AN EVALUATION OF THE EMERGENCY POWERS AND PROTECTION OF HUMAN RIGHTS IN THE PEOPLES REPUBLIC OF CHINA.

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1.0 Introduction

To acknowledge and protect human rights are the main themes of our current world. No country or government in this contemporary world would consider human rights as a bad term, an awful concept or an unpopular glossary. However, the issue is, what rights should one protect in times of state of emergency declared by the state and how should these rights be protected. Internationally and locally, these questions have been viewed with examinations of theories and testing of practices. One could proclaim in a non-exaggerating way that, there lies doubts in adequately protecting human rights of citizens especially during period of state of emergency.[1]

In many democratic states like Peoples' Republic of China, there are a selection of legal definitions for specific states of emergency, when the constitution of the State is partially in abeyance depending on the nature of the perceived threat to the general public. In order of severity these may include:

1. Martial law when civil rights are severely restricted by the imposition of military force within a Sovereign state, for example during a period of extreme threat of invasion or actual hostilities by foreign forces.
2. State of siege when the civil rights of specified persons or groups such as political activists are likely to be curtailed, for example to prevent an insurrection or organized acts of treason by suspected agents provocateurs.

[1] From the angle of international laws in human rights, particularly in probing the system for limiting human rights through the angle of *The International Covenant of Civil and Political Rights*, I think a consensus has been accorded internationally. In which we can say that the works done by Fred·Novak in his *The Annotation to the International Covenant on Civil and Political Rights* (Chinese version translated by Bi Xiaoqing and Sun Shiyan, by Life·Reading·New Knowledge Sanlian Book Shop, 2003 edition) could represent the overall research standard in this aspect. Probing on system at respective level could only be taken steps further when the new system emerges.

3. Civil emergency dealing with disaster areas and requiring the deployment of extraordinary resources to contain dangerous situations such as natural disasters or extensive malicious property damage such as may occur during rioting or by arson. As well as regular emergency services sometimes military forces may be assigned to deliver aid under especially dangerous conditions or to prevent looting

Sometimes, the state of emergency can be abused by being invoked. An example would be to allow a state to suppress internal opposition without having to respect human rights. Derogations by states having ratified or acceded to binding international agreements such as the ICCPR, the American and European Conventions on Human Rights and the International Labour Conventions are monitored by independent expert committees, regional Courts and other State Parties.[2]

Under a stable social system, human rights protection is a must in the legal constitution; however, in the case of a non-stable social system, how to protect the citizens' rights would be a comparatively difficult issue. Its difficulty lies in how to draw a line between the extraordinary manipulation of government powers and the legal rights possess by the citizens. This presentation intends to analyze the reasons for derogation of human rights during the state of emergency, summarize briefly the purposes and limits of the derogation of limiting human rights in the state of emergency in Peoples' Republic of China.

2.0 Emergency Powers of a State

In times of emergency, a government is empowered to perform actions that it would normally not be permitted to do. A government can declare during an emergency eg during a disaster, civil unrest, or armed conflict total or partial suspension of the law of the land. Such declarations alert citizens to change their normal behavior and orders government agencies to implement emergency plans. *Justitium* is its equivalent in Roman law a concept in which the senate could put forward a final decree (senatus consultum ultimum) that was not subject to dispute. States of emergency can also be used as a rationale or pretext for suspending rights and freedoms guaranteed under a country's constitution or basic law. The procedure for and legality of doing so vary from country to country.[3]

A State of Emergency is called when a "community" has had a disaster that exceeds their resources.
A community can be a local government like a village or city, a tribal area, a county, a state or even the entire country. Some examples of calling a State of Emergency are…
•Hurrican Irma

•Hurrican Harvey

•Island-wide blackout in Puerto Rico

[2] https//en wikipedia.org//state of emergency

[3] ibid

•Riots in Baltimore after the death of Freddie Gray

The reason a community will declare a State of Emergency is because the federal government does not have the authority to step in and take over an emergency scene. They have to be requested by a mayor, county president, governor etc.

