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### **THE UNITED NATIONS AND STATES OF EXCEPTION**

**Charles F. Szymanski**

**Professor**

**Vytautas Magnus University Faculty of Law (Lithuania)**

**Adjunct Professor**

**Michigan State University College of Law (USA)**

**Contact information**

Address: Ožeškienės str. 18, Kaunas 44254, Lithuania

Phone: (+370 37) 751 044

E-mail address: [c.szymanski@tf.vdu.lt](mailto:c.szymanski@tf.vdu.lt)

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#### **ABSTRACT**

The political and legal problem of a state of exception, whereby a state deviates from its normal constitutional and legal order in response to a real or perceived emergency, has generated much debate. Critics contend that the use of a state of exception really is an exception that swallows the rule, with the potential to corrode the entire legal order. The first part of this article explores international law's attempt to put limits upon countries use of state of exception, as enforced by Human Rights Committee of the United Nations. Secondly, the author looks at the broader question of whether or not the U.N., as a super-state, itself uses states of exception, and what, if any, limits are placed upon it.

#### **KEYWORDS**

States of exception, derogation, Security Council, human rights

## INTRODUCTION

Who is the Potter, pray, and who the Pot? *The Rubaiyat of Omar Khayyam*

As an intellectual exercise, any in-depth examination of states of exception is something akin to meditating upon a zen koan. In existing or aspiring liberal democracies, the application of the rule of law is the benchmark of how society is or should be governed. Yet, as Carl Schmitt recognized in the wake of the First World War, and in the midst of a dysfunctional Weimar Germany, certain emergency situations are bound to arise where deviations from (and thus exceptions to) the strict adherence to the rule of law are necessary (to one degree or another) in order to keep society running. Schmitt's focus upon the exception and its implications has rightly been described as one of his most significant contributions, even by critics who strongly disagree with his conclusions.<sup>1</sup> The implications are indeed somewhat mind-bending. If an exception to the rule of law is necessary, then is the exceptional state a period in disregard or in conflict with the law, or simply a period without law?<sup>2</sup> If the exception is formalized, does it so swallow the rule as to expose a fatal flaw in liberal democracies, inviting dictatorship of the entity or office that decides the exception and/or a perpetual state of exception, or is it a strategic retreat necessary to preserve democracy itself?<sup>3</sup> And perhaps more fundamentally, what is normal and what is an exception?<sup>4</sup>

Definitive answers to these questions are beyond the scope of this article. As a practical matter, at least 147 countries do in fact have some kind of state of

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<sup>1</sup> Owen Gross, "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy," 21 *Cardozo L. Rev.* 1825 (2000): 1866-67.

<sup>2</sup> See, e.g., Vik Kanwar, "Giorgio Agamben, State of Exception," 4 *Int'l J. Const. L.* 567 (2006): 570-571 (book review) (exploring the differences between "the exception understood as an alternative rule to the exception as a gap or void in the law," the latter position being held by Agamben); Stephen Humphreys, "Legalizing Lawlessness: On Giorgio Agamben's State of Exception," 17 *Eur. J. Int'l L.* 677 (2006): 678-79.

<sup>3</sup> See, e.g., Clinton J. Rossiter, "Constitutional Dictatorship: Crisis Government in the Modern Democracies" (Princeton: Princeton University Press, 1948): 314 ("No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself."); Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," 6 *U.Pa. J. Const. L.* 1001 (2004); Mark Tushnet, "Meditations on Carl Schmitt," 40 *Ga. L. Rev.* 877 (2006); Gabriel L. Negretto and Jose A.A. Rivera, "Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship," 21 *Cardozo L. Rev.* 1797 (2000) (examining the effect of state of emergency clauses in Latin American constitutions on the fragility of democracy in Latin America).

<sup>4</sup> Owen Gross, *supra* note 1: 1825 (humorously, but insightfully, quoting *The Hitchhiker's Guide to the Galaxy* to raise the proposition "are we sure what is normal anyway?"); Mary Anne Franks, "Guantanamo Forever: United States Sovereignty and the Unending State of Exception Storming the Court: How a Band of Yale Law Students Sued the President – and Won," 1 *Harv. L. & Pol'y Rev.* 259 (2007): 260 ("the dark and paradoxical dimension of the state of exception... is that the state of exception, which was meant to be a temporary provisional suspension of the norm, often instead becomes the norm – the law – itself."); Adam Mizock, "The Legality of the Fifty-Two Year State of Emergency in Israel," 7 *U.C. Davis J. Int'l L. & Pol'y* 223 (2001) (the relevance of the article to perpetual states of exception being self-evident in the title).

emergency provision written in their constitutions.<sup>5</sup> Concerned with the possible abuse of such provisions, the International Covenant on Civil and Political Rights ("ICCPR") provides for certain limitations on states' emergency powers (particularly with respect with the suspension or limitations of certain human rights in a state of emergency), as well as some United Nations ("UN") oversight through the Human Rights Committee. Thus, the UN has taken the role of an overseer, or check, on states use of states of exception, particularly where these emergency powers conflict with international human rights obligations.

This article will explore the UN's role as an enforcer of international limitations on domestic emergency powers, and will then turn to the more problematic – and koan-like – question of "who watches the watcher?" This question is posed in a general sense and a specific sense. Over time, the UN itself has generally taken on many of the characteristics of a super-state, and its charter viewed as a kind of supra-national constitution. Chapter VII of the charter, concerning the powers of the UN Security Council, can itself be read as an exception to the normal rights and obligations found in the rest of the charter. The Security Council has used its 'exceptional' powers under Chapter VII more and more frequently in recent years, with respect to the use of economic sanctions as well as the use of force (Iraq, Afghanistan, the 'war on terror', etc.). Consequently, the issue arises whether the use of such powers should also operate under some kind of restraints, and if so, how would such restraints be enforced.<sup>6</sup>

Whether one properly views the UN as a kind of super-state or not, it is apparent that in some specific situations the UN does assume the attributes of a state, most obviously in certain peacekeeping and state building missions. Notable examples of the UN acting as an administrator of territory, and thus like a state, include its missions in Kosovo and East Timor.<sup>7</sup> The issues surrounding the concept of a state of exception in such specific situations will be addressed in a separate article.<sup>8</sup>

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<sup>5</sup> Linda Camp Keith and Steven C. Poe, "Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration," 26 *Human Rights Quarterly* 1071 (2004): 1080.

<sup>6</sup> See Jared Schott, "Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency," 6 *Nw. U. J. Int'l Hum. Rts.* 24 (2007). A related issue may be whether additional emergency powers should be given to the Security Council to deal with international terrorism, and again, if so, under what, if any, additional constraints. However, the more logical view is that a "new" state of exception is unnecessary since the Security Council already possesses broad emergency powers under Chapter VII (Andrea Bianchi, "Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion," 17 *Eur. J. Int'l L.* 881 (2006): 891-892).

