UNaccountable? The United Nations, Emergency Powers, and the Rule of Law

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ABSTRACT

For a body committed to the rule of law in theory, the applicability of the rule of law to the United Nations in practice remains oddly unclear. This Article will not consider the personal responsibility of UN officials, who generally enjoy personal or functional immunity from legal process in the territories where they work. Rather the focus of this Article is on the quasi-constitutional question of the liability of the organization itself. As the United Nations has assumed more state-like functions—in particular through the coercive activities of its Security Council—the question of what limits exist on the powers thus exercised has become more pressing. These powers may be compared to emergency powers within the domestic jurisdiction of states. Whereas a state of emergency is traditionally invoked in order to justify a departure from or stretching of the rule of law, here the existence of an emergency is a prerequisite to invoking the rule of law at all. At the same time, those promoting the rule of law generally lie beyond the reach of the jurisdiction in question—both during times of emergency and in times of quiet.

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I. INTRODUCTION

> Above all we must remember that the ways of Orientals are not our ways, nor their thoughts our thoughts. Often when we think them backward and stupid, they think us meddlesome and absurd. The loom of time moves slowly with them, and they care not for high pressure and the roaring of the wheels. Our system may be good for us; but it is neither equally, nor altogether good for them. Satan found it better to reign in hell than to serve in heaven; and the normal Asiatic would sooner be misgoverned by Asiatics than well governed by Europeans.
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> Lord Curzon, 1889[1]

In 1952, a committee of the American Society of International Law considered whether the laws of war should apply to United Nations (UN) enforcement actions. After struggling with the question, the committee noted that the UN held a "superior legal and moral position"[2] to the States Parties to the relevant conventions and concluded that the organization should "select such of the laws of war as may seem to fit its purposes."[3] This conferred extraordinary latitude upon the United Nations, which at the time consisted of only

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1. 2 GEORGE N. CURZON, PERSIA AND THE PERSIAN QUESTION 630–31 (Barnes & Noble, Inc. 1966) (1892).
2. William J. Bivens et al., *Should the Laws of War Apply to United Nations Enforcement Action?*, 46 AM. SOC'Y INT'L L. PROC. 216, 217 (1952).
3. *Id.* at 220.

sixty countries. Since that time, UN membership has more than tripled, and the organization itself has affirmed—though only in 1999—that international humanitarian law does indeed apply to peacekeeping and other operations.[4]

For a body ostensibly committed to the rule of law in theory,[5] the applicability of the rule of law to the UN in practice remains oddly unclear. A historical reason for this was the uncertain legal personality of this club of states when it was created, which had to be inferred by the International Court of Justice four years later.[6] With respect to specific bodies of law, an ongoing problem is that the UN is not itself a party to, among other things, the human rights treaties negotiated under its auspices.[7]

This Article will not consider the personal responsibility of UN officials, who generally enjoy personal or functional immunity from legal process in the territories where they work.[8] Rather the focus is on the quasi-constitutional question of the liability of the organization itself. As the UN has assumed more state-like functions—in particular through the coercive activities of its Security Council—the question of what limits there are on its powers has become more pressing. Though there are significant problems with applying concepts such as the rule of law uncritically at the international level,[9] the focus here will be the manner in which the UN Security

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4. *See* The Secretary-General, *Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999) (setting out principles and rules of international humanitarian law applicable to United Nations forces).

5. *See, e.g.*, G.A. Res. 60/1, para. 134(a), U.N. Doc. A/RES/60/1 (Sept. 16, 2005) (stating that member states unanimously reaffirm their commitment to "an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States").

6. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

7. *See, e.g.*, International Covenant on Civil and Political Rights art. 4, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (listing 165 parties but not the UN).

8. For a discussion of this topic, see Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15, *available at* http://www1.umn.edu/humanrts/instree/p&i-convention.htm (adopting legal immunity); The Secretary-General, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, delivered to the General Assembly*, U.N. Doc. A/59/710 (Mar. 24, 2005) (presenting a report from Prince Zeid of Jordan to the Secretary-General on comprehensive strategy to elimitate sexual exploitation and abuse in UN peacekeeping operations); and Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L. 103 (2002) (discussing the immunity of UN peacekeepers).

9. *See, e.g.*, Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 355–60 (2008) (discussing the concept of an international rule of law and theoretical barriers, such as the "assumption that domestic legal principles can be translated directly to the international sphere").

Council has used the rule of law as a tool, particularly in situations involving actual or potential conflict, and the extent to which the rule of law has constrained the exercise of power by the Council or its delegates.

The Council's powers thus invoked derive from Chapter VII of the UN Charter, and they are the sole exception to the saving clause that renders the domestic jurisdiction of Member States otherwise inviolable.[10] These powers may be invoked when the Council determines that there has been a "threat to the peace, breach of the peace, or act of aggression."[11] Such a framework clearly resonates with a doctrine of emergency powers.[12] What is interesting is that whereas a state of emergency is traditionally invoked in order to justify a departure from or stretching of the rule of law, here the existence of an emergency is a prerequisite to invoking the rule of law at all. At the same time, however, those promoting the rule of law generally lie beyond the reach of the jurisdiction in question—both during times of emergency *and* in times of quiet.[13]

This Article will examine these two issues—the use of the rule of law at the international level as a tool and its application to those who wield it—with a particular emphasis on UN operations in Asia, notably Timor-Leste (East Timor) and Afghanistan. Part II will examine the ways in which the rule of law has been used to stabilize conflict zones, focusing on the activities of the UN Security Council from the mid-1990s onwards and in particular on Timor-Leste. Part III will consider the extent to which the rule of law has constrained the decisions and actions of the Council, focusing on accountability issues and the apparent compromise of these principles in Afghanistan. Part IV will consider what light (if any) these operations shed on larger questions, such as whether there are

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10. U.N. Charter art. 2, para. 7.

> 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.

Id.

11. *Id.* art. 39.

12. *See generally* 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) (acknowledging the emergency doctrine but arguing that it is a "regulative ideal" allowing the Security Council to invoke Chapter VII authority with little accountability).

13. *See, e.g.*, *id.* at 79 ("Whether the imperative of international security is invoked as an after-the-fact rationalization for derogations, or is in fact part of the preliminary calculus leading thereto, the normative exceptionalism of Chapter VII is crystallized, and without corresponding limits the notion of a lawless and unanswerable cadre of actors is reinforced.").

discernibly Western or Asian approaches to the role law plays in times of crisis.

Of particular interest is the extent to which the UN can be said to reflect Western values, as is frequently alleged. A tentative conclusion is that there may be some rhetorical merit to this claim: Western states do largely set the agenda for the human rights framework that is commonly used to judge state actions.[14] Nevertheless, the United Nations and the international system wield executive authority so infrequently and inconstantly that broad conclusions are not yet possible. More interesting is the manner in which internationally administered "emergency" powers demonstrate the willingness of even established democracies to invoke the rule of law instrumentally, as a tool to provide stability—implicitly to compromise rule of law principles in the name of security.[15] At the same time, this Article also will attempt to shed some light on the underlying question of whether it even makes sense to speak of "emergency" powers before the rule of law has been established in a meaningful sense.

II. INVOKING THE RULE OF LAW AS A RESPONSE TO EMERGENCY

The rule of law has long been invoked in human rights treaties as the foundation of a legitimate state[16] and in development policies as the basis for a sustainable economy.[17] Frequently this invocation

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14. *See, e.g.*, Ashwani Peetush, *Global Ethics, Human Rights and Non-Western Values*, 1 GLOBAL STUD. J. 63 (2007) (arguing that criticism of the Universal Declaration of Human Rights as being parochial and biased towards Western values is well-founded).

15. *See* Schott, *supra* note 12, ¶ 100 ("Domestic emergency powers have a tendency to creep into non-emergency spheres and thereby weaken republican and constitutional safeguards in these areas.").

16. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, pmbl., U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) ("[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."). For a discussion of the relationship between human rights and the rule of law, see Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809 (2005).

17. For an early link between the rule of law, the free market, and economic prosperity, see generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Clarendon Press 1976) (1776). In the 1960s, the U.S. Agency for International Development, the Ford Foundation, and other private American donors began an ambitious program to reform the laws and judicial institutions of countries in Africa, Asia, and Latin America. JAMES GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 7–8 (1980). The "law and development" movement, steeped in dependency theory, generated hundred of reports and articles—yet a decade later, leading academic participants and a former official at

has been of greater rhetorical significance than political significance, in the same way that a great many states invoke the rule of law in theory with little effort to implement it in practice. More recently, however, the rule of law has also been used at the international level by the UN Security Council as a means of conflict resolution.[18] This Part considers the manner in which the Council has used the rule of law as a response to "emergencies" and then assesses how this played out in Timor-Leste. Following David Dyzenhaus,[19] an examination of the relationship between the rule of law and emergencies may be best pursued through consideration of practical examples. Two elements are of special interest: what the UN did while exercising a degree of control over the territory and what influence (if any) this had on subsequent governance practices.

A. *The Security Council's Uses of the Rule of Law*[20]

Apart from a preambular reference in relation to the deterioration of law and order in the Congo in 1961,[21] the Security Council first used the words "rule of law" in the operative paragraph of Resolution 1040 (1996), where it expressed its support for the Secretary-General's efforts to promote "national reconciliation, democracy, security and the rule of law in Burundi."[22] (It is noteworthy that the French text rendered rule of law as "*le rétablissement de l'ordre*."[23]) Many peace operations have subsequently had important rule of law components, such as those in Guatemala (1997),[24] Liberia (2003–),[25] Côte d'Ivoire (2004–),[26] Haiti

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the Ford Foundation declared it a failure. *Id.* at 211; John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development in the United States*, 1974 WIS. L. REV. 1062.

18. *See infra* notes 24–27 and accompanying text.

