorism, can be argued to have aided the maintenance of public order and protected the right to life.⁹⁸ This derogation was justifiable.

It is worth noting here that the UK has however been found to have not acted in compliance with Article 5 in further counter-terrorism cases, such as in *Serdar Mohammed & Others v. Secretary of State for Defence* where an individual was held for almost four months in a detention found to be unlawful and arbitrary,⁹⁹ drawing criticism from Amnesty International.¹⁰⁰ In this case it would be far easier to argue that the UK's derogations were unjust.

With regard to the above cases the assertion of the European Union counter-terrorism coordinator is worthy of mention: "The rule of law, good governance, and protection of basic freedoms are among the strongest tools in the fight against terrorism. Terrorist movements often arise in societies where human rights are denied and opportunities for political expression are lacking. This is why the European Union and its partners must make a priority - some would say: more of a priority - of combating human rights violations."¹⁰¹

Conclusion

Human rights and dignity are closely linked in human rights law, and the former is stated as being derived from the latter in the ICCPR and ICESCR. Dignity is a malleable term, culturally and temporally relevant. For the purpose of this study dignity meant worthy of respect.

The ICCPR, ACHR and ECHR are human rights treaties containing provisions

⁹⁷ Case of Brannigan and McBride v. The United Kingdom, *see supra* n.82, at p.66.

⁹⁸ *Ibid* 55-60.

⁹⁹ *Serdar Mohammed & Others v. Secretary of State for Defence* [2015] EWCA Civ 843.

¹⁰⁰ Amnesty International, 'Annual Report: United Kingdom 2015/2016' (*Amnesty International* 2016).

¹⁰¹ De Vries, Gijs (2006), "Check Against Delivery" Address to the crowd on receiving the Ramon Trias Fargas Memorial on 16 November 2006 :Barcelona.

regarding derogations. International norms and non-derogable rights may not be derogated from. The derogations are only allowed during emergencies, of varying definition, and must be required by the exigencies of the situation. It has been argued however that suspension of certain laws has been used by States to allow for human rights violations. Member States are all subject to various monitoring systems.

To make derogation justifiable the ends must justify the means brought about in an acceptable manner. The individual needs to be viewed as an ends and not a means, the ends must be rooted in the dignity of the individual. For the means to be acceptable it needs to be legal, maintain public order and protect or promote human rights.

In Case 1, the ends, was an incorrect interpretation of a States obligation to protect the right to life. The means were not required by the exigencies of the situation and were found to not be needed to maintain public order and protect or promote human rights thus the derogations were not justified. In Case 2 however, the ends was rooted in protecting human dignity and the means helped to maintain public order, protect human rights and were judged to not exceed that required by the exigencies of the situation making the derogations justified.

References

1. *African Charter on Human and Peoples' Rights* Oct. 21, 1986. 21 ILM 58
2. *American Convention on Human Rights*, 'Pact of San Jose, Costa Rica' Nov. 22, 1969, OASTS 36
3. Amnesty International, 'Annual Report: United Kingdom 2015/2016' (*Amnesty International* 2016).
4. Amnesty International: (2015) *Death Sentences and Executions 2014*. [Online: Web] Accessed 01 April, 2016, URL: https://www.amnesty.org.uk/sites/default/files/death_sentences_and_executions_2014_en.pdf.
5. Bantekas, Ilias & Oette, Lutz (2013), *International Human Rights Law and Practice* 74-75, 327-328, Cambridge: Cambridge University Press,
6. Bingham, John (2013), "Margaret Thatcher: Seconds from death at the hands of an IRA bomber", *The Telegraph*, [8 April 2013], Accessed 18 March 2014, URL: <http://www.telegraph.co.uk/news/politics/margaret-thatcher/9979915/Margaret-Thatcher-Seconds-from-death-at-the-hands-of-an-IRA-bomber.html>

7. Case of A. and Others v. The United Kingdom App no. 3455/05 (ECtHR, 19 February 2009)109, 191.
8. Case of Brannigan and McBride v. The United Kingdom App no. 14553/89; 14554/89 ECHR, 25 May 1993
9. Case of Brogan and Others v. The United Kingdom App no. 11209/84; 11234/84; 11266/84; 11386/85 ECHR, 29 November 1998; 62
10. Case of Sakik and Others v. Turkey (Merits and Just Satisfaction) [26 November 1997] ECtHR VII 34-39.
11. Cohen, Nick et al. (1993), "The Bishopsgate Bomb: One bomb: pounds 1bn devastation: Man dead after City blast - Two more explosions late last night", *The Independent*, [25 April 1993], Accessed 18 March 2014, URL: <http://www.independent.co.uk/news/the-bishopsgate-bomb-one-bomb-pounds-1bn-devastation-man-dead-after-city-blast-two-more-explosions-late-last-night-1457397.html>;
12. *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended)
13. De Vries, Gijs (2006), "Check Against Delivery" Address to the crowd on receiving the Ramon Trias Fargas Memorial on 16 November 2006: Barcelona.
14. Donnelly, Jack (1982), "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights", *The American Political Science Review*, Vol 76, No 2. 303-315.
15. Foster, Jonathan & McKittrick, David (1992), "IRA widens bomb campaign: Manchester shoppers hurt as attacks on commerce switch away from London", *The Independent*, [4 December 1992], Accessed 18 March 2014, URL: <http://www.independent.co.uk/news/ira-widens-bomb-campaign-manchester-shoppers-hurt-as-attacks-on-commerce-switch-away-from-london-1561326.html>;
16. Gander, Kashmira (2014) "Thailand declares state of emergency in bid to quell Bangkok protests", *The Independent*, Bangkok, [21 Jan 2014] Accessed 31 March 2016, URL:<http://www.independent.co.uk/news/world/asia/thailand-declares-state-of-emergency-to-deal-with-ongoing-anti-government-protests-9074790.html>