<sup>7</sup> See, e.g., Hollin K. Dickerson, "Assumptions of Legitimacy: And the Foundations of International Territorial Administration," 34 *Den. J. Int'l L. & Pol'y* 161 (2006).

<sup>8</sup> For a variety of reasons, the UN and its personnel have broad immunity with respect to the actions it takes as an administrator of territory. At the same time, its obligations under international human rights law are ambiguous, and in any case difficult to enforce. See, e.g., Frederick Rawski, "To Waive or not to Waive: Immunity and Accountability in UN Peacekeeping Operations," 18 *Conn. J. Int'l L.* 103 (2002). Thus, two questions emerge: should UN territorial administration be considered a per se state of emergency (since UN missions are typically made in response to a threat to international security, where domestic law and order have ceased to effectively function), and if so, what obligations, if any, should

Who is the potter and who is the pot – are only national states of exception subject to control by the UN under the rubric of the ICCPR, or should some similar rubric also apply to the actions of the UN when it acts like a state – is the issue this article seeks to answer.

## 1. INTERNATIONAL LAW ON STATES OF EXCEPTION AND THE UN'S ROLE IN ENFORCEMENT

Article 4 of the ICCPR specifically addresses the scope of a state's declaration of a state of exception and the manner in which it operates with respect to the state's human rights obligations, as follows:

1. 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 measure 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 obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.<sup>9</sup>

On its face, then, the ICCPR permits a state to derogate from certain human rights obligations under very limited circumstances. First, the state of emergency must exist "in time of public emergency which threatens the life of the nation."<sup>10</sup> Such public emergencies potentially within the scope of Article 4 include "war; a political emergency, such as a coup or uprising; or a severe natural disaster."<sup>11</sup> An economic crisis that creates a "situation of severe internal unrest" might also

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the UN qua UN as administrator have to protect human rights in such a situation - for example, the same obligations as domestic states under the ICCPR? Or, should the UN be required to affirmatively declare a state of emergency to avoid meeting certain human rights standards in the territory for which it is responsible? See generally Simon Chesterman, "Unaccountable? The United Nations, Emergency Powers, and the Rule of Law," 42 *Vand. J. Transnat'l L.* 1509 (2009).

<sup>9</sup> See *International Convention on Civil and Political Rights*, (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 Mar. 1976 [the provisions of article 41 (Human Rights Committee) entered into force 28 Mar. 1979] [hereinafter – ICCPR], Article 4.

<sup>10</sup> *Ibid.*, ¶ 1.

<sup>11</sup> Edel Hughes, "Entrenched Emergencies and the 'War on Terror': Time to Reform the Derogation Procedure in International Law?" 20 *N.Y. Int'l L. Rev.* 1 (2007): 24.

conceivably qualify.<sup>12</sup> At the same time, “not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1.”<sup>13</sup> It is the burden on the state claiming a derogation under Article 4, section 1 that such a severe emergency exists. Thus, “the State party concerned is duty bound, when it invokes Article 4 (1) of the covenant in proceedings under the Optional Protocol, to give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in Article 4(1) of the Covenant exists in the country concerned.”<sup>14</sup> Justifications for derogation based on “vague and undefined concepts – such as public order, public safety, public security, necessity, national security, international terrorism, latent subversion, perverse delinquency, and internal disturbance” will generally not suffice, unless such reasons are connected to concrete domestic circumstances.<sup>15</sup>

In the case of long-term emergencies, the derogating state must show the threat to the life of the nation is extant throughout the entire length of the claimed emergency. Put another way, the derogation under Article 4 (1) “may only last as long as the life of the nation is threatened.”<sup>16</sup>

Second, the existence of the emergency must be officially proclaimed. This “requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed.”<sup>17</sup> It also requires more than a simple declaration that an emergency exists. Instead, “when proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers.”<sup>18</sup> In this way, arbitrary derogations arising from de facto emergencies will not meet the requirements of Article 4.<sup>19</sup>

Third, Article 4 (1) imposes a proportionality requirement on any derogation resulting from a validly declared state of emergency threatening the life of the nation. Any such derogation must be limited “to the extent strictly required by the exigencies of the situation.”<sup>20</sup> Thus, the derogation should be limited in terms of geography,<sup>21</sup> duration and scope, to the extent necessary to effectively deal with

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<sup>12</sup> Dominick McGoldrick, “The Interface Between Public Emergency Powers and International Law,” 2 *Int'l J. Const. L.* 380 (2004): 393.

<sup>13</sup> *Ibid.*: 392-393.

<sup>14</sup> See Edel Hughes, *supra* note 11: 36 [quoting *Consuelo Salgar de Montejo v. Columbia*].

<sup>15</sup> See Dominick McGoldrick, *supra* note 12: 394.

<sup>16</sup> *Ibid.*

<sup>17</sup> *General Comment No. 29, States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11 August 31, 2001, ¶ 2.

<sup>18</sup> *Ibid.*

<sup>19</sup> See Dominick McGoldrick, *supra* note 12: 396.

<sup>20</sup> ICCPR, Article 4, ¶ 1.

<sup>21</sup> See Edel Hughes, *supra* note 11: 38-39.

the specific emergency at issue.<sup>22</sup> Where a limitation of certain rights would address the legitimate concerns arising out of a national emergency, the complete derogation of such rights would not be countenanced.

Two examples illustrate the scope of the proportionality requirement:

If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.<sup>23</sup>

Likewise, in a case involving Uruguay, the government had deprived all members of certain political groups who had been electoral candidates of all political rights for a period of 15 years. Since this action was taken without regard to whether these individuals had resorted to violence or sought to advance their political agenda by violent means, it was disproportionate to the stated emergency goal of restoring peace and order, and thereby invalid under Article 4.<sup>24</sup>

Even where these Article 4 prerequisites have been satisfied, a state still may not derogate from certain international human rights norms, even during a valid state of emergency. Article 4 (2) specifically lists other provisions of the ICCPR from which no derogation is permitted: Article 6 (the right to life), Article 7 (freedom from torture), Article 8(1)(2) (freedom from slavery), Article 11 (the right not to be imprisoned for failure to fulfill a contractual obligation), Article 15 (prohibition on retroactive criminal laws), Article 16 (right to recognition as a person before the law), and Article 18 (the right to freedom of religion, thought and conscience).<sup>25</sup>

In addition, other rights, although not specifically named, are also considered nonderogable. These include other state obligations under international law, principles of nondiscrimination, and implied nonderogable rights. State obligations under international law obviously vary to some extent, depending upon the international treaties and conventions to which a particular state has agreed. These may also include principles of international humanitarian law, which would encompass obligations under the Geneva Conventions on the Law of War, as well as those arising from "the United Nations Charter, humanitarian law treaties, regional

<sup>22</sup> See Dominick McGoldrick, *supra* note 12: 407-408.

<sup>23</sup> *General Comment No. 29*, *supra* note 17, ¶ 5.

<sup>24</sup> See Dominick McGoldrick, *supra* note 12: 408 [citing *Silva v. Uruguay*].

