

Syria:

**The Need to Reform Monitoring
of
States of Emergency**

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I. Introduction

Between states of emergency being declared as a result of the numerous hurricanes, the riots in France and the earthquake in Pakistan and the investigations into Syria's treatment of Maher Arar and the Syrian Government's role in the assassination of former Lebanese Prime Minister Rafiq Al Hariri, both states of emergency and Syria have been much in the headlines in the fall of 2005, although never in the same context; this is somewhat ironic given that Syrians are currently living under the world's second longest continuous state of emergency.¹ During this time Syria's emergency laws have directly led to thousands of gross violations of human rights. The Syrian Human Rights Committee has identified Syria's governing emergency law as "the most repressive law [affecting] the rights and freedoms of all Syrian citizens without exceptions".² This being said, Syria's emergency laws cannot be directly blamed for all of Syria's human rights abuses, although they do facilitate most of them indirectly.

This paper will focus on the United Nations' ("UN") failure to effectively monitor compliance with article 4 of the *International Covenant on Civil and Political Rights* ("ICCPR"), using Syria as an extreme example of this failure and the institutionalized abuse of human rights that results from long-term imposition of states of emergency.³

¹ The Syrian state of emergency, which has been in effect since March 9, 1963 is second in length only to neighbouring Israel, which has been under a continuous state of emergency since May of 1948.

² Syrian Human Rights Committee, "Special Report – Repressive Laws in Syria," (19 February 2001), online: Syrian Human Rights Committee <<http://www.shrc.org.uk/data/asp/d4/254.aspx>>, accessed: 11/16/05.

³ *International Covenant on Civil and Political Rights*, GA Res. 2200A(XXI), UN HCHROR, (1996), online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/english/law/ccpr.htm>>, accessed: 11/16/05.

The need for the UN to take a hard look at its monitoring and enforcement of derogations from the ICCPR under article 4 could not be more urgent, as several states have been implementing increasingly restrictive “security legislation” in the wake of the September 11, 2001 attacks on the World Trade Centre and the Pentagon, which while not formally declaring states of emergency, closely approximates the same derogation of rights in the name of stability. With international pressure on Syria following the UN’s investigation into the Hariri assassination, the time is also ripe for reform in Syria, and the termination of the state of emergency and revocation of Syria’s emergency laws must lie at the heart of these reforms. For these reasons, it is crucial that the UN take a stronger stand on the enforcement of the use of article 4 of the ICCPR.

To present this argument, I will first offer some background on the situation in Syria, how the Ba’th party rose to power, how the emergency laws were implemented, the international instruments affecting Syria’s state of emergency, and the international response to the situation in Syria. Then, the UN’s monitoring mechanisms for states of emergency will be examined, including a look at the role of the UN’s Special Rapporteur on States of Emergency. This will be followed by an in-depth look at the principles developed by the Special Rapporteur to govern states of emergency, and an application of these principles to the situation in Syria so as to determine the legitimacy of Syria’s state of emergency under the ICCPR. I will then propose changes to the monitoring mechanisms that would help to prevent a situation similar to that in Syria developing in the future, and make some suggestions as to how the UN could most effectively deal with the current state of emergency in Syria.

II. What Lies Behind Syria's 44-Year State of Emergency?

To understand how Syrians have come to live under a continuous state of emergency for the past 44 years, one must first recognize Syria's history of political instability and the Ba'th Party's rise to power; to fully grasp this, one must first appreciate the history of foreign control over Syrian territory and Syria's diverse ethnic, religious and tribal composition.

Syria has a long history of occupation by foreign powers; being occupied at various times throughout its history by Amorites, Hittites, Assyrians, Babylonians, Persians, Greeks, Romans, Arabs, Turks, and the French, among others.⁴ These various stages of Syrian history have all left their mark on the region, leaving it populated by many different ethnic, religious and linguistic groups. The various past occupations meant that Syria had no history of existence as a distinct entity until it became a French mandate in 1920.⁵ Prior to this time, Syria had been a part of the Ottoman Empire since 1516, with the term "Syria" being used to refer to the larger region, including what eventually became Lebanon, Jordan, Palestine and parts of Israel.

After the collapse of the Ottoman Empire at the end of World War I, Syria came to be under a French mandate through the League of Nations, dividing it from the British mandates of Palestine and Jordan, both of which shared a common history with what became Syria.⁶ This left the emerging Syrian state not only under the control of yet another foreign power, but also without a sense of national identity, as most Syrians'

⁴ Syrian Human Rights Committee, "History," online: Syrian Human Rights Committee <www.shrc.org/data/asp/eng/syriahistory.aspx>, accessed: 10/02/05.

⁵ Raymond Hinnebusch, *Syria: Revolution from Above*, (New York: Routledge, 2001) at 18.

⁶ *Ibid.* at 19.

sense of identity had previously been based on smaller pre-existing units such as their city, tribe or sectarian group or larger regional identities such as the Arab nation, the Islamic religion or the Empire.⁷ Syrians were also left feeling betrayed by Western powers who they felt had imposed artificial national boundaries on them and broken their promise to create an Arab state in return for the Arabs' assistance in defeating the Ottoman Empire.

This situation created fertile ground for the emergence of political movements that played on this resentment and the larger group identities. Due to their ability to unite the many fractionalized ethnic and religious groups, Pan-Arab and Islamist movements began to grow in Syria. The Pan-Arab movement was particularly popular because it allowed the many religious and tribal sects to unite under a common identity and the common goal of re-uniting the Arab peoples under a unified state.

After the Second World War, Pan-Arab groups were able to exploit rivalries between the world super powers and Syria was eventually able to gain independence from the French. With the last of the French troops left Syria in 1946, Syrian politics became dominated by nationalist movements, including the Ba'th party and other Pan-Arab groups, Islamists and Communists.⁸

The post-war years saw great political instability in Syria, with control of the government changing hands several times through a series of military coups beginning in 1949 and continuing throughout the 1950s. During this time, the strength and power of the Ba'th party continued to grow within the general population and, most importantly, within the Syrian military. The Ba'th party's ability to manipulate the various religious

⁷ *Ibid.* at 18.

⁸ *Ibid.* at 22.

and sectarian divides in Syrian society is what set it apart from the other Pan-Arab groups and allowed it to quickly become the dominant player in this movement. Ideologically, the Ba'th party was rooted in the idea that Arabs formed one nation, artificially divided by imperialism to keep it weak; it sought to unify the Arab nation under a single state. This, combined with the Ba'th's staunch secularism and socialist leanings, helped it to achieve mass appeal.