Under international law, rights and freedoms may be suspended during a state of emergency; for example, a government can detain persons and hold them without trial. Most rights that can be derogated from are listed in the International Covenant for Civil and Political Rights. Non-derogable rights cannot be suspended. Non-derogable rights are listed in Article 4 of the ICCPR; they include right to life, the rights to freedom from arbitrary deprivation of liberty, slavery, torture, and ill-treatment. [4]

Some countries have made it illegal to modify emergency law or the constitution during the emergency; other countries have the freedom to change any legislation or rights based constitutional frameworks at any time that the legislative chooses to do so. Constitutions are contracts between the government and the private individuals of that country. The International Covenant for Civil and Political Rights (ICCPR) is an international law document signed and ratified by states. Therefore, the Covenant applies to only those persons acting in an official capacity, not private individuals.

However, States Parties to the Covenant are expected to integrate it into national legislation. The state of emergency (within the ICCPR framework) must be publicly declared and the Secretary-General of the United Nations and all other States Parties to the Covenant must be notified immediately, to declare the reason for the emergency, the date on which the emergency is to start, the derogations that may take place, with the timeframe of the emergency and the date in which the emergency is expected to finish. Although this is common protocol stipulated by the ICCPR, its monitoring Committee of experts has no sanction power and its recommendations are therefore not always strictly followed; enforcement is therefore better regulated by the American and European Conventions and Courts on human rights.[5]

Though fairly uncommon in democracies, dictatorial regimes often declare a state of emergency that is prolonged indefinitely for the life of the regime, or for extended periods of time so that derogations can be used to override human rights of their citizens usually protected by the International Covenant on Civil and political rights. In some situations, martial law is also declared, allowing the military greater authority to act. In other situations, emergency is not declared and de facto measures taken or decree-law adopted by the government.

Ms. Nicole Questiaux (France) and Mr. Leandro Despouy (Argentina), two consecutive United Nations Special Rapporteurs, have recommended to the international community to adopt the following "principles" to be observed during a state or de facto situation of emergency :

1. Principles of Legality,
2. Proclamation,
3. Notification,

[4] Nicole Questiaux and Leandro Despouy "Question of Human Rights and State of Emergency"Journal on Perspective on state of emergency in countries p.56

[5] ibid

4. Time Limitation,
5. Exceptional Threat,
6. Proportionality,
7. Non-Discrimination,
8. Concordance and Complementarity of the Various Norms of International Law[6]

Article 4 to the International Covenant on Civil and Political Rights (ICCPR), permits states to derogate from certain rights guaranteed by the ICCPR in "time of public emergency". Any measures derogating from obligations under the Covenant, however, must be to only the extent required by the exigencies of the situation, and must be announced by the State Party to the Secretary-General of the United Nations. The European Convention on Human Rights and American Convention on Human Rights have similar derogatory provisions. No derogation is permitted to the International Labour Conventions.[7]

3.0 Emergency Powers and Protection of Rights in Peoples Republic Of China

Over the years China has upheld the law-based governance of the country as a basic guideline, striving to put the rule of law in a socialist context and making new progress in legal protection of human rights. Since the 18th CPC National Congress, the Party's Central Committee has maintained people-oriented development. As an integral part of its effort to modernize the state governance system and capacity, it has created a strategy of fully enforcing the law-based governance of the country, giving more weight to respecting and ensuring human rights in building socialism under the rule of law, and opening a new era of legal protection of human rights in China.

In implementing the law-based governance of the country, China has upheld human rights in every link of the process, from legislation through law enforcement and judicial justice to a law-abiding society. Respecting and ensuring human rights has become an important principle in legislation, and the socialist legal system with Chinese characteristics, with the Constitution at its core, has been steadily improved. Law-based governance has been further implemented, and the exercise of administrative power has been regulated to a fuller extent. Judicial reform has been extended, with the goal of ensuring fairness and justice in every case handled. Further progress has been made in ensuring the rule of law for society, with a significant improvement in elevating public awareness in law and human rights, and the CPC[8], upholding law-based governance, has laid a solid foundation for legal protection of human rights.