<sup>25</sup> ICCPR, Article 4(2); see also Edel Hughes, *supra* note 11: 26.

human rights conventions, and customary international law.”<sup>26</sup> As the latter point suggests, even apart from specific treaty or convention obligations, states would be held to the standards set by general international law covering nonderogable rights in emergency situations. “In this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations.”<sup>27</sup>

A state’s emergency measures may also not derogate from principles of nondiscrimination. Indeed, “one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.”<sup>28</sup> This is notwithstanding the fact that the antidiscrimination provisions of the ICCPR are not expressly listed in Article 4(2) as nonderogable.<sup>29</sup> At the same time, Article 4 (1)’s scope appears to be expressly limited to the categories stated therein (race, color, sex, language, religion or social origin), and not to other protected categories specified elsewhere in the ICCPR, such as holding “political or other opinion[s], national origin, property, birth and other status.”<sup>30</sup> National origin discrimination during states of emergency – for example, detaining “enemy” nationals during a conflict – was consciously permitted by the drafters of Article 4.<sup>31</sup> On the other hand, a particular emphasis was placed on prohibiting sex discrimination during states of emergency. “The equal enjoyment of human rights by women must be protected during a state of emergency,” and any state declaring such an emergency must show the “impact of such [emergency] measures and demonstrate that they are nondiscriminatory.”<sup>32</sup>

Finally, other sections of the ICCPR, though not expressly named as nonderogable by Article 4(2), should be considered nonderogable by implication. For the most part, this is tied to states’ obligations under general international law: there are certain international norms from which no state can deviate, whether or not they are listed in Article 4(2) and whether or not they are expressly identified in the ICCPR. Therefore, the following obligations should also be considered nonderogable: to treat all persons deprived of their liberty with humanity and respect for the inherent dignity of the human person; the prohibition against taking hostages, making abductions or unacknowledged detentions; to protect the rights of minorities; the prohibition against the deportation or transfer of population

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<sup>26</sup> See Dominick McGoldrick, *supra* note 12: 412.

<sup>27</sup> *General Comment No. 29, supra* note 17, ¶ 10.

<sup>28</sup> *Ibid.*, at ¶ 8.

<sup>29</sup> *Ibid.*

<sup>30</sup> See Dominick McGoldrick, *supra* note 12: 413.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*



without grounds; and the prohibition against war propaganda and inciting national, religious or racial hatred.<sup>33</sup>

Certain procedural guarantees, connected with the protection and enforcement of nonderogable rights during an emergency, are also themselves not subject to derogation. These include the right to a fair trial, the protection of judicial guarantees, and the obligation of a state to provide remedies for any violation of the ICCPR.<sup>34</sup>

Finally, pursuant to Article 4(3), states seeking to derogate from their obligations under the ICCPR during a state of emergency:

commit themselves to a regime of international notification. A State party availing itself of the right of derogation must immediately inform the other States parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures. Such notification is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant.<sup>35</sup>

Moreover, "this a additional formal step may encourage a state to reconsider its decision."<sup>36</sup>

The notice required by Article 4(3) should not be in summary form. Instead, states "should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law."<sup>37</sup> Additional notice must be provided when there is a change in the declared state of emergency, i.e., the emergency (and accompanying derogations) is extended in duration, geographically, or in scope. However, the additional notice is not limited to extensions of the emergency, but also encompasses any change to the state of emergency, including its termination.<sup>38</sup>

The failure of a state to provide sufficient notice under Article 4(3) does not in any way release that party from its obligations under Article 4 and the rest of the ICCPR, or from UN oversight of the state's compliance with the ICCPR.<sup>39</sup> Conversely, a state's failure to give notice *does* prejudice its right to subsequently

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<sup>33</sup> See *General Comment No. 29*, *supra* note 17, ¶ 13.

<sup>34</sup> *Ibid.*, ¶¶ 14, 15 and 16.

<sup>35</sup> *Ibid.*, ¶ 17.

<sup>36</sup> See Adam Mizock, *supra* note 4: 232.

<sup>37</sup> See *General Comment No. 29*, *supra* note 17: at ¶ 17.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*



claim it validly derogated from the ICCPR because of the existence of an Article 4 emergency.<sup>40</sup>

The UN exercises such oversight through a Human Rights Committee ("HRC"), established pursuant to Part IV of the ICCPR. The HRC consists of 18 individuals with high moral character, and possessing competence in the field of human rights and law.<sup>41</sup> Members of the HRC serve for 4 year terms, and no more than one member may be from any one state.<sup>42</sup> Members may be compensated by the UN, and the Secretary-General provides the HRC with all the staff and facilities necessary for the HRC to fulfill its function.<sup>43</sup> The HRC normally shall meet at the UN's offices in Geneva, Switzerland. While the HRC can determine its own rules of procedure, a quorum comprises no less than 12 members, and all decisions of the HRC must be made by a majority of those present.<sup>44</sup>

The HRC monitors state parties' compliance with the ICCPR in three different ways. First, state parties are required to submit reports to the HRC concerning their own compliance with the ICCPR, usually every four years. The HRC then may make general comments, as it sees appropriate, to the reports.<sup>45</sup>

The HRC also has competence to hear inter-state complaints that one state party is not complying with its obligations under the ICCPR. The complaining state must first give written notice of its protest to the alleged offending state. Within three months of its receipt of this notice, the receiving state must provide a written explanation or other statement to the complaining state "which should include ... reference to domestic procedures and remedies taken, pending, or available in the matter."<sup>46</sup>

If the dispute is not resolved at the interstate level within 6 months from the date the state received the complaint from the other state party, either state has the right to refer the matter to the HRC.<sup>47</sup> The HRC will accept the matter only after it is satisfied that all domestic remedies have been exhausted, or that the application of such remedies has been unreasonably prolonged.<sup>48</sup> Once the case is accepted, the HRC will attempt to assist the parties to informally resolve the dispute, with the help of its offices.<sup>49</sup> If the matter is resolved in this way, the HRC

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<sup>40</sup> See Edel Hughes, *supra* note 11: 36-37 [quoting Tae Hoon Park v. Republic of Korea] (since "the State party had 'not made the declaration under Article 4(3) of the Covenant that a public emergency existed and that it derogated certain Covenant rights on this basis' [it] could not use this provision to justify the measures taken against the author of the complaint.").

<sup>41</sup> ICCPR, Articles 28 and 29.

<sup>42</sup> *Ibid.*, Articles 31 and 32.

<sup>43</sup> *Ibid.*, Articles 35 and 36.

<sup>44</sup> *Ibid.*, Articles 37 and 39.

<sup>45</sup> *Ibid.*, Article 40; see also Human Rights Committee, *Monitoring civil and political rights* // <http://www2.ohchr.org/english/bodies/hrc/index.htm> (accessed March 22, 2010).

<sup>46</sup> *Ibid.*, Article 41 (1)(a).

<sup>47</sup> *Ibid.*, Article 41 (1)(b).

<sup>48</sup> *Ibid.*, Article 41(1)(c).