19. David Dyzenhaus, *The State of Emergency in Legal Theory*, *in* GLOBAL ANTI-TERRORISM LAW AND POLICY 65 (Victor V. Ramraj et. al. eds., 2005).

20. This section draws upon a few passages from Security Council Resolutions discussed at greater length in *An International Rule of Law?* Chesterman, *supra* note 9.

21. S.C. Res. 161B, pmbl., U.N. Doc. S/4741 (Feb. 21, 1961) ("*Noting with deep regret and concern* the systematic violations of human rights and fundamental freedoms and the general absence of the rule of law in the Congo"; the relevant corresponding French text was "l'absence générale de légalité au Congo").

22. S.C. Res. 1040, para. 2, U.N. Doc. S/RES/1040 (Jan. 29, 1996).

23. *Id.* (from the French translation of the document). This translates to "the reestablishment of order."

24. S.C. Res. 1094, para. 1, U.N. Doc. S/RES/1094 (Jan. 20, 1997).

25. S.C. Res. 1509, para. 1, U.N. Doc. S/RES/1509 (Sept. 19, 2003) (establishing the United Nations Mission in Liberia).

26. S.C. Res. 1528, para. 6(q), U.N. Doc. S/RES/1528 (Feb. 27, 2004) (authorizing the UN Operation in Côte d'Ivoire (UNOCI) to "assist the Government of National Reconciliation in conjunction with ECOWAS and other international

(2004–),[27] and the Democratic Republic of the Congo (2007–).[28] The mandates for such missions tend to be broad, calling for the "re-establishment" or "restoration and maintenance" of the rule of law without formally articulating what this might entail.[29] In practice, the dominant activities have tended to include personnel training, assisting institution-building, advising on law reform issues, and monitoring, with the emphasis on criminal law processes.[30] Less attention has been paid, for example, to land law.[31]

In addition to supporting domestic rule of law institutions, the Security Council has created international criminal tribunals to replace domestic processes for trials arising from the former

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organizations in re-establishing the authority of the judiciary and the rule of law throughout Côte d'Ivoire").

27. S.C. Res. 1542, para. 7(I)(d), U.N. Doc. S/RES/1542 (Apr. 30, 2004) (authorizing the UN Stabilization Mission in Haiti to facilitate "the restoration and maintenance of the rule of law, public safety and public order in Haiti through the provision inter alia of operational support to the Haitian National Police and the Haitian Coast Guard, as well as with their institutional strengthening, including the re-establishment of the corrections system").

28. S.C. Res. 1756, para. 3, U.N. Doc. S/RES/1756 (May 15, 2007). Here, the Security Council determined the following:

> MONUC [UN Organization Mission in the Democratic Republic of the Congo] will also have the mandate, in close cooperation with the Congolese authorities, the United Nations country team and donors, to support the strengthening of democratic institutions and the rule of law in the Democratic Republic of the Congo and, to that end, to . . . (c) [a]ssist in the promotion and protection of human rights, with particular attention to women, children and vulnerable persons, investigate human rights violations with a view to putting an end to impunity, assist in the development and implementation of a transitional justice strategy, and cooperate in national and international efforts to bring to justice perpetrators of grave violations of human rights and international humanitarian law; . . . (e) [a]ssist in the establishment of a secure and peaceful environment for the holding of free and transparent elections; (f) [c]ontribute to the promotion of good governance and respect for the principle of accountability.

Id. The UN Observer Mission in El Salvador (ONUSAL, 1991–1995) had a rule of law component within its human rights division. *See* El Salvador—ONUSAL Background, http://www.un.org/Depts/dpko/dpko/co_mission/onusalbackgr2.html (last visited Nov. 3, 2009) (summarizing the final months of ONUSAL).

29. *See* S.C. Res. 1528, *supra* note 26, para. 6(q) (using "re-establishment"); S.C. Res. 1542, *supra* note 27, para. 7(I)(d) (using "restoration and maintenance").

30. Vivienne O'Connor, *Rule of Law and Human Rights Protections Through Criminal Law Reform: Model Codes for Post-Conflict Criminal Justice*, 13 INT'L PEACEKEEPING 517, 517 (2006).

31. *See, e.g.*, Daniel Fitzpatrick, *Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor* (Evaluation & Policy Analysis Unit, United Nations High Comm'r for Refugees, Working Paper No. 58, 2002), *available at* http://www.unhcr.org/3c8399e14.html (highlighting the importance of land and housing policies to post-conflict issues and making suggestions for their incorporation based on the author's experience with UNTAET in East Timor).

Yugoslavia (1991–)[32] and Rwanda (1994).[33] These tribunals were explicitly created as part of an effort to bring peace to war-torn territories, but they have been criticized for spending significant resources in order to prosecute few individuals with little lasting impact on the judicial institutions of the territory concerned.[34] Hybrid tribunals, such as the Special Court for Sierra Leone[35] and the Extraordinary Chambers in the Courts of Cambodia,[36] were intended to blend international supervision with development of national capacity but have had limited success.[37]

In two situations, Kosovo (1999–2008)[38] and Timor-Leste (1999–2002),[39] the UN assumed direct responsibility for the administration of justice, including control of police and prison services. (Similar powers were exercised in Bosnia and Herzegovina through the Office of the High Representative from 1996.[40]) Resolution 1272 (1999), for example, determined that the situation in Timor-Leste constituted a threat to peace and security and invoked the Security Council's Chapter VII powers.[41] It established the UN Transitional Administration in East Timor (UNTAET) and endowed it with "overall responsibility for the administration of East Timor," granting the new body power "to exercise all legislative and executive authority, including the administration of justice."[42] UNTAET had further authorization "to take all necessary measures to fulfil its mandate."[43] These potentially dictatorial powers were tempered by the political understanding that the Timorese people had voted overwhelmingly for independence and that this transition should be

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32. S.C. Res. 827, para. 2, U.N. Doc. S/RES/827 (May 25, 1993).

33. S.C. Res. 955, para. 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

34. *E.g.*, David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Success and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD. AFF. 7, 12–17 (2002) (exploring criticisms of the I.C.T.Y. despite the vast resources invested in it).

35. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137.

36. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 U.N.T.S. 117.

37. *See* David Cohen, *"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future*, 43 STAN. J. INT'L L. 1, 36–38 (2007) (summarizing the successes and shortcomings of the hybrid tribunals).

38. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

39. S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

40. S.C. Res. 1088, U.N. Doc. S/RES/1088 (Dec. 12, 1996).

41. S.C. Res. 1272, pmbl., U.N. Doc. S/RES/1272 (Oct. 25, 1999).

42. *Id.* para. 1.

43. *Id.* para. 4.

overseen by the United Nations.[44] Timor-Leste duly became independent two-and-a-half years later.[45]

The frequency with which the rule of law is now invoked through the UN as a means of preventing or responding to crises has led to a proliferation of institutions, notably including a new Rule of Law Coordination and Resource Group and a Rule of Law Unit.[46] The roles attributed to the rule of law as a response to crises have also been reflected in the burgeoning literature on the subject.[47]

That literature rarely considers the irony that lawless means are being used to promote law (though that irony tends not to be lost on the locals).[48] Some analogize this to the laws of military occupation and colonialism, in particular the civilizing mission incorporated more openly in texts such as the League of Nations Covenant, which explicitly provided that "the tutelage of [peoples not yet able to stand by themselves] should be entrusted to advanced nations who by reason of their resources, their experience or their geographical

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44. *Id.* pmbl.

45. Timor-Leste was internationally recognized as an independent state on May 20, 2002. CIA World Factbook—Timor-Leste, https://www.cia.gov/library/publications/the-world-factbook/geos/tt.html (last visited Nov. 3, 2009).

46. The Secretary-General, *Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law*, para. 48, *delivered to the Security Council and the General Assembly*, UN Doc. S/2006/980, A/61/636 (Dec. 14, 2006).

47. *See generally* RICHARD CAPLAN, INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULE AND RECONSTRUCTION (2005) (examining the nature of international administration operations since the mid-1990s, their effectiveness, and the key operational and political challenges which arise); JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (2006) (examining the difficulties of creating a rule of law in post-conflict societies and offering insights into how policy-makers can improve future rule of law efforts); DOMINIK ZAUM, THE SOVEREIGNTY PARADOX: THE NORMS AND POLITICS OF INTERNATIONAL STATEBUILDING (2007) (examining the normative framework underlying international state-building efforts through case studies of international administrations in Bosnia and Herzegovina, Kosovo, and Timor-Leste); Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.–Apr. 1998, at 95 (discussing reasons for increased attention to the idea of a rule of law).

48. *See, e.g.*, *Xanana Gusmao: The Right to Live in Peace and Harmony*, GUARDIAN (Austl.), Jan. 31, 2001, *available at* http://www.cpa.org.au/z-archive/g2001/g1031.html (follow link for "Xanana Gusmao's New Year's Message") (President Gusmao's message to East Timor). In his message, President Gusmao criticized this phenomenon:

> We are witnessing another phenomenon in East Timor; that of an obsessive acculturation to standards that hundreds of international experts try to convey to the East Timorese, who are hungry for values: democracy (many of those who teach us never practised it in their own countries because they became UN staff members); human rights (many of those who remind us of them forget the situation in their own countries); gender (many of the women who attend the workshops know that in their countries this issue is no example for others).

Id.

position can best undertake this responsibility, and who are willing to accept it."[49] This language of a "sacred trust" survived in the present UN Charter.[50]

A more interesting analogy for present purposes is that which one might draw between the UN Security Council and the Roman law concept of *iustitium*.[51] As Giorgio Agamben has argued, this state of exception represents not the fullness of powers but "an emptiness and standstill of the law."[52] In times of crisis, the Security Council does not invoke emergency powers in the sense of enhanced centralized authority; rather, the crisis (a threat to international peace and security) justifies a temporary suspension of the law (the non-intervention principle enshrined in Article 2(7) of the UN Charter) for a specific purpose (restoration of peace and security).[53]

Formally, states have agreed to this arrangement through their UN membership,[54] even though such powers go somewhat beyond what the original Charter contemplated.[55] In the 1990s, that expansion could be tracked by the language used to justify each step as "unique" (Somalia in 1992),[56] "unique and exceptional" (Haiti in

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49. League of Nations Covenant art. 22, para. 2.