[6] www.nuigalway.ie › sites › eu-china-humanrights › seminars E/CN.4/Sub.2/1997/19, at Chapter II..

[7] Some political theorists, such as Carl Schmitt, have argued that the power to decide the initiation of the state of emergency defines sovereignty itself. In State of Exception (2005), Giorgio Agamben criticized this idea, arguing that the mechanism of the state of emergency deprives certain people of their civil and political rights, producing his interpretation of homo sacer.

[8] The rule of law is a symbol of human progress, and serves as the guarantee for ensuring human rights. It is the determination and ultimate goal of the Communist Party of China (CPC) and the Chinese government to fully implement law-based governance of the country, strengthen legal protection of human rights in all areas, ensure that the Chinese people fully enjoy their rights and freedoms, achieve social fairness and justice, and promote overall human development and social progress.

After recurrent years of strenuous effort in reform and development of China's constitution,[9] China has made remarkable progress in law based human rights protection[10]. People's basic rights and freedoms are now better protected under Chinese socialism. The undertaking of human rights protection in China has made much headway. Committed to a great and unprecedented cause, China is contributing to the diversity of human civilization and providing Chinese wisdom and solutions to promote social progress.

The constitution of China also provides for powers to be exercised during a period of emergency. Such power is provided in Article 80 of the Constitution of the People's Republic of China, as adopted on December 4, 1982[11] which provides:

> *…The President of the People's Republic of China, in pursuance of the decisions of the National People's Congress and its Standing Committee, promulgates statutes, appoints or removes the Premier, Vice Premiers, State Councilors, Ministers in charge of ministries or commissions, the Auditor- General and the Secretary-General of the State Council, confers state medals and titles of honor; issues orders of special pardons; proclaims entering of the state of emergency; proclaims a state of war; and issues mobilization orders.*

3.1 What is a State of Emergency

A state of emergency derives from a governmental declaration made in response to an extraordinary situation posing a fundamental threat to the country. The declaration may suspend certain normal functions of government, may alert citizens to alter their normal behavior, or may authorize government agencies to implement emergency preparedness plans as well as to limit or suspend civil liberties and human rights.[12] The need to declare a state of emergency may arise from situations as diverse as an armed action against the state by internal or external elements, a natural disaster, civil unrest, an epidemic,[13] a financial or economic crisis or a general strike. States of emergency are not uncommon occurrences, particularly in dictatorial regimes where the state of emergency may endure as long as the regime lasts. In some situations, martial law is also declared, allowing the military greater authority to act. Other terms for referring to emergency situations are state of exception, state of alarm and state of siege.

3.2 What are the key components of a State of Emergency

States of emergency have two components: (i) a legal framework consisting of the constitutional and legislative bases for the state of emergency, and (ii) an operational framework involving the organizational structure and strategic plans for dealing with the state of emergency. While separate, these components must be compatible; in other words, the legal framework must take into account operational requirements, and the operational requirements must respect the legal framework, including

[9] www.nuigalway.ie › sites › eu-china-humanrights ›
[10] The Fundamental rights of the Chinese are provided under Chapter 2 of the constitution fr0m Articles 33 to 51
[11] Article 80 of the Constitution of the People's Republic of China, as adopted on December 4, 1982
[12] Article 23 of the Peoples' Republic of China constitution of 1947 recognises the limitation of these rights in times of emergencies, however the article has been removed in the 1982 constitution (as amended CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA First Session of the Thirteenth National People's Congress on March 11, 2018)
[13] ibid

international law. Focusing on the legal framework, this backgrounder will deal with democratic accountability, human rights and the rule of law during states of emergency because the implementation of emergency law invariably leads to restrictions on normal economic, civil or political activity and rights in order to address the extraordinary circumstances that have given rise to the emergency situation.