<sup>49</sup> *Ibid.*, Article 41(1)(e).

will make a report consisting of "a brief statement of the facts and of the solution reached."<sup>50</sup>

Assuming the matter is not resolved through such efforts at conciliation, the HRC has the right to request relevant information from the parties.<sup>51</sup> The state parties themselves have the right to representation before the HRC, and to make oral and/or written submissions.<sup>52</sup> The HRC will examine any communications from the parties in closed meetings.<sup>53</sup>

Within 12 months of having received notice of the dispute, the HRC shall issue a report confined "to a brief statement of the facts; the written submissions and the record of the oral submissions made by the States Parties concerned shall be attached to the report", and the report shall be transmitted to these parties.<sup>54</sup> While a state party has a right to withdraw its recognition of the competence of the HRC under Article 41 of the ICCPR, by notification to the Secretary-General, such withdrawal will not prejudice the right of the HRC to consider a case already under consideration.<sup>55</sup>

To the extent the matter is not resolved to the parties satisfaction, the HRC may, with the consent of the parties concerned, appoint a special ad hoc Conciliation Commission ("Commission") to attempt to find a solution to the dispute.<sup>56</sup>

The First Optional Protocol to the ICCPR extended the jurisdiction of the HRC to hear complaints of state violations of the ICCPR brought by individuals. Specifically, individuals who claim to be victims of state party violations of the ICCPR may submit a communication to the HRC, so long as the state party is a party to the optional protocol.<sup>57</sup>

However, the HRC will not accept any communication from an individual: that is anonymous; is already being examined in another international forum; where the individual has not exhausted all domestic remedies, to the extent the application of such remedies has not been unreasonably prolonged; and/or is considered to be

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<sup>50</sup> *Ibid.*, Article 41(1)(h)(ii).

<sup>51</sup> *Ibid.*, Article 41(1)(f).

<sup>52</sup> *Ibid.*, Article 41(1)(g).

<sup>53</sup> *Ibid.*, Article 41(1)(d).

<sup>54</sup> *Ibid.*, Article 41(1)(h)(ii).

<sup>55</sup> *Ibid.*, Article 41(2).

<sup>56</sup> *Ibid.*, Article 42.

<sup>57</sup> Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S., 171, 6 I.L.M. 383 (1967), entered into force 23 Mar. 1976 [hereinafter ICCPR, First Optional Protocol] at Articles 1 and 2. The HRC also has jurisdiction to hear complaints brought by individuals under the Second Optional Protocol to the ICCPR aimed at the abolition of the death penalty. See Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (New York, 15 Dec. 1989) UN Doc. A/RES/44/128, entered into force 11 July 1991 [hereinafter ICCPR, Second Optional Protocol], at Article 5.

“an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.”<sup>58</sup>

Once it receives a communication from an individual about a state’s alleged violation of the ICCPR, it will forward such communication to the state accused of such violations. The receiving state shall have 6 months to make a response, including providing information about any remedial steps that have been taken.<sup>59</sup> In closed meetings, the HRC will consider all written communications provided by the individual(s) and the state involved, and thereafter “forward its views to the State party concerned and to the individual.”<sup>60</sup>

The HRC’s powers to enforce Article 4’s limitations on a state’s right to derogate from certain human rights during a state of emergency are therefore limited to an examination of “the nature and conditions of emergencies and derogations both in the State reports and in individual communications coming before it.”<sup>61</sup> Over time, the HRC has developed a body of jurisprudence interpreting and developing international state of emergency law under Article 4. Its actions range from strong statements condemning in no uncertain terms unlawful states of emergency (pointing out in the case of Chile in 1979 that “it was the junta itself that constituted the real state of emergency for the Chilean people and that article 4 of the Covenant had not been intended to justify the acts of persons who themselves created the emergency”)<sup>62</sup> to demonstrations of utter impotence (failing to make any comment on Poland’s state of emergency in 1980-81, since Poland did not submit its scheduled report under Article 40 of the ICCPR until several years after the state of emergency had ended).<sup>63</sup>

Valuable from a jurisprudential and public relations perspective, but otherwise lacking practical impact, such examinations and reports made by the HRC are a classic form of “soft law.” The victims of an unlawful state of emergency receive no monetary or equitable relief from the HRC; theirs is only a moral victory. In light “of its very limited powers,”

‘The most the implementation bodies [such as the HRC] can do is adopt a scrupulous judicial attitude that will influence world opinion by its objectivity and thoroughness.’ The HRC has established itself as an independent and respected international human rights body able to bring a constructive analysis to bear on public emergencies. That analysis can be of considerable assistance to a government acting in good faith and in cooperation with the HRC. Where elements of good faith and cooperation are lacking, the most the HRC’s

<sup>58</sup> See ICCPR, First Optional Protocol, Articles 3 and 5(2).

<sup>59</sup> *Ibid.*, Article 4(2).

<sup>60</sup> *Ibid.*, Article 5(1)(3) and (4).

<sup>61</sup> See Edel Hughes, *supra* note 11: 31.

<sup>62</sup> *Ibid.* [quoting HRC Concluding Observations to Chile, paragraph 78, U.N. Doc. A/33/40].

<sup>63</sup> See Dominick McGoldrick, *supra* note 12.

considerations can achieve is to stimulate international pressure through national and international publicity.<sup>64</sup>

With the expansion of states' use of emergency powers, particularly as applied to the "war on terror," victims of the abuse of these emergency powers need a more concrete remedy, and recalcitrant states need harsher penalties. Succinctly put:

[S]tates should not continue to enjoy the respect that ratifying human rights treaties bestows, where there is persistent failure to honor the obligations therein. As it stands, the derogation procedure, although seriously flawed, remains the only method of regulating emergencies in international law. It is imperative that the international monitoring bodies step up to the mark in ensuring that states cannot continue playing the "public emergency" card as a smokescreen for the enactment of draconian legislation and the destruction of rights.<sup>65</sup>

## 2. THE UN AS A SUPER-STATE: THE APPLICATION OF INTERNATIONAL STATE OF EMERGENCY STANDARDS TO THE SECURITY COUNCIL'S CHAPTER VII POWERS

Thus far the analysis has focused on international legal standards for the regulation – and limitation – of national state's emergency powers, to the extent they conflict with human rights obligations, and the UN's role as an "enforcer" (or at least a monitor) of these standards. But does the UN itself exercise emergency powers, and if so, how (if it all) are they regulated, and by whom (if by any entity)?

The UN Charter has been described as a kind of constitution for that body.<sup>66</sup> That being the case, Chapter VII of the Charter, and Article 39 in particular, can be read as the constitution's state of emergency clause.<sup>67</sup> As such, it permits the UN to derogate from two critical portions of the Charter, Article 2(4) and (7). Article 2(4) sets forth the core principle that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>68</sup> Yet, Article 39 permits the Security Council to make a determination that a threat to the peace exists, and Articles 41 and 42 go on allow

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<sup>64</sup> *Ibid.*: 425 [internal citations omitted].