50. U.N. Charter art. 73. Article 73 states:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.

Id.

51. GIORGIO AGAMBEN, STATE OF EXCEPTION 48–49 (Kevin Attel, trans., Univ. of Chicago Press 2005) (1942) (describing the concept of *iustitium*).

52. *Id.* at 48; *see also* Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben's State of Exception*, 17 EUR. J. INT'L L. 677, 681–82 (2006) (providing a general overview of the concept of *iustitium* and Agamben's use of the concept in STATE OF EXCEPTION).

53. *Cf.* Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721, 726, 735 (2005) (discussing the partial suspension of laws for military necessity and the accompanying obligation to restore order and providing the example of the U.S. and U.K. as "occupying powers" in Iraq).

54. *See* U.N. Charter pmbl., art. 110 (providing that member countries have agreed to Charter and that upon ratification of Charter, country becomes member of the United Nations).

55. *See* NIGEL D. WHITE, THE LAW OF INTERNATIONAL ORGANIZATIONS 90–91 (2d ed., Manchester Univ. Press 2005) (1996) (noting that the scope of Article 2(7) is deliberately unclear and that in practice, the Security Council has "developed its own interpretation as to what constitutes intervention and domestic jurisdiction"); *cf.* U.N. Charter art. 2(7) (stating that nothing in the UN Charter authorizes the organization to intervene in matters that are "essentially within domestic jurisdiction" but that the principle does not "prejudice the application of enforcement measures").

56. S.C. Res. 794, para. 2, U.N. Doc. S/RES/794 (Dec. 3, 1992).

1993),[57] and again "unique" (Rwanda in 1994).[58] Predictably, these powers have become most controversial when they slipped from the exceptional into the normal, as the Security Council's powers arguably have in the over-use of targeted financial sanctions and legislative resolutions. In the former case, sanctions in principle operate, for example, to prevent the financing of terrorist acts: as asset freezes stretch into more than a decade, these preventive acts based on secret intelligence look more like a form of punitive confiscation unsupported by evidence.[59] In the latter case, the ability of the Security Council to respond swiftly and robustly to international threats has crept towards using those powers to issue norms of general application without operating through the normal—and cumbersome—processes of international law.[60]

Although the UN is a highly unique organization with respect to the coercive powers granted to its security organ, regional organizations of more recent vintage have been granted explicit powers to be critical of, among other things, non-constitutional changes of government.[61] The Organization for Security and Co-operation in Europe (OSCE), in its previous incarnation as the Commission on Security and Cooperation in Europe (CSCE), adopted the Copenhagen Document in 1990, in which Member States recognized their responsibility to defend and protect "the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that

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57. S.C. Res. 841, para. 14, U.N. Doc. S/RES/841 (June 16, 1993).

58. S.C. Res. 929, para. 9, U.N. Doc. S/RES/929 (June 22, 1994).

59. *See* discussion *infra* Part III.A.2.

60. *See* Stefan A. Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 175 (2005) (characterizing the role of the United Nations as an international legislative body and noting Security Council resolutions that imposed financial sanctions, travel bans, and requirements on member states to combat terrorism and proliferation of weapons of mass destruction); *cf.* Simon Chesterman, *The UN Security Council and the Rule of Law*, *in* Letter from Gerhard Pfanzelter, Permanent Representative of Austria to the United Nations, to Sec'y-Gen., United Nations Sec. Council, Annex, UN Doc. A/63/69-S/2008/270 (May 7, 2008) (discussing the role of the UN Security Council in strengthening a rules-based international system).

61. *See* Ban Ki-Moon, United Nations Sec'y-Gen., Speech to the High-Level Segment of the 15th Non-Aligned Movement Summit (July 15, 2009), *available at* http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=541 ("I note the strong stand of regional organizations such as the African Union and the Organization of American States against any unconstitutional regime change."); Marc Lacey & Ginger Thompson, *Honduras is Rattled as Leader Tries Return*, N.Y. TIMES, July 5, 2009, at A4, *available at* http://www.nytimes.com/2009/07/06/world/americas/06honduras.html (following the ouster of Honduran president Manuel Zelaya, the OAS suspended the country's membership in the organization).

order or of that of another participating state."[62] The European Union (EU) has even more intrusive powers with respect to its members.[63] In 1992, the Organization of American States (OAS) amended its charter to permit suspension of a member whose democratic government has been overthrown by force.[64] Going one step further in 2000, the African Union (AU) adopted a constitutive act that recognized "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[65] Most recently, at the 2005 World Summit, the UN endorsed the "responsibility to protect," and Member States declared their preparedness

> to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[66]

These developments are in contrast with the more traditional conception of sovereignty that Asian institutions tend to embrace. Asia lacks comparable bodies to the EU/OSCE, the OAS, or the AU. The bodies that do exist, such as the Shanghai Cooperation Organization or the embryonic human rights body within the Association of Southeast Asian Nations (ASEAN), have either extremely weak mechanisms or no provision at all for scrutiny of

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62. Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, Den., June 5–29, 1990, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, para. 6 (June 29, 1990), *as reprinted in* 29 I.L.M. 1305 (1990), *available at* http://www.osce.org/documents/odihr/1990/06/13992_en.pdf. For background information on the adoption of the Copenhagen Document, see Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163 (1993).

63. *See* Europa Summaries of EU Legislation, The Amsterdam Treaty: Freedom, Security, and Justice, http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a10000_en.htm (last visited Nov. 2, 2009) (summarizing the Treaty of Amsterdam, which provides procedures for establishing the breach and suspension of a member state by the European Council when a country violates principles upon which the Union was founded—including principles of human rights, democracy, and the rule of law).

64. Organization of American States Charter art. 9, Apr. 30, 1948, 119 U.N.T.S. 3. Suspension is not automatic, however, and must be approved by a two-thirds majority of the OAS member states. *Id*. art. 9(b).

65. Constitutive Act of the African Union art. 4(h), July 11, 2000, OAU Doc. CAB/LEG/23.15, *available at* http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm.

66. 2005 World Summit Outcome, G.A. Res. 60/1, para. 139, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

members.[67] This is not to say that such questions of institutional design are explicable by Asian cultural or political differences, but it does suggest that—at least in this respect—Asia provides a useful counterpoint to the general trend towards greater delegation of powers to international organizations.

B. *Applying the Rule of Law in Timor-Leste*

Leaving aside the question of what international organizations have been empowered to do in theory, what happens in practice when forces are deployed on the ground? This Article will not rehearse the pre-1999 history of Timor-Leste.[68] When the Australia-led International Force-East Timor (INTERFET) landed—formally authorized by both a Security Council resolution[69] and Indonesian consent[70]—they swiftly drew up a Detainee Ordinance that provided for temporary detention of any person suspected of or on trial for committing a "serious offence," voluntary detainees, and any person detained as "a security risk."[71] "Serious offence" was defined by reference to certain chapters of the Indonesian Penal Code.[72] Plans had been made to transfer persons so detained to Indonesian civilian authorities, but the collapse of those structures soon led to the creation of a Detainee Management Unit (DMU) to review detention cases, comparable to a bail hearing except on the basis of written submissions.[73] Between October 21, 1999, and January 12, 2000, the

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67. *See* Charter of the Association of Southeast Asian Nations art. 14, Nov. 12, 2007, *available at* http://www.aseansec.org/ASEAN-Charter.pdf (providing for the establishment of a human rights body but not specifying any power held by the body).

68. For accounts of pre-1999 Timor-Leste, see generally GUNS AND BALLOT BOXES: EAST TIMOR'S VOTE FOR INDEPENDENCE (Damien Kingsbury ed., 2000) (collection essays by observers and participants documenting the path to East Timor's independence); IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR: THE UNITED NATIONS, THE BALLOT, AND INTERNATIONAL INTERVENTION (2001) (describing an insider's account of events leading up to the international intervention in East Timor following the country's election for independence, written by the UN Secretary-General's Special Representative in East Timor); and JOSÉ RAMOS-HORTA, FUNU: THE UNFINISHED SAGA OF EAST TIMOR (1987) (documenting the genocide of the Timorese people during Indonesian occupation in a memoir by the current president and former prime minister of East Timor).

69. S.C. Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999).

70. *See id.* at 2 (referring to requests by the Indonesian government to the UN Secretary-General for the establishment of a multi-national force in East Timor). From a legal perspective this consent would appear to be redundant.

71. Bruce M. Oswald, *Model Codes for Criminal Justice and Peace Operations: Some Legal Issues*, 9 J. CONFLICT & SEC. L. 253, 269 (2004) (citing INTERFET Detainee Ordinance, § 12 (Oct. 21, 1999)).

72. *Id.* (citing INTERFET Detainee Ordinance, *supra* note 71, § 1).

73. Michael J. Kelly et al., *Legal Aspects of Australia's Involvement in the International Force for East Timor*, 841 INT'L REV. RED CROSS, MAR. 31, 2001, at 101, *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQZ2.