Certain restrictions may be fully justified. At the same time, there is a danger that a government will take advantage of a state of emergency to introduce unwarranted restrictions on human rights and civil liberties, to neutralise political opponents, to postpone elections, or for other self-serving purposes that would be more difficult to pursue under normal circumstances. In some countries, there has been a tendency to maintain states of emergency for years or even decades, long after the original reason for its proclamation has disappeared. The danger that a "constitutional dictatorship" can arise out of a state of emergency should not be understated.

A country's constitution or legislation normally describes the circumstances that can give rise to a state of emergency, identifies the procedures to be followed, and specifies limits on the emergency powers that may be invoked or the rights that can be suspended. While each country will want to define its own practices, international norms have developed that can provide useful guidance for example, important international treaties such as the European Convention of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) stipulate that states are to observe the following principles[14]. They are:

1. Temporality - this refers to the exceptional nature of the declaration of a state of emergency.
2. Exceptional threat - the crisis must present a real, current or at least an imminent danger to the community.
3. Declaration - the state of emergency must be announced publicly; this informs citizens of the legal situation and reduces the possibility of a de facto state of emergency, that is, a situation whereby the state restricts human rights without officially proclaiming a state of emergency .
4. Communication - notification of the measures taken must be made to other states and relevant treaty-monitoring bodies; for example, if a state is to derogate from its obligations under the ECHR or ICCPR then it must inform the Secretary General of respectively the Council of Europe or the UN of its derogation, the measures it has taken and the reasons therefore, as well as the termination of the derogation.
5. Proportionality: the measures taken to counter the crisis must be proportional to the gravity of the emergency situation; this applies to the area of application, their material content and their duration.
6. Legality: human rights and fundamental freedoms during a state of emergency must respect the limits provided for by the relevant instruments of international and national law;

Furthermore, a state of emergency does not imply a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality, by which they are bound at all times.

[14] ibid

3.3 Rights not Limited in the event of a State of Emergency

Certain human rights are non-derogable under any circumstances. The ECHR and the ICCPR identify these rights as follows: 1.) the right to life 2.) prohibition of torture 3.) freedom from slavery 4.) freedom from post facto legislation and other judicial guarantees 5.) the right to recognition before the law 6.) freedom of thought, conscience and religion. 7.) the humane treatment of all persons deprived of their liberty • prohibitions against hostage-taking and unacknowledged incarceration 8.) protection of the rights of persons belonging to minorities 9.) the prohibition of propaganda advocating war or national, racial, or religious hatred 10.) procedural guarantees and safeguards designed to ensure the integrity of the judicial system.

3.4 Special Powers proclaimed in a State of Emergency

Special emergency powers are granted to the government by virtue of the constitution[15] or statutory laws. Examples of emergency measures or powers range widely, for example: the restriction of press freedom and the prohibition of public meetings, domestic deployment of the armed forces. evacuation of people from their homes and places of work, searches of homes and other private places without a warrant, arrests without charges, confiscation of private property (with or without compensation) and/or its destruction, regulation of the operations of private enterprise, interference with financial transactions and export regulations,

Security forces assist the civilian authorities in a subsidiary role. The role of parliament in most legal systems is to ensure that the executive does not have sole authority to declare a state of emergency and provide for parliamentary ratification of the decision of the executive often, with a qualified vote. As a general rule, governments, checked by parliament, must provide a well-considered justification for both their decision to declare a state of emergency and the specific measures to address the situation. Most parliaments also have the power to review the state of emergency at regular intervals and to suspend it as necessary. This parliamentary role is especially important in long-lasting states of exception, where the principle of civilian supremacy over the security sector may be at risk. Whatever the emergency situation, the post hoc accountability powers of parliament, i.e. the right to conduct inquiries and investigations on the execution of emergency powers ought to be guaranteed by law. This is important for both assessing government behaviour and identifying lessons learned with a view to future emergencies.