<sup>65</sup> See Edel Hughes, *supra* note 11: 64.

<sup>66</sup> See, e.g., Mac Darrow and Louise Arbour, "The Pillar of Glass: Human Rights in the Development Operations of the United Nations," 103 *Am. J. Int'l L.* 446 (2009): 464-465 ("The constitution of the United Nations is the UN Charter, which is accordingly the primary point of reference for an inquiry into the scope and content of the organization's human rights obligations.").

<sup>67</sup> See, e.g., Andrea Bianchi, *supra* note 6: 891 ("Chapter VII powers are themselves an exception.").

<sup>68</sup> *Charter of the United Nations*, (San Francisco, 26 June 1945), 3 Bevens 1153, 59 Stat. 1031, T.S. No. 993, entered into force 24 Oct. 1945 [hereinafter – UN Charter], Article 2(4).

it to use extraordinary measures to restore international peace and security, including, but not limited to, the use of force.<sup>69</sup>

Likewise, Article 2(7) solemnly states that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>70</sup>

Consequently, while the right of non-interference in member states' domestic affairs is ordinarily considered sacrosanct, Article 39 charges the Security Council with the unfettered right to decide whether a domestic issue rises to the level of an international threat to the peace. Once this determination is made, the Security Council may interfere in what was arguably a domestic matter by the use of military action via air, sea and land, among other measures.<sup>71</sup> "[A]s in the emergency context where the government may derogate from certain human rights safeguard to address a national threat, so too may the Council intervene without consent in the ostensibly domestic matters of its constituent units where they are deemed to threaten the greater international good."<sup>72</sup> No protection is offered to the member state under the express terms of Article 2(7) itself, which exempts the principle of non-interference from "the application of enforcement matters under Chapter VII."<sup>73</sup>

Arguably like a domestic executive or president operating under a domestic state of emergency constitutional provision, to a large extent the Security Council "is he who decides the exception", and thus is the sovereign, using Carl Schmitt's oft-quoted methodology.<sup>74</sup>

Even more problematic is the lack of restraints on the exercise of this power to "decide the exception." The first aspect of lack of restraints concerns the Security Council's ability to decide what constitutes a threat to the peace, and what actions to take in response thereto. One scholar gave the example of the Security Council's deliberation on the question of global warming as a threat to international security to illustrate the flexible boundaries as to what may or may not be considered a

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<sup>69</sup> UN Charter, Articles 39, 41 and 42; see also Jared Schott, *supra* note 6: 92\* ("the Charter has established a system providing for [Article 2(4)'s] temporary suspension vis-à-vis the Security Council during certain states of exception.") [\*note: the page citations for this article follow those provided by the Westlaw version of the text].

<sup>70</sup> UN Charter, Article 2(7).

<sup>71</sup> See Jared Schott, *supra* note 6: 93.

<sup>72</sup> *Ibid.*

<sup>73</sup> UN Charter, Article 2(7); see also Simon Chesterman, *supra* note 8: 1518.

<sup>74</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago & London: The University of Chicago Press, 1985), p. 5.

security threat under Article 39.<sup>75</sup> Taking this analogy further, assuming that it was determined that global warming did constitute such a threat, could the Security Council authorize force to seize the polluting factories of a member nation? Or, using an actual example, to what extent can the Security Council declare certain individuals and/or organizations with connections to terrorism as threats to the peace, and order member states to seize their assets?

The second, related aspect of lack of restraints concerns the almost non-existent ability of any entity to review these determinations of the Security Council. Not only can the Security Council decide the exception in the first instance, but given the lack of review, this decision may amount to the *final* decision on the existence of the exception. Both of these aspects will be dealt with in turn below.

The Security Council's ability to determine what constitutes a threat to the peace under Article 39 is not subject to judicial review. "Although this finding holds significant implications in international law, it is properly in accordance with the Charter requirements that this determination 'entails a factual and political judgment and not a legal one.' The [Security Council's] discretion to make this factual legal/determination is essentially non-reviewable ... ."<sup>76</sup> In addition, the Security Council's determination of what actions to take in response to such a threat are not directly subject to judicial review, as "the [International Court of Justice ("ICJ")] possesses no general power to review Council resolutions adopted under Chapter VII."<sup>77</sup> The ICJ may issue an advisory opinion on "any legal question" upon the request of the Security Council, but lacks such direct authority absent such a request.<sup>78</sup>

In contrast, the ICJ has suggested that it may – sometimes "somewhat surreptitiously" – conduct a limited form of indirect review of the Security Council's actions.<sup>79</sup> According to the ICJ, both the Court and the Security Council "can... perform their separate but complementary functions with respect to the same events."<sup>80</sup> In this manner, some of the actions of the Security Council may be subject to a form of review, where the consequences of such actions are "relevant to the [ICJ's] determination of state disputes."<sup>81</sup> However, even this indirect review is quite restricted. There is a presumption (albeit not an irrebuttable one) that "a

<sup>75</sup> See Jared Schott, *supra* note 6: 1.

<sup>76</sup> Rob McLaughlin, "The Legal Regime Applicable to the Use of Lethal Force when Operating under a United Nations Security Council Chapter VII mandate Authorizing 'All Necessary Means'", 12 *J. Conflict & Security L.* 389 (2007): 390; see also Jared Schott, *supra* note 6: 3 [reciting ICJ Judge Shahabuddeen's "lament" over whether there are "any limits to the Council's power of appreciation..."].

<sup>77</sup> See Jared Schott, *supra* note 6: 128 [citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 33 (Advisory Opinion)*]; see also Andrea Bianchi, *supra* note 6: 912 ("no express power of judicial review is provided for in the Charter as regards the acts of the... SC.").

<sup>78</sup> See Jared Schott, *supra* note 6: 126 [citing UN Charter, Article 96].

<sup>79</sup> See Andrea Bianchi, *supra* note 6: 912.

<sup>80</sup> See Jared Schott, *supra* note 6: 126 [quoting *Nicaragua v. U.S., 1984 I.C.J. 392, 434-435*].

<sup>81</sup> *Ibid.*: 128.

decision of the Security Council properly taken in the exercise of its competence ... cannot be summarily reopened."<sup>82</sup>

The boundaries of a "properly taken" Security Council resolution have not yet been even indirectly tested by the ICJ. However, scholarly commentary suggests that the outer limits of the Security Council's Chapter VII powers may be defined by *jus cogens*, customary international law, and/or by the provisions of the UN Charter itself.<sup>83</sup>

Of these three categories, only the proposition that the Security Council's Chapter VII actions cannot derogate from *jus cogens* norms is on solid ground. *Jus cogens* encompasses core "principles of international law from which derogation is not permitted."<sup>84</sup> As Dr. Rob McLaughlin argues,

... it is clear that the SC cannot transgress *jus cogens*. As Lauterpacht held in the Bosnia Genocide Case - albeit in a dissenting judgment, but as the only member of the bench to address the issue - rules *jus cogens* unconditionally bind the SC. The logical consequence is that SC Chapter VII Security resolutions should not be read as permitting transgression of *jus cogens*, and certainly no action taken to implement the SC resolutions should be inconsistent with applicable *jus cogens*.<sup>85</sup>

This is certainly an inherently logical proposition. The Security Council cannot order genocide or torture in the context of one of its Chapter VII resolutions.