Despite the Ba'th's growing power, there were other forces at play in Syrian politics. Throughout the 1950s Egypt, Iraq and Saudi Arabia all heavily influenced Syrian politics in different ways and at different times. In 1954, the governing coalition briefly held talks with Iraqi officials regarding the possibility of Iraq and Syria joining in a common federation.⁹ This proposal was defeated under pressure on the coalition government from Ba'thists and Communists, which led to an attempted coup organized by Iraqi officials. The failure of this coup coincided roughly with the rise to power of the staunchly nationalistic and anti-imperialist Jamal 'Abd al-Nasser in Egypt. His popularity throughout the Arab world sharply increased Egypt's influence in Syria, and further decreased the influence of the British-supported Iraqi government. This rise in influence of Egypt worried the United States and Britain - both suspicious of Nasser's ties to the Soviet Union - leading to their further meddling in Syrian politics, and even to a plot to overthrow the Egypt-friendly Ba'thist coalition government.¹⁰

These external influences on Syrian sovereignty, as well as the vast popularity of Nasser amongst the Syrian public, led Syria to unite with Egypt in 1958 to form the United Arab Republic (UAR). This union lasted 3 years before, another military coup

⁹ Malik Mufti, *Sovereign Creations*, (Ithaca: Cornell University Press, 1996), at 69.

¹⁰ *Ibid.* at 77.

lead to a group of anti-Nasserites seizing power and declaring Syria's succession from the UAR. In March of 1963 the Ba'th party seized power, in yet another military coup, with the assistance of Nasserist groups, who opposed the separatist government and sought to re-unite Syria with Nasser's Egypt. This coup is frequently referred to as "the revolution from above," as it was driven largely by Ba'th party members who already had considerable power and occurred without the usual mass violence and civil unrest that is generally associated with political revolutions.¹¹ It was on the day of this coup that Legislative Decree No. 1 of 9 March 1963 was issued bringing a state of emergency into effect under Legislative Decree No. 51 of 22 December 1962, the legislation which governs states of emergency in Syria. It is this state of emergency that continues to be in effect in Syria to this day.

The Ba'th alliance with the Nasserists quickly disintegrated, and the party took advantage of the state of emergency to purge Nasserists, as well as Communists and other opposition groups. In fact, for the first two years of their rule, the Ba'th party's hold on power was completely dependant on military oppression, enabled through the emergency legislation.¹² This process of purging was still going on during the 1967, Arab-Israeli war, which was provoked by the Ba'th party. The political power struggle for control of Syria's armed forces is often cited as one of the causes of the Arab defeat that led to Israel's continuing occupation of the Syrian Golan Heights. It is this occupation by Israel, which Syria cited in its *Third Periodic Report* to the UN Human

¹¹ *Supra* note 5, at 48.

¹² *Supra* note 5, at 49.

Rights Commission in 2004 as justification for its maintenance of the state of emergency.¹³

After coming to power in 1970, Hafiz al-Asad consolidated Ba'th power and for the first time in the history of the relatively young Syrian state, a government was able to govern without constant fear of being overthrown.¹⁴ However, even under this comparative political serenity, instability still abounded: Syria engaged in a war with Israel in 1973; a military intervention in Lebanon in 1976; a conflict with Jordan in 1979; and yet another confrontation with Israel over Lebanon in 1982. Throughout this period, Syria also endured domestic terrorism and a series of assassinations carried out by Islamist groups, such as the Muslim Brotherhood, throughout the late 1970s and early 1980s. It was the attacks of the Islamists groups that presented the toughest challenge to the Asad regime, but through the use of the emergency laws and massive repression, Asad was able to maintain control of the state.¹⁵ From the late 1980s on, the political situation in Syria has been relatively calm, and even the death of Hafiz al-Asad in 2000 and the subsequent succession of his son Bashar al-Asad, failed to result in any great instability.

III. Syria's Emergency Laws

To understand how the Ba'th party was able to maintain control of Syria during these unstable times, and the types of rights being derogated, one must take a closer look

¹³ Human Rights Committee, *Third Periodic Report*, UN HRC, 84th Sess., CCPR/C/SYR/2004/3 (2004) at para. 63, online: Office of the High Commissioner for Human Rights <<http://daccessdds.un.org/doc/UNDOC/GEN/G04/440/26/PDF/G0444026.pdf?OpenElement>>, accessed: 10/20/05.

¹⁴ *Supra* note 9, at 13.

¹⁵ *Supra* note 9, at 93.

at the emergency laws which allowed the series of purges and the repressive policies that enabled the Ba’th to defeat all opposition to their power. As mentioned above, the core of Syria’s emergency laws is Legislative Decree No. 51 of 22 December 1962. This decree, which came into force just a few months before the military coup that brought the Ba’th to power, outlines how a state of emergency is to be declared, under what conditions a state of emergency may be declared, what powers a state of emergency grants the government and how the state of emergency can be brought to an end.

Article 1 of Decree No. 51 outlines that a “state of emergency may be declared in wartime or in the event of a war-threatening condition or in the event that security or public order in the territories of the Republic or in part thereof is subjected to danger because of internal riots or public disasters”.¹⁶ It is certainly open to debate whether any of these conditions existed when Legislative Decree No. 1 of 9 March 1963 declared the state of emergency; this will be one of several factors addressed in analyzing the legitimacy of the state of emergency below. It is also worth noting that article 10 of the Decree asserts that the state of emergency can only be terminated by a legislative decree declaring the state of emergency to be lifted, and provides no time lines, no requirements for renewal and no requirements that the state of emergency be brought to an end once the conditions that gave rise to it subside.¹⁷

The most significant aspects of the Decree are found in articles 4 and 6, which respectively delineate the powers of the “Military Governor” during the state of emergency and specify which crimes will be referred to martial courts during the state of emergency. Article 4 of the Decree reads as follows:

¹⁶ *Supra* note 2.

¹⁷ *Supra* note 2.

The Military Governor or his deputy may issue written directives to take all or some of the following actions or measures, and may refer violations to military courts:

- a. Impose restrictions on the freedom of persons in terms of holding meetings, residence, transport, movements, and detaining suspects or people threatening public security and order on a temporary basis, authorizing the conducting of investigations related to both persons and places at any time, and requesting any person to perform any task.
- b. Monitor all types of letters, phone calls, newspapers, bulletins, books, drawings, publications, broadcasts, and all forms of expression, propaganda, and advertisements prior to publication. It is required to seize, confiscate, discard, cancel their concession and close their printers' shops.
- c. Specify the times during which public places are opened and closed.
- d. Withdraw licenses for keeping arms, ammunitions, explosive materials and other types of explosives, withdraw their delivery orders and seize such materials and close arms stores.
- e. Evacuate or isolate some areas, organize transportation vehicles, restrict and limit transportation between different areas.
- f. Seize any movable property or real estate, impose temporary guarding on companies and firms, and postpone due debts and liabilities incurred on the seized portion of the property or real estate.
- g. Specify punishments imposed on violations of these orders provided that the punishments are not more than imprisonment for three years and a fine of S£3000 or either punishment. In the event that the order does not specify the punishment for violation of such rules, the perpetrator of the violation should be punished by imprisonment for a period of not more than 6 months and a fine of S£500 or by either punishment.¹⁸

Article 5 allows for the Council of Ministers to further expand, or narrow, this extremely broad list of powers. Article 6 mandates that violations of any orders of the Military Governor pursuant to the powers listed in article 4, as well as all crimes against state security and public order, crimes committed against public authorities, violations of the

¹⁸ *Supra* note 2.

public trust or crimes which constitute an overall hazard, be tried before a martial court.¹⁹

The combination of these three articles means the Syrian government, with power concentrated in the President, is granted extremely broad powers not only to derogate from human rights, but also broad enforcement powers. Almost any action viewed as unfavourable by the government can be made to fit under one of the heads outlined in article 6 as crimes to be heard by a martial court.