DMU reviewed sixty cases, after which all detainees were handed over to civilian authorities under the auspices of UNTAET.[74]

Following the transfer of power to the civilian UNTAET operation, an early order of business was to determine what law applied. In Kosovo, the controversial mission authorized just months earlier, choice of law had been politically fraught. Pursuant to Russian insistence, and consistent with Resolution 1244 (1999), the first UN Interim Administration Mission in Kosovo (UNMIK) regulation established that the law in force before March 24, 1999 (the commencement date of NATO's air campaign) was applicable, "provided that this law was consistent with internationally recognized human rights standards and Security Council Resolution 1244. The largely Albanian judiciary that was put in place by UNMIK rejected this, however, with some judges reportedly stating that they would not apply 'Serbian' law in Kosovo."[75] Although the judges accepted some federal laws, including the federal code of criminal procedure, they "insisted on applying the Kosovo Criminal Code and other provincial laws that had been in effect in March 1989," asserting that Belgrade had illegally revoked them.[76] "The judges nevertheless 'borrowed' from the 1999 law to deal with cases involving crimes not covered in the 1989 Code, such as drug-trafficking and war crimes."[77] This dispute not only lowered hopes of Serb judges returning to office, but it also "further undermined local respect for UNMIK," particularly in December 1999, when UNMIK passed a regulation that finally reversed its earlier decision and

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74. *Id.*

75. SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 166 (2004) [hereinafter CHESTERMAN, YOU, THE PEOPLE] (citing On the Authority of the Interim Administration in Kosovo, UNMIK Reg. 1999/1, §§ 2–3, U.N. Doc. UNMIK/REG/1999/1 (July 25, 1999) [hereinafter UNMIK Reg. 1999/1]); Simon Chesterman, *Justice Under International Administration: Kosovo, East Timor and Afghanistan*, INT'L PEACE ACAD. REP., Sept. 2002, at 5 [hereinafter Chesterman, *Justice Under International Administration*]; *see also* The Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, paras. 55–56, *delivered to the Security Council*, U.N. Doc. S/1999/1250 (Dec. 23, 1999) [hereinafter *UNMIK Report*] (noting that "the local judicial community ha[d] been extremely reluctant to apply these laws").

76. Chesterman, *Justice Under International Administration*, *supra* note 75, at 5; *see also UNMIK Report*, *supra* note 75, para. 55 (noting an extreme reluctance to apply Serbian criminal law, which the judges viewed as having been "part and parcel of the revocation of Kosovo's prior autonomous status and an instrument of oppression since then").

77. Chesterman, *Justice Under International Administration*, *supra* note 75, at 5; *see also* WILLIAM G. O'NEILL, KOSOVO: AN UNFINISHED PEACE 80 (2002) (noting that the judges' practice of borrowing from the 1999 law for such cases damaged their credibility).

declared the laws in effect on March 22, 1989 as the applicable law in Kosovo.[78]

In Timor-Leste, by contrast, choice of law was uncontroversial.[79] UNTAET Regulation 1999/1 defined the applicable law as "the laws applied in East Timor prior to 25 October 1999."[80] The specific choice of language (i.e., "the laws applied," as opposed to "the applicable laws") was meant to avoid "the retroactive legitimization of the Indonesian occupation."[81] These laws were not translated from Indonesian to English, however, "greatly complicating the efforts of international judges to inform themselves of the laws governing the territory."[82] Institutions were sometimes developed idiosyncratically: Timor-Leste found itself, for example, with German-style investigative judges—an outcome not unconnected with the fact that UNTAET's legal adviser at the time happened to be German.[83]

Although Timor-Leste, in contrast to Kosovo, presented fewer security and political issues, "the lack of local capacity presented immense challenges."[84] For example, no Timorese lawyer had been appointed to a judiciary or prosecutorial position during Indonesian rule.[85] A Transitional Judicial Service Commission, comprised of three Timorese and two international experts, was established,[86] but in order to search for qualified legal personnel with no access to a

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78. CHESTERMAN, YOU, THE PEOPLE, *supra* note 75, at 166 (citing On the Authority of the Interim Administration in Kosovo, UNMIK Reg. 1999/24, § 1.1, U.N. Doc. UNMIK/REG/1999/24 (Dec. 12, 1999) [hereinafter UNMIK Reg. 1999/24]); Chesterman, *Justice Under International Administration*, *supra* note 75, at 5.

79. CHESTERMAN, YOU, THE PEOPLE, *supra* note 75, at 170; Chesterman, *Justice Under International Administration*, *supra* note 75, at 7.

80. On the Authority of the Transitional Administration in East Timor, UNTAET Reg. 1999/1, § 3.1, U.N. Doc. UNTAET/REG/1999/1 (Nov. 27, 1999).

81. Hansjoerg Strohmeyer, *Building a New Judiciary for East Timor: Challenges of a Fledgling Nation*, 11 CRIM. L.F. 259, 267 n.18 (2000) [hereinafter Strohmeyer, *Building a New Judiciary*], *quoted in* CHESTERMAN, YOU, THE PEOPLE, *supra* note 75, at 170 n.58.

82. Chesterman, *Justice Under International Administration*, *supra* note 75, at 15; *see also* Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 59 (2001) [hereinafter Strohmeyer, *Collapse*] (describing the challenge of translating the existing laws so that international experts might assist the local judiciary the practical application of the UNTAET formula).

83. ZAUM, *supra* note 47, at 232; *see also* Strohmeyer, *Collapse*, *supra* note 82, at 46 n.* (biographical note on Strohmeyer, the acting legal advisor to UNTAET).

84. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7.

85. *Id.*; Strohmeyer, *Building a New Judiciary*, *supra* note 81, at 269; Strohmeyer, *Collapse*, *supra* note 82, at 53.

86. CHESTERMAN, YOU, THE PEOPLE, *supra* note 75, at 170 (citing On the Establishment of a Transitional Judicial Service Commission, UNTAET Reg. 1999/3, § 2.1, U.N. Doc. UNTAET/REG/1999/3 (Dec. 3, 1999) [hereinafter UNTAET Reg. 1999/3]); Chesterman, *Justice Under International Administration*, *supra* note 75, at 7.

functioning broadcasting network, INTERFET had to drop leaflets from planes.[87] Even still, after two months, more than sixty qualified Timorese lawyers had formally applied for positions, and the first eight judges and two prosecutors were appointed and sworn in on January 7, 2000.[88]

The reliance on inexperienced local legal personnel resulted from a mix of both politics and pragmatism.[89] On one hand, appointment of the first Timorese legal officers following international intervention carried enormous symbolic importance.[90] At the same time, the numerous emergency detentions resulting from the Australian-led INTERFET operation necessitated the urgent appointment of judges with an existing knowledge of local civil law and without need for the extensive translation services typically demanded by international judges.[91] Additionally, INTERFET considered the inevitable temporariness of appointing international judges, which would cause further disruption when international funds began to diminish.[92]

In the end, UNTAET was more aggressive in Timorizing the management of judicial systems than the institutions working in political and civil affairs.[93] "The trade-off, of course, was in formal qualifications and practical experience. Some of the appointees had worked in law firms and legal aid organizations in Indonesia; others

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87. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7; Strohmeyer, *Building a New Judiciary*, *supra* note 81, at 263; Strohmeyer, *Collapse*, *supra* note 82, at 54.

88. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7; Strohmeyer, *Building a New Judiciary*, *supra* note 81, at 263–64, 264 n.12; Strohmeyer, *Collapse*, *supra* note 82, at 54 & n.39.

89. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7; *see also* Strohmeyer, *Building a New Judiciary*, *supra* note 81, at 264–66 (discussing the "multi-faceted" rationale for hiring exclusively Timorese legal personnel); Strohmeyer, *Collapse*, *supra* note 82, at 54 (listing the various reasons for INTERFET's "rapid appointment" of local legal personnel).

90. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7; *see also* Strohmeyer, *Building a New Judiciary*, *supra* note 81, at 264–66 (listing political sensitivity following intervention as one rationale); Strohmeyer, *Collapse*, *supra* note 82, at 54 (noting that appointment potentially carried "massive political significance").

91. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7; *see also* Strohmeyer, *Building a New Judiciary*, *supra* note 81, at 266 (noting the urgent need for review of the INTERFET detainees' cases); Strohmeyer, *Collapse*, *supra* note 82, at 54 (listing the need to establish a review mechanism for detainees' cases as the most critical reason).

92. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7; Strohmeyer, *Building a New Judiciary*, *supra* note 81, at 265; Strohmeyer, *Collapse*, *supra* note 82, at 54.

93. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7; Strohmeyer, *Building a New Judiciary*, *supra* note 81, at 265; Strohmeyer, *Collapse*, *supra* note 82, at 54; *see, e.g.*, Joel C. Beauvais, Benevolent Despotism: A Critique of U.N. State-Building in East Timor, 33 N.Y.U. J. INT'L L. & POL. 1101, 1149 (arguing that UNTAET has been "much more aggressive in moving toward East Timorese management of rule of law institutions").

as paralegals with Timorese human rights organizations and resistance groups."[94] None of the appointees had prior judicial or prosecutorial experience.[95] Thus, the concept of "Timorization" refers to the identity of particular officials as opposed to "the establishment of support structures to ensure that individuals could fulfill their responsibilities."[96] In order to train the new appointees, UNTAET developed a three-tiered approach, which included a one week "quick impact" course before appointment, mandatory ongoing training, and a "mentoring scheme."[97] Unfortunately, resources were limited, and UNTAET experienced difficulties in recruiting experienced mentors with civil law backgrounds, which seriously threatened the success of the training program.[98]

Quite apart from the limited legal training that was possible during the period of UNTAET administration (which was shorter than even a three-year law degree), a greater source of potential instability was the political situation upon independence.[99] It is arguable that continuing the international administration or a large foreign military presence would ultimately have encouraged free-riding on the part of the government, and that limited peacekeeping resources needed to be deployed elsewhere. Nevertheless, the international presence can certainly take some responsibility for laying the foundations for disorder by leaving in place a government where President Xanana Gusmão enjoyed massive popular support (including that of the military) without meaningful constitutional power, while Prime Minister Mari Alkatiri had constitutional authority but little personal public support.[100] This contributed to

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94. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7; *see also* Strohmeyer, *Collapse*, *supra* note 82, at 54 (describing the limited practical experience of the newly hired jurists).

95. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7; Strohmeyer, *Collapse*, *supra* note 82, at 54.

96. CHESTERMAN, YOU, THE PEOPLE, *supra* note 75, at 171.

97. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7; Strohmeyer, *Building a New Judiciary*, *supra* note 81, at 272–73, Strohmeyer, *Collapse*, *supra* note 82, at 55–56.

98. Chesterman, *Justice Under International Administration*, *supra* note 75, at 7; Strohmeyer, *Collapse*, *supra* note 82, at 56.

99. *See* S.C. Res. 1410, para. 6, U.N. Doc. S/RES/1410 (May 17, 2002) ("*[n]oting* that the emerging institutions in East Timor remain fragile and that in the period immediately after independence assistance will be required to ensure sustained momentum in the development and strengthening of East Timor's infrastructure, public administration, law enforcement and defence capacities"); Completed Peacekeeping Operations, East Timor, http://www.un.org/peace/etimor/etimor.htm (last visited Nov. 3, 2009) (stating that the UNTAET administration started 25 Oct. 1999 and ended 17 May 2002).

100. *Cf.* CHESTERMAN, YOU, THE PEOPLE, *supra* note 75, at 233 ("Through embracing formal processes that led to Fretilin's domination of the political landscape

outbursts of violence in December 2002, June 2006, and February 2008.[101]

Given the subsequent instability in Timor-Leste, what lessons, if any, were drawn from the period of international administration? Timor-Leste's emergency powers in the constitution adopted upon independence in May 2002 are, unusually, gathered under an Agambenesque subheading:

> **Section 25 (State of exception)**
>
> 1. Suspension of the exercise of fundamental rights, freedoms and guarantees shall only take place if a state of siege or a state of emergency has been declared as provided for by the Constitution.
>
> 2. A state of siege or a state of emergency shall only be declared in case of effective or impending aggression by a foreign force, of serious disturbance or threat of serious disturbance to the democratic constitutional order, or of public disaster.
>
> 3. A declaration of a state of siege or a state of emergency shall be substantiated, specifying rights, freedoms and guarantees the exercise of which is to be suspended.
>
> 4. A suspension shall not last for more than thirty days, without prejudice of possible justified renewal, when strictly necessary, for equal periods of time.
>
> 5. In no case shall a declaration of a state of siege affect the right to life, physical integrity, citizenship, non-retroactivity of the criminal law, defence in a criminal case and freedom of conscience and religion, the right not to be subjected to torture, slavery or servitude, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the guarantee of non-discrimination.
>
> 6. Authorities shall restore constitutional normality as soon as possible.[102]

Subsequent provisions set out the means by which such a declaration is to be made. The power to do so is granted exclusively to the President, but this is to follow "authorisation of the National Parliament, after consultation with the Council of State, the Government and the Supreme Council of Defence and Security."[103] When Parliament is not in session, the power of authorization falls to

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while endorsing the charismatic legitimacy of Gusmão, UNTAET sowed the seeds of a possible confrontation.").

101. *See generally* Lirio de Fonseca, *Riots Grip East Timor's Capital*, GUARDIAN (London), Dec. 5, 2002, http://www.guardian.co.uk/world/2002/dec/05/indonesia.easttimor (noting the prime minister's request for calm after rioting in East Timor left at least five people dead and the prime minister's house burned); BBC News, Timeline: East Timor, http://news.bbc.co.uk/2/hi/asia-pacific/1504243.stm (last visited Nov. 3, 2009) (listing violent events in East Timor's history from May to June 2006 that eventually led to Prime Minster Mari Alkatari's resignation and the February 2008 shooting that left President Jose Ramos-Horta injured in the stomach and rebel leader Alfredo Renaido dead).

102. CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE § 25.

103. *Id.* § 85(g); *see also id.* § 95(3)(j) (providing the National Parliament the power to "authorise and confirm the declaration").

the Standing Committee.[104] The Government, for its part, has the power to propose such a declaration to the President.[105]

The Timorese Constitution draws in part on the Constitution of Portugal.[106] In particular, the threshold for declaring a state of emergency is very similar, with the Portuguese Constitution (under the more prosaic heading "Suspension of the Exercise of Rights") allowing for such a declaration in cases of "actual or imminent aggression by foreign forces, a serious threat to or disturbance of constitutional democratic order, or public disaster."[107] This is a significantly broader set of circumstances than that recognized in the International Covenant on Civil and Political Rights, to which Timor-Leste acceded, which limits derogations to "a public emergency which threatens the life of the nation."[108] Indeed, Timor-Leste goes beyond the Portuguese baseline of either "*serious threat to* or disturbance of constitutional democratic order" by allowing for a state of emergency to be declared if there is a "serious disturbance or *threat of serious disturbance to* the democratic constitutional order."[109]

Nevertheless, there would appear to be little question that the higher threshold had been reached on the two occasions when a state of emergency was declared. The first followed a dispute between the military and the Fretilin-dominated leadership, with 600 soldiers deserting and an escalation of violence through March and April 2006 that saw numerous deaths, including nine unarmed police killed by soldiers.[110] President Gusmão declared a state of emergency on May 31, 2006, in part to reassert control over the armed forces, but also in

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104. *Id.* § 102(3)(g).

105. *Id.* § 115(2)(c).

106. *See* Laura Grenfell, *Legal Pluralism and the Rule of Law in Timor Leste*, 19 LEIDEN J. INT'L L. 305, 309 (2006) (noting the Portuguese aspects of Timor-Leste's CONSTITUTION). For a critique of the failure to engage with legal pluralism in Timor-Leste, see generally *id.*

107. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION OF THE PORTUGUESE REPUBLIC] art. 19, para. 2.

108. International Covenant on Civil and Political Rights, *supra* note 7; *cf.* ARTICLE 19 & INTERNEWS, FREEDOM OF EXPRESSION AND THE MEDIA IN TIMOR-LESTE 40 (2005), *available at* http://www.article19.org/pdfs/publications/timor-leste-baseline-study.pdf (noting that the terms "serious disturbance" and "public disorder" are "excessively broad and vague").

109. CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE § 25 (2).

110. *See Nine Unarmed Police Killed in East Timor*, USA TODAY, May 26, 2006, http://www.usatoday.com/news/world/2006-05-25-easttimor_x.htm (giving account of the violence in Timor-Leste by dissident soldiers upon the arrival of an Australian-led peacekeeping force); Jane Perlez, *East Timor Resignation Raises Hopes for End to Violence*, N.Y. TIMES, June 27, 2006, http://www.nytimes.com/2006/06/27/world/asia/27timor.html (reporting hopes that resignation of East Timor Prime Minister Mari Alkatiri would pave the way to the resolution of violence in the country).

order to force the resignation of Prime Minister Alkatiri. Alkatiri ultimately resigned on June 26, 2006.[111]

A state of emergency was declared for a second time following assassination attempts on the President and Prime Minister on February 11, 2008, apparently led by Alfredo Reinado—a rebel soldier who had deserted in the May 2006 unrest. Reinado had been detained by Portuguese and Australian troops but escaped a month later.[112] As President Jose Ramos-Horta had been shot, the Speaker of the National Parliament took on the function of acting President.[113] On behalf of the government, now-Prime Minister Xanana Gusmão requested an initial state of emergency of forty-eight hours in order to suspend the right to free movement, impose a dusk to dawn curfew, and prohibit any assembly or demonstration.[114] This was subsequently extended by ten days in order to cover Reinado's funeral[115] and then by an additional thirty days.[116]

It is far too early to draw any meaningful conclusions about how emergency powers will be invoked in Timor-Leste in the future. It is not clear, however, that it is possible to distinguish an Asian or non-Western position. Relations with Indonesia remain somewhat tense, and the constitution and the ruling elite look more to Portugal for guidance.[117] ASEAN has been reluctant to consider Timor-Leste as a

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111. *Cf.* Tom Hyland, *Charges Over Timor Violence*, SUNDAY AGE (Melbourne), Oct. 8, 2006 (describing the violence that errupted in April of 2006 and speculated political ramifications, also attempting to discredit a conspiracy theory that the violence was orchestrated by either the President or the Prime Minister for political reasons); Graham Lloyd, *Trio Holds Key to Resolving Conflict*, COURIER MAIL (Austl.), June 3, 2006 (describing the relationships between key political players in East Timorese politics).

112. Ben Doherty, *A Defiant Rebel to the End*, AGE (Melbourne), Feb. 12, 2008, http://www.theage.com.au/news/in-depth/a-defiant-rebel-to-the-end/2008/02/11/1202578699472.html.

113. *See* CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE § 84(1) ("During temporary impediment of the President of the Republic, the presidential functions shall be taken over by the Speaker of National Parliament or, in case of impediment of the latter, by his or her replacement.").

114. Xanana Gusmao, Prime Minister, East Timor, Message to the Nation (Feb. 11, 2008), *available at* http://www.easttimorlegalinformation.org/Legal_News/February_2008_4.html.

115. *State of Emergency Extended in East Timor*, ABC NEWS, Feb. 14, 2008, http://www.abc.net.au/news/stories/2008/02/13/2162141.htm.

116. *In Brief*, *President Improves*, AUSTL., Feb. 22, 2008, at 10. The state of emergency was ultimately lifted in all but one district on April 22, 2008. *See* Mark Metherell, *E. Timor Told to Follow the Rules*, SYDNEY MORNING HERALD (Austl.), Apr. 23, 2008 ("[T]he state of siege would be extended for another month in a district where army rebels involved in the assassination attempt are believed to be hiding.").