For instance, in 2003, China has encountered the SARS[16] crisis. During this process, Chinese government has gradually learned the addressing method under such state of emergency; some academics have also brought up suggestions from the angle of human rights protection. For example, Professor Du Gangjian deems that, provisions on crisis addressing should state clearly the relationship between the crisis addressing measures and human rights protection. The adoption of crisis addressing

[15] As provided in 1982 constitution (as amended CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (Adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on December 4, 1982 Amended in accordance with the Amendments to the Constitution of the People's Republic of China adopted respectively at the First Session of the Seventh National People's Congress on April 12, 1988, the First Session of the Eighth National People's Congress on March 29, 1993, the Second Session of the Ninth National People's Congress on March 15, 1999, the Second Session of the Tenth National People's Congress on March 14, 2004, and the First Session of the Thirteenth National People's Congress on March 11, 2018).

[16] www.nuigalway.ie › sites › eu-china-humanrights › seminars

measures should not discretionally infringe the fundamental human rights.

The addressing of SARS crisis shows that crisis addressing provision needs to pay attention to the following issues: (1) To identify and to decide the announcement of the state of crisis and to adopt the limitation of rights and scope for the main form of the measures for the crisis. Adopt the necessary emergency measures; but non-regulated and necessary actions should be avoided. From China's point of view, the Emergency Bye-law for Break Out of Public Hygiene Incident has made clear regulations on measures to be adopted, powers to be executed by the government and relevant department in the state of post-crisis-break out. (2) The standard and scope to be addressed need to be clearly identified, this is to prevent inadequate adoption of crisis measures and the scope for addressing being discretionally expanded. (3) The legal responsibility of any illegal behavior should be clearly identified. Under the situation of no legal responsibility, governmental department and staff could easily exceed their authority, and incident of discretionally infringing the fundamental rights of civilians could easily happen. Clearly identify the legal responsibility would favor various levels of governmental staff to install consciousness on obligation, thus preventing the occurrence of civilians' fundamental rights on freedom being infringed. (4) To clearly identify the means of administrative relief and jurisprudence relief for the victims. Jurisprudence relief shall always be the necessary and important part in every legal department. Laws without regulation on relief shall be a set of uncompleted laws. Victims that have been inappropriately or illegally treated during the state of emergency should be provided with clear means of administrative and jurisprudence relief. Infringement on civil rights caused by illegal behaviors should be rectified and relieved through administrative and jurisprudence measures.[17]

In Nigeria, a state of emergency is usually declared in times of great civil unrest. In recent years, it has specifically been implemented in reaction to terrorist attacks on Nigerians by the Islamic jihadist group Boko Haram.

On 14 May 2013, Goodluck Jonathan declared a state of emergency for the entire northeastern states of Borno, Yobe and Adamawa. A more limited state of emergency had been declared on 31 December 2011 in parts of Yobe, Borno, Plateau and Niger states. This earlier declaration included the temporary shutdown of the international borders in those regions.[18]

3.5 The role of the judicial system

The judicial system must continue to ensure the right to fair trial. It also must provide individuals with an effective means of recourse in the event that government officials violate their human rights. In order to guard against infringement of non-derogable rights, the right to take proceedings before a court on questions relating to the lawfulness of emergency measures must be safeguarded through independence of the judiciary. In some countries e.g., the United Kingdom, special judicial bodies may be set up during the emergency situation, whereas in other countries, extraordinary judicial bodies are

[17] Du Gangjian: The Protection of Human Rights in the State of Crisis Addressing, Law Journal, 15 May 2013.
[18] www.the nation cable.com

forbidden. By Article 123 of the Peoples' Republic of China's constitution, the Judicial Organs is headed by the People's Courts. [19]

In a state of emergency, responsibility for government must remain with civilian authorities on the national and local level. The courts can play a major role in decisions concerning the legality of a declaration of a state of emergency as well as in reviewing the legality of specific emergency measures. An emergency situation exerts enormous pressure on state and society. To deal with it effectively, governments need the cooperation of their citizens. Any abuse or unwarranted limitation of human rights in such a situation will undermine that cooperation and make it more difficult to surmount the emergency situation. A state has a vital interest in dealing with a state of emergency in an accountable and responsible manner. The role for neighbouring states and the international community during emergency situations may also affect the relations of a state with its neighbours and have implications for the international community. All states should have an interest in ensuring that the declaration and implementation of states of emergency are subject to certain limitations and proceed in accordance with international norms. The international community needs to be actively engaged in ensuring that governments observe these norms. In particular, it must work with concerned governments to secure a swift return to normalcy and the restoration of the constitutional order in which rights can again