It is this power granted under article 6 that has led to many of the worst human rights violations in Syria and allowed the Government to move swiftly against its opponents. The powers and organization of the martial courts is defined by Legislative Decree No. 109 dated 17th August 1967. These courts along with the Supreme State Security Court (SSSC), created by Legislative Decree No. 47 of 28 March 1968 to try political and security cases, are responsible for enforcing most of the emergency laws enacted by the Syrian government, and as such, they are referred to collectively simply as the “emergency courts”. Neither the martial courts nor the SSSC are subject to the rules set out in the Syrian Code of Criminal Procedure; both operate outside the normal court system and do not allow appeals of their decisions.²⁰ In both cases the only powers of review fall directly on the executive branch of government. As well, neither the martial courts nor the SSSC’s jurisdiction extends to cover either pre-trial procedures or the

¹⁹ *Supra* note 2.

²⁰ Amnesty International, “Memorandum from Amnesty International to the Human Rights Committee Concerning the Implementation of the International Covenant on Civil and Political Rights in Syria,” (February 2005), online: Amnesty International <<http://web.amnesty.org/library/Index/ENGMDE240472005?open&of=ENG-SYR>>, accessed: 11/16/05.

conduct of security forces.²¹ This has led to refusals to hear evidence of alleged torture, even when it has allegedly been used to extract confessions.²²

Both of these emergency courts have the power to impose death sentences, subject to executive approval, where such penalty is available by law. However, accused appearing before martial courts are not given the right to legal representation. The situation of the accused is not much better before the SSSC, where accused are formally allowed legal representation, but in practice rarely receive it, since most accused are held incommunicado under other emergency laws and are only granted limited access to legal counsel.

The combination of the accused's limited rights before the martial courts and the broad sweeping powers granted the Syrian executive under Decree No. 51 has essentially allowed the Ba'th party to incarcerate any group or individual whom they have perceived to be a threat to their power. The broad scope of emergency laws, combined with the inability or limited ability of the accused to mount a proper defence generally ensures a conviction will be entered. After such an individual has been found guilty by a martial court or the SSSC the only hope of having the conviction overturned lies directly with the executive. Such is the system that has been created by Syria's expansive emergency laws.

IV. Effects of the State of Emergency on Human Rights in Syria

As outlined in the above discussion of the main components of Syria's numerous emergency laws, the effects of these laws on the rights of Syrians is vast. The emergency

²¹ *Ibid.*

²² *Supra* note 2.

laws have eroded freedom of expression, freedom of association and assembly, individuals' rights to a fair trial, property rights and mobility rights, freedom from arbitrary arrest and detention, and many other rights supposedly protected by the ICCPR, and the Syrian Constitution. It is common in Syria for individuals to be arrested and held incommunicado for extended periods of time, without charges, for acts as innocuous as postings to the Internet, attending a meeting of a banned group, or even for associating with someone believed to be a member of a prohibited group. These individuals are then either released, never having been told the reasons for their detention, or are tried before the emergency courts with little time to meet with counsel and prepare a proper defence. Frequently members of human rights groups are the targets of such arrests, the Syrian government being highly suspicious of these groups and their opposition to government policies.

In addition to the direct assault on rights, caused by the powers granted in the emergency laws, there has also been significant human rights violations which are enabled through spill-over from these laws. For example, the independence of the seventeen distinct state security departments and the lack of any requirement to obtain judicial arrest warrants has added to the arbitrariness of many of the arrests made under the emergency laws. Under the emergency laws, all that is required in order to effect an arrest is a signed order from the Minister of Interior. What has occurred in practice, in order to expedite the operations of the state security forces, is that each state security office keeps on-hand pre-prepared and pre-signed arrest orders, which simply need the name of the individual, date of arrest and other relevant information filled out. This has led to extreme abuses of this system, with reports of corrupt security officials taking

bribes from friends and neighbours who pay them to arrest their enemies, even where no crime has been committed.²³

Similar spillover from emergency laws has often been cited as one of the major causes of torture and abuse in Syria. Although, officially prohibited by the Syrian Constitution and the Syrian Penal Code, the ability of security forces to engage in torture is facilitated by emergency laws. Syrian emergency laws allow for detainees to be held incommunicado while awaiting trial. This practice, along with the inability of martial courts and SSSC to review any of the pre-trial actions of security forces and the impunity granted to security officers by Legislative Decree No. 14 of 1969, effectively removes any checks on security forces or any means of holding them accountable for their actions.²⁴

V. Syria and International Human Rights Instruments

With human rights violations having been institutionalized in Syria for the past 42 years, it is surprising to see the number of UN human rights instruments to which Syria is a party to and the few reservations they have made in acceding to the major UN treaties. It is worth noting that Syria's state of emergency actually pre-dates all of the major human rights treaties to which it is a party; unlike many states who accede to or ratify treaties and then derogate from certain rights in response to situations that may arise, Syria actually ratified the treaties while actively committing human rights abuses and deviating significantly from both the letter and spirit of the treaties. Syria has ratified all

²³ *Supra* note 2.

²⁴ *Supra* note 20.

six major UN human rights treaties, but for our purposes we will focus on only the ones most applicable to the human rights abuses as a result of the emergency laws.

Both the ICCPR and the International Covenant on Economic, Social and Cultural rights (“ICESCR”) came into being in December of 1966, more than three years after Syria’s declaration of a state of emergency. Syria acceded to both of these treaties on April 21, 1969. In both cases Syria filed only two reservations, one stating that by signing the treaty Syria was in no way recognizing Israel or entering into a relationship with it. The second, relating to article 26 of the ICESR and article 48 of the ICCPR, both of which who may become parties to the respective treaties, simply stating that it found these articles to be incompatible with the intention of the treaties, “as they do not allow all States, without distinction or discrimination, the opportunity to become parties to the said Covenants”.²⁵ No comment was made regarding Syria’s state of emergency or any derogation from the rights of either treaty.