However, the proposition that actions taken under the Security Council's Chapter VII powers must comply with customary international law is more debatable. Article 103 of the UN Charter provides that "In the event of a conflict between the obligations of the members of the United Nations and their obligations under any international agreement, their obligations under the present Charter shall prevail."<sup>86</sup> There is some conflict as to whether Article 103 trumps customary international law, or simply prevails over states' obligations under specific treaties.<sup>87</sup> The original draft of Article 103 specified that states' obligations under the Charter prevailed over "any other international obligation to which they are subject." This was later amended to the current language, referencing only

<sup>82</sup> *Ibid.*: 127 [quoting *Libya v. U.S.* 1992 I.C.J. 114, 129]; see also Rob McLaughlin, *supra* note 76: 390 [quoting *Certain Expenses Case*, 1962 I.C.J. 151, 168] ("when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* for the organization.").

<sup>83</sup> See Rob McLaughlin, *supra* note 76: 393-402; Jared Schott, *supra* note 6: 117-124.

<sup>84</sup> See Rob McLaughlin, *supra* note 76: 394.

<sup>85</sup> *Ibid.* [internal citations omitted].

<sup>86</sup> See UN Charter, Article 103.

<sup>87</sup> Compare Rob McLaughlin, *supra* note 76: 402 ("the inescapable conclusion is that the SC does not enjoy any immunity from the requirement to comply with such fundamental rules [set by custom] by virtue of the Article 103 trump, which is valid over international agreements, but arguably not over custom.") with Jared Schott, *supra* note 6: 117 ("Under Article 103 of the Charter, the obligations of the Member States prevail over that provided by treaty. In light of their relative hierarchical positions as sources of international law, customary international law short of *jus cogens* is subject to preemption by Chapter VII action as well.").



obligations “under any international agreement.” This final language was consistent with the drafting commission’s intention not to create an unsettling “rule of general abrogation.”<sup>88</sup> Given this legislative history, it has been suggested that since the drafters had an opportunity to specifically indicate that Article 103 would trump states’ obligations under customary international law, and declined to do so, this is strong evidence that the narrower current language cannot have such an effect.<sup>89</sup>

The counterargument is that since treaties occupy a higher plane in the hierarchy of international law than custom, it would be strange to suggest that Article 103 prevails over a state’s treaty obligations, but not its obligations under customary international law.<sup>90</sup>

The International Law Commission’s own conclusions tilt in favor of the latter argument, stating that “Charter obligations may... prevail over inconsistent customary international law.”<sup>91</sup> This is probably the better reasoned approach. It is often problematic to rely on legislative history to conclusively establish the meaning of a piece of legislation, particularly, where, as here, the legislative history itself is capable of different interpretations. For example, the drafters may have feared that the “rule of general abrogation” suggested by the initial, broader language may have been interpreted as encompassing *jus cogens* itself.

Other potential sources of limitations on the Security Council’s Chapter VII powers lie within the UN Charter itself. Article 24(2) states that the Security Council “shall act in accordance with the Purposes and Principles of the United Nations,” which include the promotion of human rights.<sup>92</sup> Certain dissenting opinions of the ICJ have suggested that Article 24(2) does provided a kind of “circumscribing boundary” to the conduct of the Security Council.<sup>93</sup> On the other hand, another plausible interpretation of Article 24(2) is that the Security Council should only consider the promotion of human rights as a factor in making its Chapter VII determinations. Under this view, Article 24(2) does not incorporate the entire body of international human rights law by reference, and thus does not make it binding upon the Security Council.<sup>94</sup> Ultimately, this ambiguity leaves Article 24(2) as no greater a check on the Security Council than *jus cogens* itself. Only where the Security Council’s conduct goes so far beyond basic human rights standards that

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<sup>88</sup> See Rob McLaughlin, *supra* note 76: 400-401 [internal citations omitted].

<sup>89</sup> *Ibid.*

<sup>90</sup> See Jared Schott, *supra* note 6: 117.

<sup>91</sup> See Rob McLaughlin, *supra* note 76: 401 [quoting the ILC’s Conclusions of the work of the Study Group in the Fragmentation of International Law (2006), at conclusion 35. However, the author argues the use of the word “may” still suggests some ambiguity in the ILC’s position].

<sup>92</sup> See Jared Schott, *supra* note 6: 119.

<sup>93</sup> *Ibid.* [quoting Judge Weeramantry in *Lockerbie*, 1992 I.C.J. 114, 171 and Judge Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 1993 I.C.J. Rep. 440, Paragraph 101].

<sup>94</sup> *Ibid.*: 121-122.

rise to the level of *jus cogens*, could it be definitely said that the Security Council was totally abrogating the founding purposes and principles of the United Nations.

Article 42 of the Charter, for its part, can be read to imply a proportionality requirement upon the actions of the Security Council. It states that the Security Council may only take military action "as may be necessary" to restore international peace and security, and then only after the non-military measures outlined in Article 41 (economic and diplomatic sanctions) are considered by the Security Council as inadequate. As a boundary for the Security Council, Article 42 does not serve as a strong marker. The Security Council itself decides whether the lesser sanctions specified in Chapter 41 have been, or would be, inadequate, and likewise makes the decision as to what force may be necessary under Article 42. Nevertheless, certainly in the most extreme examples, the concept of proportionality, whether adopted from *jus cogens* or Article 42, could be seen as a limitation on the Security Council's power. Thus, ordering a nuclear attack on a nation in response for seizing a fishing vessel in disputed waters should be seen as something outside the authority of the Security Council.<sup>95</sup>

While the potential boundaries of lawful Security Council conduct remain, absent further judicial definition by the ICJ, somewhat unclear and ill-defined, the fact that a boundary may exist, and may be even indirectly enforced by the ICJ is significant. While the ICJ has not yet had its *Marbury v. Madison*<sup>96</sup> moment, in which the U.S. Supreme Court first employed judicial review on the power of the executive branch of government, the framework exists for it to take such a stand.

At the same time, regional and local tribunals also have the potential to provide a judicial check on the actions of the Security Council. Their conduct, to date, also provides a clue as to the kind of "indirect" review the ICJ may ultimately employ to limit the power of the Security Council in a given case. There are three potential general approaches to local or regional judicial review of the Security Council's Chapter VII resolutions. One approach is to find the Security Council's actions essentially non-reviewable. A second position is one of extremely limited review- the Council's actions will evade review, unless it violated *jus cogens* in a particular case. The third approach is in effect the most broad type of review: the Security Council's authority or power is not directly reviewed by the court, but the manner in which its resolution is carried out by specific member states may be subject to review under the local or regional law applicable to these states.