3.6 Which branch of government can declare a State of Emergency

Most states have legal mechanisms governing the declaration of a state of emergency and the implementation of derogations. As concerns the prerogative to declare a state of emergency, the three most common approaches are the following: The executive declares the state of emergency and is obliged to inform parliament within a specified period of time; The executive declares the state of emergency but must have this ratified by parliament before it can proceed with emergency measures (e.g. Germany); Parliament itself declares the state of emergency (e.g. Hungary). Typically, a state of emergency empowers the executive to name coordinating officials to deal with the emergency and to override normal administrative processes regarding the passage of administrative rules. China declares state of emergency over drought. For example, China declared a state of emergency[20] after the worst drought in half-a-century wiped out crops in northern China and left millions of people without drinking water. The northern and central provinces of Henan and Anhui, both of which are major grain producers, estimate that they could lose as much a fifth of their wheat crop.

Both provinces are desperately poor, and home to millions of migrant workers, many of whom have been laid off by factories on China's coast. Roughly 3.7 million people and 1.9 million head of livestock do not have easy access to water. China's State Council, the equivalent of a ministerial cabinet, ordered another 300 million yuan (£30 million) of aid in addition to the 100 million yuan that has been spent on relief supplies.[21]President Hu Jintao said that all efforts must be made to save the summer grain harvest.

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[19] Article 124 of the People's Republic of China constitution establishes the Supreme People's Court and the local people's courts at different levels, military courts and other special people's courts

[20] In China, the President has the power to declare state of emergence but subject to the ratification of the Parliament. Formerly Articles 38 and 39 but now Article 80 of 1982 constitution as amended.

[13] https://www.telegraph.co.uk › news › worldnews › asia › China-declares-stat...President Hu Jintao said that all efforts must be made to save the summer grain harvest.

4.0 The Derogation of Human Rights: Reasons, Purposes and Limits

Under the circumstance of a state of emergency, there is likelihood of insufficient resources in the society, the level of protection on human rights will reduce. This is the fundamental reason for derogating human rights. In the contemporary society, a country shall assume the obligation of maintaining the benefits of its peoples, the government shall undertake the protection of human rights as its responsibility, therefore even in the case of derogating human rights, one would still require to set protecting human rights in a long term and wide scope as its final purpose, and not just for the purpose of conveniences in governing. In order to achieve the purpose of derogating human rights for the sake of human rights protection, such country should abide with some principles that consist of realistic contents and procedures. The International Covenant on Civil and Political rights as well as other global and regional covenants had provided some criterions on this.

However, the purpose of derogating human rights is still for the sake of protecting human rights from a wider vision and longer period of coverage to protect human rights in a certain regions, and not in the contrary. In social life, that sort of derogation of rights for the sake of maintaining autocratic governing or providing conveniences to the ruler would violate the fundamental purpose of derogating system. This is because that the bottom line of governing powers are to respect and protect human rights, and commencing from this point, various government measures should not discretionally infringe the fundamental human rights.

Even during the extreme period, derogating human rights should be done with constraints and not discretion. Speaking from the purpose of UN's covenant on human rights, the ultimate purpose of the provisions for derogation is not for restricting human rights, but just to allow States parties of the covenant to reduce and waive their obligations when executing the human rights covenant under the legal and constraining conditions, while at the same time protects human rights under a largest possible scope; such allowances are to cater for the States parties of the covenant when dealing with its extraordinary occasion in order to resume democratic and legal orders, and thereon benefits the protection of human rights.[22]

For example, terrorism issue is one of the main reasons that cause some countries to call for emergency. Due to the complexity, seriousness in its danger and the particularity in combating counter-terrorism, many countries have adopted extraordinary instrument. For example, in order to monitor terrorism activities, collection of information and proofs of the terrorism criminals, methods like electronic dictator, undercover searches, relaxing conditions for arrestment of suspects, mails block, auditing bank account, etc. have been widely adopted. Some even hinge on emergencies caused by serious terrorism crimes to derogate civilian rights in a large extent. Although China has not recorded actual issue of terrorism of recent, however, cases of epidemic or disaster can also warrant declaration of state of emergency e.g drought.