The treaties themselves came into full force in 1976, at which time Syria again made no further comment on its continuing state of emergency or its derogation from the rights embodied in either treaty. The state of emergency has little effect on the rights protected under the ICESR, and it is only mentioned here because it was acceded to simultaneously with the ICCPR and their reservations were filed together. The ICCPR, however, is directly affected by Syria’s emergency laws, with several of the rights it protects being derogated from by Syria.

²⁵ *International Covenant on Economic Social and Cultural Rights: Reservations Made by Syrian Arab Republic*, online: Office of the High Commissioner for Human Rights <<http://www.unhchr.ch/tbs/doc.nsf/73c66f02499582e7c1256ab7002e2533/946dffa38e748812802567fd003912dc?OpenDocument>>, accessed: 10/22/05.

Although Syria has made no major reservations regarding the ICCPR, neither has it filed a declaration under article 41 of the ICCPR recognizing the competence of the Human Rights Committee (“HRC”) to receive and consider communications from other states party to the ICCPR who feel that Syria is not fulfilling its obligations under the Covenant.²⁶ By not filing a declaration under article 41, Syria has deprived the ICCPR of one of its most significant enforcement mechanisms, seeing that other state parties who have filed declarations under article 41 are unable to raise concerns regarding Syria’s compliance with the ICCPR to the HRC. This has resulted in other state parties to the ICCPR not being able to raise concerns regarding Syria’s state of emergency to the Committee and has prevented any meaningful dialogue on these issues. It should be noted that states rarely file such communications against one another to the Committee, so in reality Syria’s not having filed a declaration under article 41 has likely had little effect in terms of actually preventing other states from raising concerns regarding the state of emergency. What Syria’s failure to submit an article 41 declaration does do however, is raise serious questions as to Syria’s commitment to the principles embodied in the ICCPR and its intention to abide by the Covenant.

Article 4 of the ICCPR directly addresses situations of public emergency and allows for states to derogate from most of their obligations under the Covenant “to the extent strictly required by the exigencies of the situation”.²⁷ However, even under emergency situations, certain articles of the ICCPR are not allowed to be derogated from; these include articles 6 and 7, which protect individuals’ right to life and deem that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or

²⁶ *Supra* note 3, art. 41.

²⁷ *Supra* note 3, art. 4.

punishment,” respectively.²⁸ Torture, as addressed above is not formally allowed by Syrian emergency laws, but is reportedly frequently used by security forces and is facilitated by many provisions of the emergency laws. Article 6, however, is directly violated by Syrian emergency laws, as both martial courts and the SSSC are able to impose death sentences, and neither would meet the UN’s requirements of a “competent court,” which will be demonstrated by the discussion of article 14 below.²⁹ Syrian emergency laws also allow the death penalty for crimes that are unlikely to meet the threshold of “the most serious crimes” required by article 6.³⁰ Article 1 of Law No. 49 dated 7th July 1980, passed in response to the Islamist attacks and assassinations of the late 1970s and early 1980s, states that all members of the Muslim Brotherhood are considered criminals and shall be punished by death.³¹ Violations of these articles are not permitted under article 4, and therefore are serious contraventions of Syria’s obligations under the ICCPR.

The validity of Syria’s other derogations from its obligations under the ICCPR are also questionable, as will be seen below in the discussion of the legitimacy of Syria’s state of emergency. Other rights protected by the ICCPR that Syria’s emergency laws significantly derogate are: the right to liberty and security of the person and freedom from arbitrary arrest as protected by article 9; the right of all persons in custody to be treated with dignity and humanity under article 10; mobility rights protected by article 12; freedom of expression protected by article 19; the right to peaceful assembly protected by article 21; and the right to freedom of association protected under article 22. As well,

²⁸ *Supra* note 3, art. 7.

²⁹ *Supra* note 3, art. 6.

³⁰ *Supra* note 3, art. 6.

³¹ *Supra* note 2.

Syria' emergency courts, the martial courts and the SSSC, grossly violate article 14 protecting individuals' right to a "fair and public hearing by a competent, independent and impartial tribunal".³² Individuals appearing before these courts rarely are promptly informed of the charges against them, seldom, if at all, given adequate time to prepare a proper defence or communicate with counsel, have no means of judicial review available to them and are often compelled by torture to confess to crimes they may or may not have committed; all of which violate key components of a fair trial as outlined in article 14 of the ICCPR.

Aside from these violations of the ICCPR, Syria is also violating its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Syria surprisingly acceded to in August of 2004. Syria made the same reservation regarding Israel in its accession to the CAT it had with both the ICCPR and ICESR. However, in the case of the CAT, Syria did issue a more substantial reservation: Syria stated that it did not recognize the competence of the Committee Against Torture to investigate claims of torture as outlined in article 20 of the CAT.³³ This reservation effectively frustrates the intention of the CAT, and evidences Syria's unwillingness to cooperate with any meaningful monitoring or enforcement under this convention. Although bringing into question Syria's commitment to the CAT, this reservation does not remove Syria's other obligations flowing from the Convention.

³² *Supra* note 3, art. 14.

³³ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Reservations Made by Syrian Arab Republic*, online: Office of the High Commissioner for Human Rights < <http://www.unhchr.ch/tbs/doc.nsf/73c66f02499582e7c1256ab7002e2533/6c493cd87236bfcfec1256f0f00574270?OpenDocument> >, accessed: 11/16/05.

Article 2(2) of the CAT specifically states that no circumstances, including war or states of public emergency, can ever be invoked as justification for torture.³⁴ As such, Syria is not able to hide behind its state of emergency to excuse incidents of torture the way it is able to with several of its derogations of rights under the ICCPR. While formally Syria's laws may meet many of their obligations under the CAT, since all forms of torture are illegal under Syrian law, the Government is failing in its duties, under article 2(1) of the CAT, to take all effective measures to prevent acts of torture within its jurisdiction.³⁵ As well, Legislative Decree No. 14 of 1969, discussed above, with its provisions granting impunity to all security officials likely fails to meet Syria's obligations under article 4 of the CAT to ensure that all acts of torture are punishable under criminal law; it is not sufficient to enact criminal law prohibiting torture if those who have the greatest ability to commit acts of torture are protected from its reach. In addition, there appears to have been no credible attempts by Syria to investigate any of the acts of torture allegedly committed by security officials, thus failing to meet its obligation under article 12 of the CAT to investigate any credible reports of torture.³⁶ The Fact Finder's Report, submitted to the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, makes clear that credible evidence exists

³⁴ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 39/46, UN HCHROR, 1984, art. 2(2), online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/english/law/cat.htm>>, accessed: 11/16/05.