117. *See* International Crisis Group, Managing Tensions on the Timor-Liste/Indonesia Border: Overview, http://www.crisisgroup.org/home/index.cfm?id=4629&l=1 (last visited Nov. 3, 2009) (noting that while East Timor and Indonesia have "managed to establish good bilateral relations," the spectre of human rights violations and East Timor's independence continues to fraught relations between the two countries); *cf.* Alison Roberts, Deutsche Welle, Timor Leste and Portugal: A Special

potential member.[118] Australia's ongoing military support will be essential for stability. The UN presence, which was extended through February 2010, provides additional oversight.[119] Timor-Leste thus has little Asian identification and enjoys far closer formal and substantive relations with Western states and the UN—even if those relations resemble the colonial ties of earlier times. It demonstrates, if anything, the extent to which even this newest of states found itself swiftly drawn into a familiar discourse on and practice of the rule of law.

III. COMPROMISING THE RULE OF LAW BECAUSE OF EMERGENCY

Where the previous Part looked at UN efforts to promote the rule of law by invoking exceptional powers, this Part will consider the application of rule of law principles to the UN itself and examine the manner in which it was prepared to compromise them in the hope of achieving a more modest form of organized political life in Afghanistan.

A. *Does the Rule of Law Apply to the United Nations?*

The United Nations is not a party to the human rights treaties negotiated under its auspices or monitored through its agencies.[120] In part, this reflects the traditional view that only states properly enter into such treaties, a view also supported by the understanding that it is primarily states that violate or protect human rights.[121] As the UN has assumed state-like functions, however—including administrations that managed entire territories—the question of whether the UN is required to abide by basic human rights standards has become more pressing. Arguments that the UN should be bound sometimes proceed on the basis that such a conclusion is self-evident

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Relationship, http://www2.dw-world.de/southasia/SoutheastAsia/1.234818.1.html (last visited Nov. 3, 2009) ("[L]inks with Portugal remain important—links which are as much strategic as sentimental.").

118. *See* Press Release, Ass'n of Se. Asian Nations, East Timor Needs Five Years to Join ASEAN: PM (July 27, 2006), *available at* http://www.aseansec.org/afp/154.htm (quoting East Timor Prime Minister's statement that it will take the country five years to join ASEAN as it meets the organization's strict requirements for membership).

119. S.C. Res. 1867, para. 1, U.N. Doc. S/RES/1867 (Feb. 26, 2009).

120. Julia Werzer, *The UN Human Rights Obligations and Immunity: An Oxymoron Casting a Shadow on the Transitional Administrations in Kosovo and East Timor*, 77 NORDIC J. INT'L L. 105, 108 (2008).

121. *Cf.* Ruwantissa Abeyratne, *The United Nations and Perspectives on Good Government*, DAILY NEWS (Sri Lanka), May 10, 2008, http://www.dailynews.lk/2008/05/10/fea01.asp (noting that the UN does not act in its own right but instead operates as a group of states acting individually).

from the purposes and principles of the UN Charter.[122] A second approach asserts that the UN has sufficient legal personality to be bound by customary international law.[123] A third approach focuses on the activities of the UN and the state-like functions that it now exercises.[124] In a series of cases arising from the use of targeted financial sanctions, the European Court of First Instance has held that Security Council decisions, by virtue of the UN Charter's primacy clause in Article 103, are constrained only by norms of *jus cogens*.[125] This is one of only a few cases in which a tribunal has reviewed, even indirectly, the validity of Council action.[126]

Apart from the general "state of exception" that might be used to characterize the Security Council's use of Chapter VII powers[127]—most obviously to authorize the use of military force to restore peace and security—two sets of activities undertaken with the authority of the Council warrant closer analysis for their proximity to national debates about states of emergency: detention without trial in a period of relative calm and confiscation of assets without judicial review.

1. Kosovo: Executive Detentions

Kosovo, like Timor-Leste, was an unusual situation in which the UN exercised de facto day-to-day governance over a territory and population that was technically part of what remained of the Federal Republic of Yugoslavia (later renamed Serbia and Montenegro, and after further secession simply "Serbia") but always destined for a political future separate from that of Belgrade.[128] As indicated

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122. Werzer, *supra* note 120, at 109 (citing F. Mégret & F. Hoffmann, *The UN as a Human Rights Violator?: Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 317–18 (2003)).

123. *Id.* at 108–09, 118 (citing Mégret & F. Hoffmann, *supra* note 122, at 314; A. Reinisch, *Securing the Accountability of International Organizations*, 7 GLOBAL GOVERNANCE 131, 134–35 (2001)).

124. *See id.* (explaining that proponents of the third approach argue that the UN should be bound by international human rights law to the same extent its member states are bound; otherwise, states could empower an international organization to act for them as a means of escaping their international obligations) (citing Mégret & F. Hoffmann, *supra* note 122, at 318).

125. *Id.* at 111, 113–14.

126. *See* Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 para. 118 (June 21) (referring to "a situation which the Court has found to have been validly declared illegal" by the Security Council); Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 28–30 (Oct. 2, 1995), *available at* http://www.icty.org/x/cases/tadic/acdec/en/51002.htm ("[N]either the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).").

127. Schott, *supra* note 12.

128. Carsten Stahn, *The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis*, 5 MAX PLANCK Y.B. U.N. L. 108, 108–09 (2001).

earlier, however, UNMIK's faith in the judiciary and its own credibility as a lawmaker were shaky. One consequence of this was recourse to executive detentions.

On May 28, 2000, Afrim Zeqiri, a Kosovar Albanian and former Kosovo Liberation Army (KLA) fighter, was arrested on suspicion of murder for the deaths of three Serbs, one of which was a four-year-old boy.[129] The Albanian prosecutor ordered Zeqiri's release due to lack of evidence and raised suspicions of judicial bias.[130] An international judge upheld the decision; however, Special Representative of the Secretary-General (SRSG) Bernard Kouchner (currently, the Foreign Minister of France) ordered that Zeqiri remain detained under an "executive hold" and claimed authority to issue such orders for "security reasons" and pursuant to Security Council Resolution 1244 (1999).[131] SRSG Hans Haekkerup, the successor to Kouchner, gave similar orders in response to an incident that occurred in February 2001, when a bus carrying Serbian passengers from Nis to Kosovo was bombed, killing eleven.[132] In mid-March, British KFOR troops arrested four ethnic Albanians for this crime, a panel of international judges ordered that three of them be released later that month (the fourth escaped).[133] On March 28, Haekkerup issued an executive order extending detention for the suspects by thirty days, later issuing six additional orders of extended detention.[134]

Criticism by the OSCE Ombudsperson[135] and international human rights organizations such as Human Rights Watch and Amnesty International led to UNMIK's establishment of a Detention Review Commission of international experts in August 2001.[136] The Commission approved the order to extend the detentions of the Nis bombing arrestees to December 19, 2001 (a few weeks after the first

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129. Chesterman, *Justice Under International Administration*, *supra* note 75, at 5; *see also* O'NEILL, *supra* note 77, at 86.

130. Chesterman, *Justice Under International Administration*, *supra* note 75, at 5; *see also* O'NEILL, *supra* note 77, at 86.

131. CHESTERMAN, YOU, THE PEOPLE, *supra* note 75, at 167 (citing O'NEILL, *supra* note 77, at 86); Chesterman, *Justice Under International Administration*, *supra* note 75, at 5.

132. Chesterman, *Justice Under International Administration*, *supra* note 75, at 5.

133. *Id.*

134. *Id.*

135. Ombudsperson Institution in Kosovo, *Special Report No 3: On the Conformity of Deprivations of Liberty Under "Executive Orders" with Recognized International Standards*, *delivered to the SRSG* (June 29, 2001), *available at* http://www.ombudspersonkosovo.org/repository/docs/E4010629a.pdf.

136. Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071, 1116 n.202 (2006) [hereinafter Chesterman, *The Spy*]; David Marshall & Shelley Inglis, *Human Rights in Transition: The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 113 (2003).

provincial elections in Kosovo), concluding that "there [were] reasonable grounds to suspect that each of the detained persons ha[d] committed a criminal act."[137] The Kosovo Supreme Court finally ordered release of the three detainees at the end of that period, as the three-month mandate of the Commission had not been renewed.[138] Afrim Zeqiri, the last detainee held under Executive Order, was released on bail in early February 2002 (after approximately twenty months of detention).[139]

Two years after the establishment of UNMIK, officials argued that Kosovo still ranked as an "internationally-recognized emergency."[140] Such circumstances, they argued, require that "international human rights standards accept the need for special measures that, in the wider interests of security, and under prescribed legal conditions, allow authorities to respond to the findings of intelligence that are not able to be presented to the court system."[141] Indeed, human rights law provides for derogation from particular norms, for example, the right to a fair trial, but this type of derogation is typically limited to circumstances of "war or other public emergency threatening the life of the nation," and some form of official notification of the circumstances is required.[142] This type of notification was not given in Kosovo, likely due to political reservations in regards to admitting that Kosovo, even two years after UNMIK arrived, remained a "public emergency."[143] Producing an odd result in a war primarily justified on the grounds of support for human rights, a Chapter VII resolution adopted by the Security Council somehow absolved a UN operation from certain human rights obligations.[144]

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137. Simon Chesterman, *Rough Justice: Establishing the Rule of Law in Post-Conflict Territories*, 20 OHIO ST. J. ON DISP. RESOL. 69, 83 (2005) [hereinafter Chesterman, *Rough Justice*] (citing Press Release, UNMIK, Supreme Court Releases Nis Bomb Suspects (Dec. 19, 2001), *available at* www.unmikonline.org/press/2001/press-r/pr671.htm); Chesterman, *The Spy*, *supra* note 136, at 1116 n.202 (citing Arben Qirezi, *Kosovo: Court Overturns Haekkerup Detention Orders*, IWPR BALKAN CRISIS REPORT NO. 308 (Jan. 11, 2002)); Marshall & Inglis, *supra* note 136, at 114.