[22] Chen Zexian, Huang Fang: *Punishments of Terrorism Crimes and Protection of Human Rights In Accordance to Laws.*

It is instructive to note that such measures could possibly infringe the fundamental human rights like civilian privacy rights, freedom in communicating, non-infringement of accommodation, personal freedom, etc. In such situation, one should be extremely careful about the issue of human rights protection in the measures of fighting against terrorism crimes, and shall constrain special measures for counter-terrorism within a rational and legal scope. Of course, what worth paying attention to should be the counter-terrorism actions taken up by international body; as measures that cross the territory of a country would normally be adopted, and hence this would lead us into entering into the boundary of international relationship. In the scope of international relationship and international politics, the enforcement of restricting local laws would be weakening and international regulations would be relatively in shortage when comparisons are made.

5.0 Conclusion

In cases of state of emergency, the international obligation of human rights protection and governmental duties, is not often expected from the country and to exhaust the non-sustainable social resources on protecting human rights; and should also not over conservative about governmental interests (the power holders are prone in reducing civilians' interests in order to increase their own discretions) and let the minority instant-interests bloc manipulates and devours the social resources. In order to look for such consensus, the crucial issue in actual practices is to ensure a moderation of derogation to be taken into the measures. Regarding moderation, one should consider a series of actual indicators during practices.

To adopt derogating measures, one should satisfy pre-conditions like: (1) The incidents happen is threatening the survival of a country; (2) The emergency is of temporary nature and it shall not be some kind of "a curfew" or "an extraordinary state" that would last for couple of years or even several decades. During the adoption process of derogating measures, one should conform with the following principles:

(1) Conformity principles, ie. the States parties should adopt the derogating measures (degree, time) in accordance to the needs of crisis during the state of emergency, and should not go exceeding the actual situation; otherwise it would bring too much restrictions and pressures to the civilians.

(2) Non-discriminating principles, ie. the derogating measures adopted by the States parties should not include any discrimination on race, color of skin, sex, language, religion or social origin.[23]

(3) Consistency principle, ie. the States parties shall adopt measures that are not contradicting to the obligation based on international law that they are undertaking.[24] Article 4 of the UN's *Covenant of Civil and Political Rights* stipulated that: In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

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[23] Yang Yuguan: *Human Rights Law*, Chinese People's Public Security University Press, 2003 edition, p 125.

[24] Liang Shuying: ''*About the Derogation Provisions in The International Covenant on Civil and Political Rights*, quoted from *The Research on Issues Regarding the Approval and Implementation of The International Covenant on Civil and Political Rights"* edited by Chen Guangzhong, China Legal Publishing House, 2012 edition, p 80-82.

During the process of derogating rights, the fundamental rights of civilians should still be under protection. Article 4.2 of *The International Covenant of Civil and Political Rights* has also stipulated principles for non-derogable rights. The provisions stipulated, concurrently with the derogating rights, seven non-derogable rights for countries even if they are in the state of emergency when survival is being threatened. Such rights include:

(1) Every human being has the inherent right to life (Article 6). No one shall be arbitrarily deprived of his life, even it is in the state of emergency. Any death sentence made during this state shall strictly be carried out in accordance to procedures. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

(2) Torture is not allowed (Article 7). In the state of emergency, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

(3) The freedom of exempt from slavery and force-labor (Article 8). In the state of emergency, no one shall be held in either slavery or servitude. However, in the state of emergency, the government could forcibly compel its civilians in providing services and laborious works.