³⁵ *Ibid.* art. 2(1).

³⁶ *Ibid.* art.12.

of torture and cruel and inhumane treatment in Syrian prisons, making it all the more serious that these allegations have not been investigated by the Syrian Government.³⁷

VI. The Response of the International Community to Syria's State of Emergency

Now that the background of the Syrian state of emergency has been established, it is important to look at the response of the international community and the UN to determine what could be done to prevent such a situation from developing again in the future and illuminate what can be done to resolve the situation in Syria. Generally, the response of the international community has been weak; few states have paid any attention to the human rights situation in Syria until very recently and the UN has done little to directly address the need to lift the state of emergency in Syria. Non-governmental organizations (“NGOs”), such as Amnesty International (“Amnesty”), Human Rights Watch, and other regional human rights groups have been the most vocal opponents of Syria’s state of emergency, and were among the earliest groups to cite the importance of lifting the state of emergency to improving the human rights situation in Syria.

Among these groups, Amnesty was the first to raise concern with the prolonged use of emergency laws by Syria, stating as early as 1979 that the “greatest source for concern [in Syria] is [the Government’s] using emergency legislation to extort political rights, violate human rights to freedom and life, withhold basic legal guarantees, and

³⁷ Stephen J. Toope, “Report of Professor Stephen J. Toope: Fact Finder,” Commission of Inquiry into the Actions of Canadian officials in Relation to Maher Arar, 14 October 2005.

conduct secret trials for political prisoners before ad-hoc security courts”.³⁸ Amnesty has continued to be a vocal critic of Syria’s state of emergency, continuing to write reports on its effects on human rights in that country and has been highly critical of it in its shadow reports submitted to the HRC to coincide with Syria’s periodic reports on compliance with the ICCPR.

Up until very recently, few states commented on Syria’s state of emergency, and it has never been raised by any state in the UN General Assembly or in the Security Council. This may be evidence of a reluctance on the part of states to criticize the use of emergency laws by other sovereign states in case they themselves became the targets of the same criticism; emergency measures are frequently declared by many states. This leads to another likely reason why Syria was not singled out earlier for its prolonged state of emergency: through the 1970s and 1980s the use of emergency laws for political purposes was quite common, particularly in South America, where several countries had long running states of emergency at that time.³⁹ It could be that other applications of emergency measures simply overshadowed Syria; the South American states of emergency and the situation in South Africa dominated the reports of the Special Rapporteur on States of Emergency, and by extension it would seem likely they received more of his attention.

³⁸ Amnesty International, “Syria: A Brief Review,” (Amnesty International, 1979), quoted in Syrian Human Rights Committee, “Special Report – Repressive Laws in Syria,” (2001), online: Syrian Human Rights Committee <<http://www.shrc.org.uk/data/asp/d4/254.aspx>>, accessed: 11/02/05.

³⁹ Leandro, Despouy, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, UN ESC, 49th Session, UN Doc. E/CN.4/Sub.2/1997/19, (1997), at para. 2, online: Office of the High Commissioner for Human Rights <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/58af9dc14a3e2dba8025665c004a87f7?Opendocument>>, accessed: 10/20/05.

The large number of states declaring states of emergency led the UN to take action. In 1977 the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (“the Sub-Commission”) passed a resolution requesting that the Economic and Social Council authorize a detailed analysis of the relationship between human rights violations and the imposition of states of emergency.⁴⁰ The analysis was authorized, and resulted in a report being submitted by Mrs. Nicole Questiaux to the Sub-Commission in 1982. This report was the first detailed work on the relationship between states of emergency and human rights and would frame the UN’s approach to the topic for the better part of the next twenty years. Among several recommendations made by Mrs. Questiaux, the most significant was that the UN implement a system of continuous monitoring of states of emergency and maintain a list of states which had implemented emergency measures.⁴¹ In this report she also began to develop many of the governing principles to be applied to states of emergency, that were developed further by others and which will be discussed in greater detail below.

Mrs. Questiaux’s recommendations led to the appointment of Mr. Leandro Despouy as Special Rapporteur on States of Emergency in 1985. Mr. Despouy’s mandate included maintaining, and updating annually, a list of all states which had “proclaimed, extended or terminated a state of emergency,” as well as examining and submitting reports on the compliance of states with international law with regard to their implementation of states of emergency, studying the impacts of states of emergency on

⁴⁰ *Ibid.* at para. 12.

⁴¹ Tom Hadden, “Human Rights Abuses and the Protection of Democracy During States of Emergency,” in Eugene Cotran and Adel Omar Sheri eds., *Democracy, the Rule of Law and Islam* (The Hague: Kluwer Law International, 1999) 111 at 120.

human rights and putting forward recommendations as to how to best protect human rights in states of emergency⁴²

Not much was done by Mr. Despouy during his 12 year tenure to address the compliance of states with the ICCPR or other international laws, but he did compile ten annual reports listing states which had proclaimed, extended or concluded states of emergency and did contribute significantly both to the understanding of the relationship between states of emergency and human rights abuses and further developed the principles stated by Questiaux in her report. The annual lists, while serving the important purpose of tracking the use of states of emergency, did not comment on the legality of the imposition of emergency laws, and never commented on Syria's state of emergency beyond stating: "State of emergency proclaimed on 8 March 1963 still in force. Information received from non-governmental organizations."⁴³ Sometimes the lists did not even include this much on Syria. States that submitted reports and cooperated with Mr. Despouy did receive more coverage. Mr. Despouy does not appear to have directly addressed the situation in Syria in any other way during his time as Special Rapporteur.

In 1997 Despouy's mandate as Special Rapporteur on States of Emergency came to an end. He compiled his final annual list of countries and submitted his final report outlining the general principles governing states of emergency and the application of article 4 of the ICCPR. The report also summarized his general findings on the effect of

⁴² *Supra* note 39 at para. 13.

⁴³ Leandro, Despouy, *Tenth Annual List of State which, Since 1 January 1985, Have Proclaimed, Extended or Terminated a State of Emergency*, UN ESC, 49th Session, UN DO. E/CN.4/Sub.2/1997/19/Add.1, (1997), at 13, online: Office of the High Commissioner for Human Rights <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/95d3ae7c4f71ee0b802567c3003498b9?Opendocument>>, accessed: 10/20/05.

states of emergency on human rights and made several recommendations as to how the UN could most effectively deal with states of emergency in the future. Some of these recommendations will be addressed below. However, none of the recommendations were any where near how the UN chose to proceed after Despouy's mandate was over.