All three approaches were carefully examined by the European Court of Justice (ECJ) in *Yassin Abdullah Kadi and Al Barakaat Int. Foundation v. Council of*

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<sup>95</sup> *Ibid.*: 123-124; see also Rob McLaughlin, *supra* note 76: 397 (discussing the concept of proportionality as *jus cogens*).

<sup>96</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

the European Union, et al.<sup>97</sup> Kadi involved the attempt of the European Union and several of its member states (France, the United Kingdom, Spain and the Netherlands) to give effect to a Security Council resolution requiring U.N. members to freeze the assets of Osama bin Laden, al-Qaeda, the Taliban and their associates. The plaintiffs in this case were alleged to have been connected with the entities identified in the Security Council resolution, and duly had their assets seized in accordance with a Council Regulation designed to implement that resolution. However, according to the plaintiffs, they were not given due process (i.e., proper notice and a right to a fair hearing) before their respective properties were taken, in violation of fundamental European Community law.

The Court of the First Instance (CFI) took the second position outlined above, with respect to its powers of judicial review over a Security Council resolution. Thus, it ruled that the conduct of the European Council and Commission, together with the enforcing EU member states, towards the plaintiffs,

since it is designed to give an effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations offering no latitude in that respect, must enjoy immunity from jurisdiction so far as concerns its internal lawfulness save with regard to its compatibility with the norms of *jus cogens*.<sup>98</sup>

Applying this rather lofty standard, the CFI concluded that the bare denial of a right of access to the court and associated deprivation of property without due process is a right protected by the standards of *jus cogens*.<sup>99</sup> However, the CFI ultimately concluded that the defendants' actions did not, in this case, amount to a deprivation of the right of due process as defined by *jus cogens*. The Security Council itself had an internal mechanism (a Sanctions Committee) whereby parties whose assets had been seized in accordance with the resolution could have their case re-examined. Moreover, the resolution of the Security Council was not of an indefinite duration, in that the maintenance of such resolutions would be re-examined after a period of 12 to 18 months by the Security Council itself. Given these safeguards, and taking into account the importance of the resolutions to the maintenance of international peace and security, the ICJ found that the plaintiffs' rights under *jus cogens* were not violated.<sup>100</sup>

On appeal, the ECJ reversed the decision of the CFI. In so doing, they rejected the arguments of certain defendants that the CFI erred in allowing any kind of review of actions mandated by a Security Council resolution, as well as the

<sup>97</sup> *Yassin Abdullah Kadi and Al Barakaat Int. Foundation v. Council of the European Union, et al.*, 2008/C 285/03 (September 3, 2008) [hereinafter – Kadi].

<sup>98</sup> *Ibid.*, ¶ 327 [summarizing the CFI's position].

<sup>99</sup> *Ibid.*, ¶ 288.

<sup>100</sup> *Ibid.*, ¶¶ 289-290.

CFI's own determination that a *jus cogens* standard of review was appropriate in this case. Instead, the ECJ ruled it possessed the competence to review any European Council, Commission or EU member state action taken to implement a Security Council resolution, pursuant to the standards of applicable primary EU law.<sup>101</sup> Such primary law would include fundamental rights and freedoms enshrined in EU law, and which would include the right of access to the court and due process.<sup>102</sup> As support for this conclusion, the ECJ cited then-Article 300(6) of the European Community Treaty (EC), which states that "an international agreement may not enter into force if the Court has delivered an adverse opinion on its compatibility with the EC Treaty, unless the latter has been amended."<sup>103</sup>

The ECJ went on to distinguish its holding from several decisions of the European Court of Human Rights (ECHR), which, in contrast, appeared to defer jurisdiction in cases lodged against states which were implementing Security Council resolutions. In these decisions, *Behrami and Behrami v. France and Sarameti v. Germany*, the plaintiffs sought to hold France and Germany responsible for the conduct of their respective troops which formed a part of the UN peacekeeping mission in Kosovo. These troops formed a part of the UN's internal security force (KFOR), mandated by a resolution of the Security Council. Those cases, according to the ECJ:

involved actions directly attributable to the United Nations as an organisation of universal jurisdiction fulfilling its imperative collective security objective, in particular actions of a subsidiary organ of the UN created under Chapter VII of the Charter of the United Nations or actions falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter, and not actions ascribable to the respondent States before that court, those actions not, moreover, having taken place in the territory of those States and not resulting from any decision of the authorities of those States.<sup>104</sup>

In contrast, the defendants in the *Kadi* case were not acting directly on behalf of the Security Council, nor were they exercising powers directly delegated to them by the Security Council. In any event, and possibly notwithstanding the existence of this distinguishing factor, the ECJ had the authority to review the legality of the Community regulation at issue as an "expression of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is

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<sup>101</sup> *Ibid.*, ¶ 308.

<sup>102</sup> *Ibid.* The Charter of the United Nations, on the other hand, would have primacy over "secondary Community law". *Ibid.*, ¶ 307.

<sup>103</sup> *Ibid.*, ¶ 309.

<sup>104</sup> *Ibid.*, ¶ 312.

not to be prejudiced by an international agreement[,]” where an alleged violation of a fundamental right was involved.<sup>105</sup>

The ECJ also rejected the contention that the existence of an internal review system within the UN, and created by various additional Security Council resolutions, precludes judicial review. Under the UN’s administrative scheme, a party whose assets are subject to seizure by virtue of the Security Council’s resolution may apply for relief by going before a Sanctions Committee. However, finding that the UN administrative procedure did not protect a party’s fundamental due process rights, the ECJ ruled it must determine whether the plaintiffs’ rights were violated under applicable EC law.<sup>106</sup>

Applying EC law, the ECJ ultimately concluded that the plaintiffs’ rights were violated by the summary manner in which (in accordance with the applicable EC regulation) their property was seized. The offending regulation was annulled, although its effect with respect to the particular defendants was temporarily kept in place so that the defendants could not liquidate their assets before a new process, with appropriate due process guarantees, could begin.<sup>107</sup>

A contrary approach was taken by an English appeals court in the *Al-Jedda* case.<sup>108</sup> *Al-Jedda* involved a dual British and Iraqi citizen who was detained without trial for an extended period by British forces in Iraq operating pursuant to a Security Council resolution. The plaintiff contended that his detention was unlawful under the European Convention on Human Rights (ECHR), as incorporated into British law. The court of appeals upheld the dismissal of his claim by the lower court.

Significantly, the court found that the relevant Security Council resolution permitted the detention without trial of individuals considered to be a threat to security in Iraq, even for periods longer than one year. Pursuant to Article 103 of the UN Charter, member states’ obligations in carrying out the resolutions of the Security Council issued under Chapter VII of the Charter prevailed over any other treaty obligations held by the states. As a result, pursuant to Article 103, the treaty obligations the ECHR imposed upon Britain were superseded by the Security Council’s resolution on Iraq, to the extent there was a conflict. As the ECHR prohibits prolonged detentions without trial, a conflict existed, and under this analysis the Security Council resolution trumped the pertinent provisions of the ECHR.<sup>109</sup>

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<sup>105</sup> *Ibid.*, ¶¶ 315-317.