(4) No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation (Article 11). This means that no one shall be kept in prison just on the reason of unable to repay debts.

(5) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country (Article 14).

(6) Everyone shall have the right to recognition everywhere as a person before the law (Article 16). An individual citizen's dignity shall not be degraded in the state of emergency.

(7) Everyone shall have the right to freedom of thought, conscience and religion (Article 18). Rights as a person, thought, conscience and freedom of religion are all inherent rights, they will not obstruct the execution of administration powers in the state of emergency. The government also should not interfere the inherent dignity and belief of a person.

These non-derogable provisions could be understood as the main contents of fundamental international human rights, they reflect contents in three aspects: (1) Rights to personal life and the survival rights to the collective group;

(2) Fundamental right to recognition everywhere as a person, right of freedom as an individual body;

(3) Right in equality. The protection on these fundamental rights have already exceeded race, historical culture, economy, social system and territory and becoming a common international obligation, no country shall claim that all human rights issues are internal affairs. The derogating principles has stipulated clear restrictions on derogating rights for the States parties, derogating measures should not aim at the non-derogable rights, to protect human rights in the state of emergency is an inseparable and important part of international protection of human rights.

In July 2001, The Human Rights Committee has pointed out in Article 29 of *The General Comment on Article 4 of The International Covenant on Civil and Political Rights*, that in order to ensure the observance of the non-discriminating obligation, habitual obligation and other international humanitarian obligation, and many other rights should also be protected in the state of emergency,

including: prohibition of hijacking hostage; prohibition of forcing peoples to leave their homeland; rights of the minority race; all detainees shall have the rights to be treated as persons; the basic factors of having rights in fair judgment, for example drivels of innocent, particularly under the circumstance where death penalty is applicable; rights of personal freedom should not be deprived of. Although these rights have not been clearly listed in the abovementioned Covenant as non-derogable rights, they have been deemed as non-derogable rights concealed in the provisions of the international covenant.[9]

No matter how critical the situation is, to exercise administrative power in the state of emergency would require the basic restrictions of procedures. The regulation would restrict governmental power, specified through jurisdiction. The international human rights covenant has made the regulation, and all countries (including countries that have been approved and countries that have not been approved by the Covenant, as there should be no "country being excluded by the laws" existing in this contemporary society) should consider them during the state of emergency. The requirements of such procedures include:

If the States parties of the human rights covenant should delay in using derogation rights, then the Secretary-General of the United Nations should inform the other States parties of the present Covenant regarding the various derogated provisions, the reasons for implementing the derogation and the date for ending such derogation. The governing body involves shall officially announce the state of emergency. Without any announcement and abridgment of legal rights of civilians in actual fact means terrorism governing, a country governed by law has to enter the state of emergency through normal procedure. Apart from drawing the bottom line, the protection of civil rights under the state of emergency shall also clearly state the necessary methods and means of the relief when civil rights are infringed during such emergency state; the procedures could only be simplified. Regarding compensations by the government or any other, who infringes on people's right whether during state of emergency or not should be liable to both civil and criminal actions.

How to adopt decisive measures and to address them properly while at the same time respecting and protecting human rights in the largest extent during the maintenance of the normal social working orders and living order are issues we should seriously ponder on. Although the state of emergency is an internal issue of a country in most occasion, but under the background of globalize human rights, human rights issue is a global issue. There are global standards for regulations on human rights, there are globalize mechanisms for the monitoring of human rights, therefore even in the state of emergency, a country should fully consider the obligation pursuance to the international covenant that it undertakes. Observing such obligation pursuance to international covenant will not only just set up a good international image or receive excellent comments from international society, but more importantly it is one of the important symbols for the government to show to its peoples that it is a creditable and trustable government. Therefore, when addressing the issue of human rights during the state of emergency, one should not persist on one's way and consider them as internal affairs and thinks that outsiders have no rights to interfere.

[9] General Comment No. 29: States of Emergency (article 4) : 31/08/2001, CCPR/C/21/Rev.1/Add.11, para. 5.