Immediately following the submission of Despouy's final report the Sub-Commission on Prevention of Discrimination and Protection of Minorities put forward a resolution requesting the Commission on Human Rights to pass a motion appointing Mr. Ioan Maxim to replace Despouy as Special Rapporteur on States of Emergency, and continue with the annual reporting initiated by Despouy.⁴⁴ However, in the name of "efficiency" the Commission declined to pass this motion appointing Maxim and instead, passed the duties of reporting on states of emergency on to the Office of the High Commissioner for Human Rights, making the reports bi-annual in the process.⁴⁵ Since this time there has been no reporting done on state of emergency by the UN, except for the bi-annual lists, which are no more detailed than those prepared by Despouy. The HRC did reaffirm several of the principles discussed below in a general comment on

⁴⁴ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of Human Rights and States of Emergency*, SUBCOM Res. 1997/27, UN SUBCOMOR, 49th Sess., UN Doc. E/CN.4/SUB.2/RES/1997/27 (1997), online: Office of the High Commissioner for Human Rights <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/827dc97a9760a5ecc12566330030c5a4?Opendocument>>, accessed: 11/02/05.

⁴⁵ Commission on Human Rights, *Question of Human Rights and States of Emergency*, CHR Dec. 1998/108, UN CHROR, 54th Sess., UN Doc. E/CN.4/DEC/1998/108 (1998), online: Office of the High Commissioner for Human Rights <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/0bf34bbf1de545f98025666a004ecf26?Opendocument>>, accessed: 10/20/05.

Article 4 in August of 2001, but did not engage in the same detailed analysis as that undertaken by Despouy in his final report.⁴⁶

VII. Principles Governing States of Emergency and Their Application to Syria

Mr. Despouy's greatest contribution to international law on states of emergency was to clarify and summarize the principles which govern them. In his final report Despouy outlines ten governing principles of states of emergency. It is important to note that this was not the first attempt to establish such principles as the *Paris Minimum Standards of the Human Rights Norms in a State of Emergency* ("Paris Minimum Standards")⁴⁷ and the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* ("Siracusa Principles"),⁴⁸ put forward by NGOs in the mid-1980s both attempted to establish similar governing principles. What was significant about Despouy's final report was that it summarized much of the commentary, judicial decisions of the European Court of Human Rights, cases heard before the International Labour Organization, statements made by the HRC, and other such assessments of states of emergency by international bodies into one statement of where the law on states of emergency stood. In doing so, Despouy captures the essence of the principles put forward in the *Paris Minimum Standards* and the

⁴⁶ Human Rights Committee, *General Comment on Article 4 of the International Covenant on Civil and Political Rights: States of Emergency and Rights Derogation*, UN HRC, 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, online: University of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/gencomm/hrcom5.htm>>, accessed: 11/16/05.

⁴⁷ International Law Association, "The Paris Minimum Standards of Human Rights Norms in a State of Emergency" (1985) 46 Am. J. Int'l L. 1072.

⁴⁸ "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (1985) 7 Hum. Rts. Q. 3.

Siracusa Principles. These principles shed significant light on the interpretation of article 4 of the ICCPR and how and when derogation of rights should be permitted in instances of public emergency.

As Despouy's principles represent the UN's current position on states of emergency and capture most of what is expressed in the *Siracusa Principles* and the *Paris Minimum Standards*, only the principles articulated in his final report will be discussed in any depth.

a. Principle of Legality

Essentially, this principle requires that the state of emergency be “extended only in accordance with the Constitution or Fundamental Law [of the state] and the obligations imposed by international law”.⁴⁹ For a state of emergency to be in accordance with this principle a state must meet three basic requirements: it must have domestic laws which clearly set out how a state of emergency is to be declared, and what powers such a declaration grants the government; that the state of emergency be declared in accordance with these laws; and that the state of emergency, and the enabling domestic legislation, be in line with all international laws. Despouy finds this principle required by the rule of law, to be inseparable from the state of emergency itself, since the exceptional powers it grants are just that, an exception to the rule.⁵⁰

The Syria state of emergency has some serious difficulties in meeting the threshold of legality required by this principle. As outlined above, Syria is in breach of the non-derogable right to life outlined by article 6 of the ICCPR, as a result of its

⁴⁹ *Supra* note 39 at para. 52.

⁵⁰ *Supra* note 39 at para. 50.

imposition of the death penalty by emergency courts, which do not allow judicial appeal of their decisions. As a result of this breach, Syria's state of emergency is in violation of article 4, and thus not in line with "international law". Syria claims that the death penalty has been "virtually in abeyance" since 1987, and that even though death sentences are handed down by courts, they are always commuted to penalties of imprisonment by the executive.⁵¹ Even if this is the case, the death penalty continues to remain on the books, and thus at the very least Syria's domestic emergency laws do not conform with its obligations under the ICCPR.

The legality of the declaration of Syria's state of emergency under its domestic emergency laws is equally tenuous. Although Syria's domestic laws, are sufficiently broad that they can be adapted to render permissible almost any government decision – a situation which itself offends the principle of legality – the Government did not meet the formal requirements of Decree No. 51 of 1962. Article 2 of the Decree requires that the decree which brings the state of emergency into effect "be submitted to the Council of Deputies at its first meeting".⁵² However, Decree No.1 of 1963 was never submitted to the Council of Deputies or, its successor, the Council of the People.⁵³ As such, the proclamation of the state of emergency failed to meet the formal requirements laid out by its enabling legislation, leaving the legality of the state of emergency questionable and thus violating the principle of legality.

⁵¹ *Comments by the Government of the Syrian Arab Republic on the Concluding Observations of the Human Rights Committee: Syrian Arab Republic*, UN HCHR, 2001, UN Doc. CCPR/CO/71/SYR/ADD.1 at para. 9, online: Office of the High Commissioner for Human Rights
<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.71.SYR.Add.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.71.SYR.Add.1.En?Opendocument)>, accessed 11/20/05.

⁵² *Supra* note 2.

⁵³ *Supra* note 2.

b. Principle of Proclamation

The principle of proclamation requires that the government officially proclaim any state of emergency to be in force, so that the public is made aware of the scope of the emergency measures.⁵⁴ This principle is explicitly required by article 4(1) of the ICCPR and has been consistently recognized by the HRC in commenting on “de facto states of emergency” which have existed in several countries due to their derogations of the rights protected by the ICCPR.⁵⁵

As discussed above, the Syrian government did issue a decree publicly proclaiming the state of emergency. The legality of the proclamation is not at issue under this principle, it being addressed by the principle of legality. Thus, Syria meets the requirements of a public proclamation of the state of emergency established by this principle.

c. Principle of Notification

The principle of notification is also expressly required by article 4 of the ICCPR.

Article 4(3) states:

Any State party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminated such derogation.⁵⁶

⁵⁴ *Supra* note 39 at para. 54.

⁵⁵ *Supra* note 39 at para. 56.

⁵⁶ *Supra* note 3, art. 4(3) [emphasis added].