138. Chesterman, *Rough Justice*, *supra* note 137, at 83 (citing Press Release, UNMIK, *supra* note 138); Marshall & Inglis, *supra* note 136, at 114.

139. Chesterman, *Justice Under International Administration*, *supra* note 75, at 6.

140. *Id.* at 5; Marshall & Inglis, *supra* note 136, at 114.

141. Simon Chesterman, *Kosovo in Limbo: State-Building and Substantial Autonomy*, INT'L PEACE ACAD. REP., Aug. 2001, at 11 [hereinafter Chesterman, *Kosovo in Limbo*] (quoting *UNMIK Refutes Allegations of Judicial Bias and Lack of Strategy*, UNMIK NEWS, June 25, 2001 at 2).

142. CHESTERMAN, YOU, THE PEOPLE, *supra* note 75, at 149 (quoting Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 222; International Covenant on Civil and Political Rights, *supra* note 108, art. 4).

143. Simon Chesterman, *Kosovo in Limbo*, *supra* note 141, at 11.

144. *Id.* at 11.

2. Targeted Financial Sanctions

A second instance of quasi-emergency powers being invoked through the UN is the use of targeted financial sanctions. Security Council Resolution 1267 (1999) established a committee (the 1267 Committee) to oversee implementation of a sanctions regime that initially targeted Afghanistan's Taliban government but was later expanded to apply to Osama bin Laden and "individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization."[145] Following the September 11, 2001 attacks on the United States and the successful military operation in Afghanistan, the regime was further expanded in January 2002 with the removal of a geographic connection to Afghanistan and any time limit on the government's application.[146]

The targeted sanctions in question entailed the worldwide freezing of an individual's assets.[147] The process for identifying those individuals whose assets should be frozen, however, was somewhat opaque. Only upon the passage of Resolution 1526 in January 2004 were Member States proposing individuals called upon to provide information demonstrating an association with Al Qaida.[148] Resolution 1526 "*encourage[d]*" Member States to notify such individuals and inform them that their assets were being frozen.[149] In July 2005, approximately six years after the listing regime was established, Resolution 1617 required Member States to provide the Committee a "statement of case describing the basis of the proposal" whenever they proposed additional names for the consolidated list.[150] However, this did not affect the individuals and entities (over 400) that had already been listed without a formal statement of case.[151] Additionally, Resolution 1617 "*request[ed]* relevant States to inform, to the extent possible, and in writing where possible, individuals and entities included in the Consolidated List of the measures imposed on them, the Committee's guidelines, and, in particular, the listing and delisting procedures."[152] Meanwhile, the sanctions regime had been

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145. Chesterman, *The Spy*, *supra* note 136, at 1111–12 (citing S.C. Res. 1333, para. 8(c), U.N. Doc. S/RES/1333 (Dec. 19, 2000)).

146. *Id.* at 1112 (citing S.C. Res. 1390, para. 3, U.N. Doc. S/RES/1390 (Jan. 28, 2002)).

147. *Id.* at 1111 (citing S.C. Res. 1390, *supra* note 146, para. 2(a)).

148. *Id.* at 1112 (citing S.C. Res. 1526, para. 17, U.N. Doc. S/RES/1526 (Jan. 30, 2004)).

149. *Id.* (quoting S.C. Res. 1526, *supra* note 149, para. 18).

150. *Id.* (quoting S.C. Res. 1617, para. 4, U.N. Doc. S/RES/1617 (July. 29, 2005)).

151. *Id.*

152. *Id.* (quoting S.C. Res. 1617, *supra* note 150, para. 5).

challenged in European courts on the basis that assets were being frozen without adequate legal protections.[153]

The European Court of First Instance held that the ability to review decisions ultimately made by the Security Council was severely limited.[154] Nevertheless,

> the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.[155]

The Court found that this very high threshold had not been reached in the cases before it.[156] In January 2008, the Advocate General of the European Court of Justice argued that measures adopted by the Council applied within the European Community only to the extent that this was compatible with Community law: "There is no reason, therefore, for the Court to depart, in the present case, from its usual interpretation of the fundamental rights that have been invoked by the appellant."[157] As for what this might mean for states bound by Article 103 of the UN Charter,[158] the Advocate General merely noted its understanding that such a ruling might "inconvenience the Community and its Member States in their dealings on the international stage."[159]

In September 2008, the European Court of Justice held that, while it did not purport to challenge the primacy of the Security Council's resolutions as a matter of international law—contradicting the Court of First Instance on this point—it could nevertheless review the lawfulness of the Community act intended to give effect to those resolutions.[160] The European regulation in question violated fundamental rights (effective judicial protection and respect for

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153. Mehrdad Payandeh & Heiko Sauer, *European Union: UN Sanctions and EU Fundamental Rights*, 7 INT'L CONST. L.J. 306, 309 (2009).

154. Case T-306/01, Yusuf v. Council of the European Union, 2005 E.C.R. T-306/01, para. 339.

155. *Id.* para. 277; Case T-49/04, Hassan v. Council of the European Union, 2006 E.C.R. T-49/04; Case T-253/02, Ayadi v. Council of the European Union, 2006 E.C.R. T-253/02; Case T-315/01, Kadi v. Council of the European Union, 2005 E.C.R. T-315/01.

156. Case T-306/01, *supra* note 154, para. 289.

157. Joined Cases C-402 & C-415/05 P, Kadi v. Council of the European Union, and Al Barakaat Int'l Found. v. Council of the European Union, 2008 E.C.R. 299, para. 46 (separate opinion of Advocate General Maduro regarding Case C-415/05).

158. *See* U.N. Charter art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

159. Joined Cases C-402 & C-415/05 P, *supra* note 157, para. 39 (separate opinion of Advocate General Maduro regarding Case C-415/05).

160. *Id.* paras. 286–88 (majority opinion).

property) and was therefore struck down.[161] Nevertheless, as annulment with immediate effect "would be capable of seriously and irreversibly prejudicing the effectiveness" of the measures imposed by the Council, the effects of the regulation would be maintained for three months.[162]

B. *Compromising the Rule of Law in Afghanistan*

The rule of law was compromised in a quite different manner in Afghanistan, which faced challenges distinct from Timor-Leste and represented an entirely different context. The UN advocated a "light footprint" approach as a means of promoting local ownership, though it was only practical given the size and population of the country and politically viable given the undisputed sovereignty of the Afghan government under Hamid Karzai.[163] This substantially limited the role that the international presence played, though key areas were still potentially "externalized."[164]

Under the Taliban's rule, justice in Afghanistan had been "notoriously capricious and brutal," and in its own way, the overthrow was similarly brutal.[165] In addition to reports of anti-Taliban forces summarily executing prisoners of war amidst the fighting, there were also allegations of Rashid Dostum's troops killing Taliban detainees by the hundreds while the detainees were transported in sealed freight containers.[166] Unfortunately, these and other allegations against members of Hamid Karzai's new government went uninvestigated.[167]

> The Bonn Agreement provided that the Interim and later Transitional Authority should, "with the assistance of the United Nations, establish an independent Human Rights Commission, whose responsibilities will include human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions." At the same time, the UN was separately granted "the right to investigate human rights violations and, where necessary, recommend corrective action," as well as to develop and implement a human rights education program. In keeping with the "light footprint" philosophy, senior UN staff was circumspect about taking the lead in human rights.
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> . . . .
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> Under the Bonn Agreement, the Interim Authority was to establish, "with the assistance of the United Nations, a Judicial Commission to

161. *Id.* paras. 322–28.
162. *Id.* para. 373.
163. Chesterman, *Rough Justice*, *supra* note 137, at 89.
164. *Id.*
165. *Id.* at 91.
166. *Id.* (citing *World Report*, 2003 HUM. RTS. WATCH 198).
167. *Id.* (citing *World Report*, 2003 HUM. RTS. WATCH 198).

> rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law[,] and Afghan legal traditions."[168]

A document from the Office of the Special Representative emphasized the need for a careful, strategic approach:

> [A]ll agree that global experience in justice reform and development has shown that non-strategic, piecemeal and "interventionist" approaches can have dire consequences for the effective development of [the justice] sector. A strategic, comprehensive, Afghan led, integrated programme of justice sector reform and development can only begin with a comprehensive sectoral review and assessment of domestic needs, priorities, initiatives and capacities for reconstruction and development of this crucial sector. To date, none has been undertaken.[169]

These assumptions are, to a large extent, debatable, given the experiences of Timor-Leste and Kosovo:

> UNMIK in particular found that failure to engage *immediately* with rule of law questions can eliminate the opportunity for the maximum impact of international engagement. It is true that a strategic, comprehensive approach is desirable, but not if it means indefinite delays until the security environment allows for a thorough review. If necessary, skeletal legal reforms might be made on an emergency basis until a more strategic approach can be formulated.
>
> In Afghanistan, UNAMA's [the U.N. Assistance Mission in Afghanistan's] mandate was interpreted as requiring the U.N. to facilitate rather than lead. In areas such as the choice of laws, the structure of the legal system, and appointment of judges, this was entirely appropriate. But such an interpretation was less persuasive in relation to basic questions of rebuilding courthouses, procuring legal texts and office equipment, and training of judges. Instead, it appeared that rule of law was simply not a priority. In the 48-page National Development Framework drafted by the Afghan Assistance Coordination Authority (AACA) in April 2002, the justice system warranted only a single substantive sentence.[170]

Italy agreed to serve as "lead donor" on the justice sector at the Tokyo pledging conference in January 2002, essentially because the other "lead donor" portfolios had already been taken, and there was little evidence of activity in this area.[171] Courts that were able to function did so erratically, despite the Afghan Interim Authority's appointments of new judges (which even included a number of

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168. *Id.* at 91–92 (alteration in original) (quoting Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, annex II, para. 6, *in* Letter from Kofi A. Annon, Sec'y-Gen., to the President of the United Nations Sec. Council, U.N. Doc. S/2001/1154 (Dec. 5, 2001) [hereinafter Bonn Agreement]).