<sup>106</sup> *Ibid.*, ¶¶ 321-326.

<sup>107</sup> *Ibid.*, ¶¶ 375-376.

<sup>108</sup> *Al-Jedda*, [2006] EWCA Civ 327.

<sup>109</sup> *Ibid.*, ¶¶ 71 and 80.

The plaintiff went on to contend that Security Council resolutions may not violate *jus cogens* and even customary international law protecting rights that do not rise to the level of *jus cogens*. Rejecting these arguments, the court found that extended detention without trial did not rise to the level of *jus cogens*, and that it therefore did not need to address the question further. Second, and significantly, it rejected the arguments on customary international law on the basis that questions concerning the legality of a Security Council resolution “however, are not arguments that a national court can entertain.”<sup>110</sup> Indeed, acknowledging that the Security Council resolution did exceed the norms established by European and International human rights treaties, the court stressed that “[i]t is not open to this national court to hold that the Security Council had no power to do so.”<sup>111</sup>

Finally, the plaintiff argued that his claim that his detention violated British common law should be considered and upheld. However, applying applicable choice of law rules, the court concluded that Iraqi, rather than British, law applied to this case, and thus rejected his remaining claims under British law.

The court’s decision in *Al-Jedda* is more in accord with the CFI’s conclusion in *Kadi*. Both courts considered a regional or national tribunal’s role in reviewing the effect of a Security Council’s resolution under Chapter VII as extremely deferential. The court’s role was limited to ascertaining whether or not the resolution violated principles of *jus cogens*. To the extent the resolution conflicted with other treaties, such as the ECHR, the treaties comprising EC law, the ICCPR, or customary international law, the resolution prevailed in accordance with Article 103 of the UN Charter.

In this respect, the analysis of the CFI and the English Court of Appeal in *Al-Jedda* is more logical than that employed by the ECJ. The ECJ did not explain why EC law, which itself is the product of international treaties, prevailed over a conflicting Security Council resolution given the constraints of Article 103.<sup>112</sup> Instead, the ECJ appeared to create an artificial dichotomy with respect to the effect of such resolutions on EC law, depending on whether they created a conflict with EC primary (core human rights, for example) and secondary law.<sup>113</sup> It further carved out an additional exception, based on ECHR precedent, providing immunity to states acting as direct agents of the UN in implementing a Chapter VII Security Council regulation (for example, by sending troops as part of a multi-national U.N.

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<sup>110</sup> *Ibid.*, ¶ 75.

<sup>111</sup> *Ibid.*, ¶ 85.

<sup>112</sup> Cf. Simon Chesterman, *supra* note 8: 1534 [noting that prior to the ECJ’s decision, the Advocate General of the ECJ acknowledged the potential conflict of this position with Article 103, but “merely noted its understanding that such a ruling [ignoring this conflict] might ‘inconvenience the Community and its Member States in their dealings on the international stage.’”] [internal citations omitted].

<sup>113</sup> *Kadi*, ¶¶ 307-308.

peacekeeping operation), where such action is taken outside the respective states' home territory (for example, French and German troops in Kosovo).<sup>114</sup>

While the ECJ judicial activism may be applauded as an attempt to put at least some check on the otherwise extensive powers of the Security Council, the legal reasoning it employed in so doing is less admirable. Article 103 of the UN Charter, for good or for bad, exists, and its impact on cases involving a conflict between a Security Council resolution promulgated under Chapter VII and a treaty should be addressed.<sup>115</sup> Nevertheless, this may be a case of necessity being the mother of invention. Until and unless the ICJ does provide meaningful judicial review on the actions of the Security Council, regional and national tribunals may attempt to fill this vacuum, with or without a solid legal basis.<sup>116</sup>

### CONCLUSIONS

The UN occupies a dual role with respect to states of exception. On one hand, the UN, through its Human Rights Committee's enforcement of the ICCPR's limitations on national states of exception, acts as a kind of guarantor against abuses inherent in the existence of such situations. The legal framework limiting the scope and duration of states of exception is solid and well-developed. Unfortunately, the HRC's enforcement powers in this respect are somewhat wanting. While the concept of soft law has many merits, bereft of the possibility of imposing hard sanctions, the HRC as thus far shown an inability to effectively penalize states which flout the ICCPR's limitations on states of exception. In this respect, even a slight increase of the HRC's enforcement powers – beyond the ability to issue a damning report – would be welcome. Such increased power could include the capacity to award nominal damages in a given case, perhaps in the range of 5,000-10,000 dollars, along the lines of the ECHR's awards.

The other side of the relationship of the UN to states of exception is one of a subject: the UN as a super-state, the executive branch of which, the Security Council, has the right to create a state of exception from the normal rules/constitution binding this super-state. Specifically, this is the right to derogate

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<sup>114</sup> *Ibid.*, ¶ 312.

<sup>115</sup> One possible way for a regional or national court to avoid the Article 103 problem would arise in situations where the Security Council resolution gives some discretion to the member state as to how it may be implemented. In that way, the court can legitimately check whether the manner of the resolution's implementation was in accord with regional or national standards. However, where, as in *Kadi*, the resolution leaves no such flexibility, this is obviously not an option.

<sup>116</sup> While the legal systems in many states are subordinated to international law (i.e., international law prevails over conflicting domestic law), the courts in states which do not take such a position (for example, the United States, where treaties are a source of law, but not necessarily higher than domestic federal law, and in any case not higher than the constitution) may have a logical basis to apply the ECJ's position in *Kadi*. Significantly, the conflict between the Security Council resolution and the rights enshrined in a national constitution, for example, would not necessarily implicate Article 103, as the conflict is not with an international treaty.



from the UN Charter (particularly the right to derogate from the principle of non-interference in domestic affairs), by passing resolutions for international security under Chapter VII of the Charter. As the globalization process has accelerated, and threats to international peace and security have taken on more and more of a global character, closer attention has been rightly given to these "states of exception" created by the Security Council, and what, if any, limitations may be placed upon them. While various possible limitations have been suggested, in general they have been quite limited, with a consensus that the Security Council's Chapter VII actions are more a non-reviewable political decision. At best, some form of indirect review (i.e., on the effect of the implementation of the Security Council's resolution, rather than a legal challenge on the resolution itself) from the ICJ, or even regional or national tribunals, may be possible.

While some tribunals, such as the ECJ, have been more assertive in placing a judicial limit on the Security Council's actions, the legal framework in which they have done so has been less than coherent. A better long-term solution would be for the ICJ to assume its natural role as a kind of check on the executive branch of the UN, particularly where the Security Council is exercising its "exceptional" powers under Chapter VII of the Charter. There have been signs that the ICJ is moving towards taking such a role, as evidenced by various dissenting opinions over the years, but this process should itself be accelerated to match the growing assertiveness of the Security Council in response to meeting global threats.

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