Key to this principle is that the state notify the UN not only of its declaration of a state of emergency, but also the obligation on the state to inform the UN of the specific rights being derogated, and the reasons for these derogations.⁵⁷

Neither Amnesty nor the HRC seems to be certain whether Syria has ever notified the Secretary-General of their state of emergency. Amnesty, tends to believe that Syria has not fulfilled this obligation.⁵⁸ However, the HRC actually asked Syria if it had met its notification obligation in the *List of Issues* it submitted to Syria as part of its response to Syria's *Third Annual Report*.⁵⁹ This being the case, it would seem likely that Syria has not notified the Secretary-General of their intent to derogate from the ICCPR, and likely are in breach of the principle of notification.

d. Principle of Time Limitation

While not explicit in article 4, this principle, like the principle of legality, is implied by the exceptional nature of a state of emergency. If not temporary, a state of emergency becomes the law and not a derogation from it. A permanent derogation of human rights would be opposed to the rule of law, the principles that underlie the ICCPR, and human rights generally.

⁵⁷ *Supra* note 39 at para 62.

⁵⁸ Amnesty International, "Syria: 41 Years of the State of Emergency – Amnesty International Reiterates its Concerns Over a Catalogue of Human Rights Violations" (March 2004), online: Amnesty International <<http://web.amnesty.org/library/index/ENGMDE240162004>>, accessed: 10/02/05.

⁵⁹ Human Rights Committee, *List of Issues: Syrian Arab Republic*, UN HRC, 84th Sess., UN Doc. CCPR/C/84/L/SYR (2005) at para. 6, online: Office of the High Commissioner for Human Rights <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.84.L.SYR.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.84.L.SYR.En?OpenDocument)>, accessed: 11/18/05.

Given the extreme length of time for which Syria's state of emergency has been in effect, there is clearly a strong prima facie case for the violation of this principle. Decree No. 51 of 1962 imposes no requirement to renew states of emergency declared under it, and imposes no limitations on the length of time the state of emergency remains in effect. This being the case, the Decree itself would appear to be in opposition to this principle.

As for the actual imposition of the state of emergency, it appears that the Syrian Government has simply continued to add to the emergency laws and adapt them to suit any situation which it perceives to pose a threat to the rule of the Ba'th party. The state of emergency was declared as a result of the military coup, which brought the party to power and then used to ensure they were able to maintain and entrench their control. The emergency laws were then used during the state of war with Israel in 1967, which the government still claims is the reason for the continuation of the state of emergency to this day. However, the laws were then adapted and added to in the early 1980s to allow the government to address the attacks and assassinations being carried out by Islamic extremist groups. A government cannot be allowed to maintain a state of emergency for the sake of convenience, using its emergency powers to respond to situation at its discretion. Yet this appears to be exactly what the Syrian Government is doing, by its own admission in its *Third Periodic Report*.⁶⁰

e. Principle of Exceptional Threat

Closely related to the principle of time limitation, the principle of exceptional threat requires that the state of emergency only exist in response to an exceptional,

⁶⁰ *Supra* note 13 at para. 70.

imminent threat to the life of the nation where “the ordinary measures or restrictions permitted by the Convention for the maintenance of public security, health or public order are clearly inadequate”.⁶¹ Under the heading of this principle, Despouy also discusses the geographic application of the state of emergency, as there has been some discussion, largely in the case law from the European Court of Human Rights,⁶² that the threat must be to the entire nation. Despouy concludes that where there is a threat to only part of a nation, the state of emergency should be applied only in that portion of the territory.⁶³

Clearly Syria has faced some periods where an exceptional threat to state has existed, most obvious among these being the several wars Syria has been a party to over the past 42 years. But have these periods of exceptional threat combined to cover the entirety of this period? Has Syria continuously faced an imminent threat that would require emergency measures since 1963? In its *Third Periodic Report* to the HRC Syria justifies the state of emergency as a result of the ongoing occupation of the Golan Heights since 1967.⁶⁴ The UN does recognize this as an illegitimate occupation of Syria by Israel, and the General Assembly continues on an almost annual basis to request Israel end its occupation of the Syrian Golan Heights.⁶⁵ The Committee also seems to accept Syria’s assertion in its *Third Periodic Report* that this occupation is the reason for their

⁶¹ *Supra* note 39 at para. 79.

⁶² See, *Ireland v. United Kingdom* (1982) 4 EHRR 40; *Lawless v. Ireland* (1960), [1979-80] 1 E.H.R.R. 15.

⁶³ *Supra* note 34 at para. 81.

⁶⁴ *Supra* note 13.

⁶⁵ *The Syrian Golan*, GA Res. 59/33, UN GAOR, 59th Sess. UN Doc. A/RES/59/33 (2005), online: United Nations General Assembly <<http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/24/PDF/N0447824.pdf?OpenElement>>, accessed: 12/01/05.

ongoing state of emergency, but is concerned that the actual derogations as a result of the state of emergency are not actually necessary to deal with the exigencies of the Israeli situation.⁶⁶ This is a legitimate concern, as the emergency laws have generally been employed against the Ba'th party's political opponents, members of the Muslim Brotherhood and human rights activists and bear almost no relation to the situation in the Golan Heights.

This is where the geographic limitation of the exceptional threat principle may be useful to analyze the situation. Clearly the situation in the Golan does not pose an imminent threat to the life of the entire nation; the occupation has gone on for almost 40 years. Nonetheless, there may continue to be a legitimate threat to the Golan region that may require the use of some emergency measures, within this region, to deal with the massive displacements of people and the fact that a portion of Syrian territory is under foreign occupation. However, this is not how the state of emergency has been applied, and it would seem that the Golan occupation is not a legitimate reason to maintain a state of emergency over the entirety of the Syrian state. Thus, the Syrian state of emergency fails to meet the requirements of the principle of exceptional threat.

f. Principle of Proportionality

The basis for the principle of proportionality is explicit in the text of article 4(1) of the ICCPR, where it states:

⁶⁶ Human Rights Committee, *Concluding Observations of the Human Rights Committee, Syrian Arab Republic*, UN HRC, UN Doc. CCPR/CO/71/SYR/Add.1 (2001), online: Office of the High Commissioner for Human Rights <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6f4b9c3073e07ad7c1256a2a0037de0f?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6f4b9c3073e07ad7c1256a2a0037de0f?OpenDocument)>, accessed: 11/20/05.

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation...⁶⁷

In assessing proportionality, both the scope and duration of the emergency measures should be proportional to the severity of the danger.⁶⁸ Shedding further light on this principle, Despouy also comments that states should attempt to mitigate the adverse consequences of the derogation of human rights by adopting specific administrative or judicial measures to allow for the better monitoring of these derogations.⁶⁹

The powers allowed during a state of emergency by Decree No. 51 of 1962 are extremely broad in terms of both time and scope, allowing the Military Governor the ability to endlessly extend the already broad powers listed in the Decree and setting no limits on the length of the state of emergency. The Syrian government has done little to limit the broad powers granted to them in the Decree, and in fact have applied the laws in an even more broad manner, applying emergency laws against any group who opposes Government policies, and viewed as a threat to the Ba'th regime.