169. *Id.* at 94 & n.99 (citing OFFICE OF THE SRSG FOR AFGHANISTAN, PROPOSAL FOR A MULTI-AGENCY REVIEW OF JUSTICE SECTOR DEVELOPMENT IN AFGHANISTAN 2 (2002)).

170. Chesterman, *Rough Justice*, *supra* note 137, at 94–95 (citations omitted).

171. *Id.* at 95.

women),[172] and Karzai's appointment of a septuagenarian chief justice with no secular legal background did not help matters.[173]

Of still greater concern than the relative inattention to establishing the rule of law—admittedly difficult in a country that had known little peace in a generation—was the preparedness of both international and national actors to look the other way as war criminals moved into political office and narco-trafficking was used to supplement ministerial appropriations.[174]

The formal laws on declarations of a state of emergency in the constitution ultimately adopted in 2004 are not especially controversial; if anything, the relevant chapter is restrictive, setting up a potentially tense relationship between the President and the National Assembly, which must "consent" to a state of emergency longer than two months and "endorse" any state of emergency of a short period:

> **Chapter Nine: State of Emergency**
>
> Article 143. If because of war, threat of war, serious rebellion, natural disasters or similar conditions, protection of independence and national life become impossible through the channels specified in this Constitution, the state of emergency shall be proclaimed by the President, throughout the country or part thereof, with endorsement of the National Assembly. If the state of emergency continues for more than two months, the consent of the National Assembly shall be required for its extension.
>
> Article 144. During the state of emergency, the President can, in consultation with the presidents of the National Assembly as well as the Chief Justice of the Supreme Court, transfer some powers of the National Assembly to the government.
>
> Article 145. During the state of emergency, the President can, after approval by the presidents of the National Assembly as well as the Chief Justice of the Supreme Court, suspend the enforcement of the following provisions or place restrictions on them:
>
> 1. Clause Two of Article Twenty-Seven [no detention without due process];
>
> 2. Article Thirty-Six [right to free assembly];
>
> 3. Clause Two of Article Thirty-Seven [privacy of personal correspondence];
>
> 4. Clause Two of Article Thirty-Eight [restrictions on power to search personal residences].
>
> Article 146. The Constitution shall not be amended during the state of emergency.

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172. *Id.*

173. *Id.* (citing Hafizullah Gardish, *Chief Justice Under Scrutiny*, INST. WAR & PEACE REPORTING AFGHAN RECOVERY REP., Mar. 28, 2003).

174. *See* Faiz Ahmed, *Afghanistan's Reconstruction Five Years Later: Narratives of Progress, Marginalized Realities, and the Politics of Law in a Transitional Islamic Republic*, 10 GONZ. J. INT'L L. 269, 274–75, 284 (2007) (noting suspicions of war criminals serving public office and narco-funding).

> Article 147. If the presidential term or the legislative term of the National Assembly expires during the state of emergency, the new general elections shall be postponed, and the presidential as well as parliamentary terms shall extend up to four months. If the state of emergency continues for more than four months, the President shall call the Loya Jirga. Within two months after the termination of the state of emergency, elections shall be held.
>
> Article 148. At the termination of the state of emergency, measures adopted under Article One Hundred Forty-Four and One Hundred Forty-Five of this Constitution shall be void immediately.[175]

These provisions broadly correspond to the relevant provisions of the 1964 constitution, with the role of the king being taken by the President and slightly greater power being granted to the National Assembly than was enjoyed by the Loya Jirga (Great Council).[176]

The threshold established by the Constitution is significantly higher than that in Timor-Leste and more closely follows the model of the International Covenant on Civil and Political Rights, though not its limitation of any derogation "to the extent strictly required by the exigencies of the situation."[177] Significantly greater checks do exist on the potential exercise of powers, including enumeration of those rights from which derogation is possible (rather than saving of specific rights) and oversight of such derogation by both the legislature and the chief justice.[178]

As with Timor-Leste, however, it is difficult to draw generalizations from the case of Afghanistan applicable to a larger non-Western or Asian context. Afghanistan's regional identification is weak, though unlike Timor-Leste it successfully resisted colonization and thus lacked an externally-derived legal system that could be reintroduced.[179] In any case, the resurgence of the Taliban and the limited ability of the central government to exercise power in much of the country continues to pose grave threats to the life of the nation.[180] It is not clear that a declaration of a state of emergency—as opposed to enhanced international military support—would alter this.

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175 CONSTITUTION OF AFGHANISTAN art. 143–48; *see also id.* art. 64(8) (providing that the President has the power to proclaim *and terminate* a state of emergency "with the endorsement of the National Assembly").

176. CONSTITUTION OF AFGHANISTAN OF 1964, tit. 9, *available at* http://www.afghan-web.com/history/const/const1964.html.

177. International Covenant on Civil and Political Rights, *supra* note 108, art. 4(1).

178. *Id.* art. 4(2).

179. Chesterman, *Rough Justice*, *supra* note 137, at 89.

180. *See* KENNETH KATZMAN, AFGHANISTAN: POLITICS, ELECTIONS, AND GOVERNMENT PERFORMANCE (Cong. Research Serv. ed., 2009), *available at* http://www.fas.org/sgp/crs/row/RS21922.pdf (discussing the United States' efforts to strengthen Afghanistan's government to combat Taliban influences).

In fact, despite its troubled recent history, Afghanistan has never invoked its state of emergency provisions. Some Afghan scholars and watchers wryly speculate that the government might instead one day declare a state of "normality."[181]

IV. CONCLUSION: THE "WAYS OF ORIENTALS"?

This brief survey of the ways in which the UN has supported and compromised the rule of law in Asian contexts may, in the end, offer more heat than light.

On the relationship between formal and informal institutions, recurrent tensions in UN peace operations exist between form and substance, as well as between short-term stability and longer-term sustainability. In Timor-Leste, the government inherited a country that was both the newest and the poorest in the region, with a constitutional structure that set in place an inevitable clash of personalities. Remarkably, the consequences of that clash were managed within the four corners of the constitution, though this depended heavily on the ongoing support of the UN and military contributions from Australia and other states. In Afghanistan, some UN officials saw the rule of law as a luxury for a state that could hope for, at best, a kind of organized anarchy even in good times.[182] This essentially acknowledged by default the ongoing importance of informal institutions at the local level, even as such local commanders (i.e., warlords) were formally denounced as undermining the hopes of stability. In both cases, area specialists have been critical of foreign receptiveness to existing local institutions, though it is not clear that either offers broad lessons for a coherent non-Western narrative.

With respect to the relationship between emergency powers and the rule of law, one interesting dimension of the examples considered above is the manner in which the invocation of extraordinary powers at the international level is grounded on a claim to establish or support the rule of law. As indicated earlier, these powers are properly understood as "exceptions," both in the formal sense that the Security Council only enjoys any power to intrude upon the domestic jurisdiction in a time of crisis and in the practical sense that the

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181. *Cf., e.g.*, Venkat Iyer, States of Emergency—Moderating Their Effects on Human Rights, 22 DALHOUSIE L.J. 125, 127 n.1 (1999) (noting that in some countries, the "normality" is antithetical to human rights).

182. *Contra* Press Release, Security Council, Iraq, Middle East, Afghanistan, Africa Key Issues Before Security Council in 2003, U.N. Doc. SC/7982 (Jan. 16, 2004) (noting Secretary-General Kofi Annan's argument that while some had lost faith in a peace process, the rule of law is not a luxury).

powers are invoked infrequently. As that frequency has increased and they have been applied to general rather than particular problems (to "terrorism" rather than to Libyan support for terrorism, for example), so has the controversy about the limits to be applied to them. At the national level, where these extraordinary powers have been used to impose order it would be too much to imply a kind of original sin to the institutions thus created. Nevertheless, the contradictions between what international administrators say and what they do have complicated the administration of territory while under international control and left an uncertain legacy for those who inherit it.

On the larger question of Asian versus Western discourses on emergency powers, it is hard to draw general conclusions. Timor-Leste does not identify strongly as Asian in a constitutional sense: its colonial and post-conflict baggage, ongoing ties to Portugal and Australia, and continuing UN presence bind it to a global (and perhaps Western) discourse. Certainly the two occasions in which states of emergency were declared more closely approximate the Western constitutionalist approach to dealing with crises than, for example, similar experiences in recent Indonesian history. Afghanistan for its part suffers from such weakness of central institutions that it is barely a meaningful state (in the sense of an organized polity with institutions that can offer some basic public goods and claim a monopoly over the legitimate use of violence). As with Timor-Leste, much of the discourse on emergencies is offered in language intelligible to the Western ear, though this may bear little reality to the conflict as it plays out on the ground.

This disconnect between rhetoric and reality is perhaps the most interesting and troubling aspect of the cases considered here. Upon his return from an 1889 trip to Persia, Lord Curzon thoughtfully noted the different perspectives on governance held by Europeans and "Orientals," who might legitimately regard their own systems of government as more appropriate than those of Europeans, and in any case would generally prefer to poorly govern themselves than be governed well by foreigners.[183] Such observations were insightful but uncharacteristic. As Viceroy of India a decade later, Curzon did not appoint a single Indian to his advisory council; when asked why, he absurdly replied that in the entire country there was not an Indian fit for the post.[184] If there is an Asian approach to the development of constitutional structures emerging from conflict, it is that those structures inevitably reflect the varied colonial heritage of the region

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183. CURZON, *supra* note 1, at 630.

184. DAVID GILMOUR, CURZON: IMPERIAL STATESMAN 168 (Farrar, Straus & Giroux ed. 2003).

and are cast with an eye to international legitimacy but stand or fall on the basis of local politics.