17. Hurst Hannum, “Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding” [2006] *Human Rights Quarterly*, 1 56.
18. Immanuel Kant, *Groundwork for the Metaphysics of Morals*, Allen Wood (ed.) and (trans.), Yale University Press 2002)
19. Inter-American Commission on Human Rights *Report on Terrorism and Human Rights* (22 October 2002) OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 247.
20. International Covenant on Civil and Political Rights (1976) 999 UNTS 171
21. International Covenant on Economic, Social and Cultural Rights (1976) 993 UNTS 3
22. International Law Commission (14th session) Jun. 28, 1930, Convention concerning Forced or Compulsory Labour: May 01, 1932, Geneva, Article 2.
23. J. Criddle, Evan & Fox-Decent, Evan (2012), *Human Rights, Emergencies, and the Rule of Law* *Human Rights Quarterly*, 39 41.
24. Jonathan Law (ed.), *Oxford Dictionary of Law* (7th ed., Oxford University Press 2013) 166.
25. Kofi A. Annan (2005), “In larger freedom: towards development, security and human rights for all”, *Report of the Secretary-General*, UN Doc. A/59/565, 21 March 2005.
26. Mark R. Amstutz (2005), *International Ethics: Concepts, theories, and cases in global politics* (2nd ed., Rowman & Littlefield Publishers 2005) 85.
27. Marks, Susan (1993), “Terrorism and Derogation under the European Convention on Human Rights” *The Cambridge Law Journal*, 360 361.
28. Maurice Waite (ed.), *Oxford English Dictionary* (7th ed., Oxford University Press 2012) 230.
29. McCrudden, Christopher (2008), “Human Dignity and Judicial Interpretation of Human Rights”, *The European Journal of International Law*, 655, 656 – 663.
30. N. Shaw, Malcolm (2013), *International Law*, 6th edn., 124-125, Cambridge: Cambridge University Press 2013.

31. Organization of American States (1979), *Statute of the Inter-American Court of Human Rights*, La Paz Bolivia, Resolution No. 448; Article 2.
32. Peter H. Collin, *Dictionary of Law* (4th ed., Bloomsbury 2004) 169.
33. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414 Article 6(2).
34. *Serdar Mohammed & Others v. Secretary of State for Defence* [2015] EWCA Civ 843.
35. Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex (1984) UN Doc E/CN.4/1984/4.
36. Staff Reporter, British Broadcasting Corporation (1983), "1983: Harrods bomb blast kills six" [17 December 1983], Accessed 18 March 2014, URL: http://news.bbc.co.uk/onthisday/hi/dates/stories/december/17/newsid_2538000/2538147.stm
37. Staff Reporter, British Broadcasting Corporation (1993), "1993: Child killed in Warrington bomb attack", British Broadcasting Corporation (20 March 1993) Accessed 18 March 2014, URL: http://news.bbc.co.uk/onthisday/hi/dates/stories/march/20/newsid_2544000/2544121.stm
38. Staff Reporter, British Broadcasting Corporation (1993), '1993: Anglo-Irish pact paves way for peace' *British Broadcasting Corporation*, [15 December 1993], Accessed 18 March 2014 URL: http://news.bbc.co.uk/onthisday/hi/dates/stories/december/15/newsid_4032000/4032141.stm
39. The Charter of the United Nations 1945
40. *UN Committee Against Torture*, Jun. 20, 2014 *Concluding observations on the initial report of Thailand* UN Doc CAT/C/THA/CO/1 at pp.19-21.
41. UN Human Rights Committee 'General Comment No. 29 States of Emergency (Article 4) (Aug. 31, 2001) UN Doc CCPR/C/21/Rev.1/Add.11 at p.13
42. UN Human Rights Committee, Aug. 04, 2004, *Rules of Procedure of the Human Rights Committee*, UN Doc. CCPR/C/3/Rev.7 66(1)(2).

43. UNCHR, *Situation of Detainees at Guantanamo Bay*, February 27, 2006, UN Doc E/CN.4/2006/120 50, 51
44. United Nations Human Rights Office of the High Commissioner: Special Rapporteur on contemporary forms of slavery, including its causes and consequences.[Online: Web] Accessed 01 April 2016, URL: <http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SRSlaveryIndex.aspx>
45. Universal Declaration of Human Rights 1948

Critique

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