The proportionality of the application of emergency measures is even more questionable when viewed in the context of Syria's self-proclaimed reason for continuing the imposition of the emergency laws: Israeli occupation. It is difficult to make the argument that the imprisonment of human rights advocates or members of Islamist groups is even connected to the Israeli occupation, let alone a proportional response to it. As well, the fact the emergency measures failed the geographic component of the

⁶⁷ *Supra* note 3, art. 4(1) [emphasis added].

⁶⁸ *Supra* note 39 at para. 86.

⁶⁹ *Supra* note 39 at para. 91.

exceptional threat principle would make it quite difficult for it to get over the proportionality hurdle. Also, by preventing Syrians from challenging emergency laws and denying them procedural guarantees and the opportunity for judicial review, the emergency courts fail to mitigate the harm caused by the derogation of rights, and also violate this principle.

g. Principle of Non-Discrimination

This principle of non-discrimination is again captured within the language of article 4, where it states that measures derogating from the obligations outlined in the ICCPR can “not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.⁷⁰ However, there has been some debate as to how effectively article 4 captures this principle as a result of the word “solely” which has been viewed by some as rendering the inclusion of this limit on derogation ineffective, by requiring that discrimination not be based only on one of the grounds listed, but allowing for it to be based on one or more of the grounds, plus another unlisted factor.⁷¹ In a General Comment made by the HRC in 1981 to help clarify some of the issues surrounding article 4, the Committee states, that state parties to the ICCPR “may not derogate from certain specific rights and may not take discriminatory measures on a number of grounds”.⁷² Despouy reads this comment as placing non-discrimination on par

⁷⁰ *Supra* note 3, art. 4(1).

⁷¹ *Supra* note 39 at para. 92.

⁷² Human Rights Committee, *Article 4*, Human Rights Committee General Comment 5/13, HRC, 13th Sess., UN Doc. HRI/GEN/1/Rev.1 (1994), online: University of Minnesota Human Rights Library <<http://humanrights.law.monash.edu.au/gencomm/hrcom5.htm>>, accessed: 12/01/05.

with the non-derogable rights enumerated in article 4(2) and suggests that the principle of non-discrimination thus be seen as not being subject to any limitations or derogations.⁷³

An argument could be made out that Law No. 49 dated 7th July 1980, declaring that every member of the Muslim Brotherhood is to be sentenced to death, is discriminatory on the ground of religion, given that the Muslim Brotherhood is composed predominantly of Sunni Muslims. However, this is a stretch as it is not composed entirely of Sunnis and many Sunnis are not members of the Muslim Brotherhood. The Muslim Brotherhood is also more easily classified as political group than a religious group, given its aspirations of converting Syria to an Islamist state. Although political opinion is included as one of the prohibited grounds of discrimination in article 2 of the ICCPR, it is not included in article 4(1) as one of the non-derogable grounds of discrimination. As such, this law would not seem to violate the principle of non-discrimination, although it does violate some of the other governing principles discussed above.

h. Principles of Compatibility and Complementarity

The principles of compatibility and complementarity are most easily discussed together, since they both address the relationship between the ICCPR and other international instruments addressing human rights. The underlying principle is that the ICCPR is meant to complement other human rights obligations states may have, not to supersede them, and certainly not to allow them to derogate from them where such rights would otherwise be non-derogable. The notion of compatibility, which implies the

⁷³ *Supra* note 39 at paras. 93 and 94.

complementary relationship between the ICCPR and other human rights obligations, is clearly expressed in article 4(1) of the ICCPR which states that derogations will only be permitted “provided that such measures are not inconsistent with [states’] other obligations under international law”.⁷⁴ Thus the ICCPR clearly recognizes the existence of other human rights obligations, which will continue to be binding on states, beyond what is expressed in the ICCPR.

Syria is not party to any regional human rights regimes⁷⁵, but this does not mean it does not have other obligations at international law that may be affected by its state of emergency. As discussed above, Syria’s obligations under the CAT are clearly affected by the emergency laws, which is enough to constitute a breach of the principle compatibility. Also, Syria’s emergency laws run counter to the principles expressed in the Universal Declaration of Human Rights, also in breach of this principle.

i. Principle of Concordance

In his final report, Despouy seems to use the principles of compatibility and complementarity to stretch the principle of concordance, which is derived from article 5 of the ICCPR. Article 5(1) of the ICCPR states:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized

⁷⁴ *Supra* note 3, art. 4(1).

⁷⁵ The League of Arab States did adopt *The Arab Charter on Human Rights* in 1994, but it has not at this time been ratified by enough states to come in to force. See, Ibrahim Al-Jazy, “The Arab League and Human Rights Protection” in Eugene Cotran and Adel Omar Sheri eds., *Democracy, the Rule of Law and Islam* (The Hague: Kluwer Law International, 1999) 211.

herein or at their limitation to a greater extent than is provided for in the present Covenant.⁷⁶

Despouy seems to apply the principles of compatibility and complementarity, to the language of article 4(1) to imply that the “rights and freedoms recognized herein” encompass all rights recognized in the international order. While such a reading may be in line with the broad purpose of protecting human rights embodied by the ICCPR, it seems to be counter to the actual language of article 5(1), which refers explicitly to the rights “provided for in the present Covenant”. Had those drafting the ICCPR intended this article to refer to all international obligation binding on parties to ICCPR, it would seem likely they would have chosen to express this more clearly.

All of this being said, the Syrian state of emergency would seem to violate even the narrowest interpretations of this principle. A look at the reality of the situation in Syria suggests that the true nature of the use of emergency laws is to oppress political dissent and maintain the current regime’s hold on power. This seems to be directly “aimed at the destruction” of freedom of political opinion, which article 2 of the ICCPR seeks to protect. As a means of doing so, the Syrian emergency laws, through their long standing nature have essentially completely eroded the majority of the rights protected by the ICCPR. Consequently, Syrian emergency laws violate even a narrow interpretation of the principle of concordance. Accordingly, Syrian emergency laws would certainly violated the broader concordance standard envisioned by Despouy.

⁷⁶ *Supra* note 3, art. 5(1).

j. Additional Non-Derogable Rights

In addition to summarizing the various general principles developed to govern states of emergency, Despouy also comments on and adds to the non-derogable rights listed in article 4(2). As well as adding the non-discriminatory principle to these non-derogable rights, Despouy also suggests several other rights which may not be derogated in a state of emergency. Key among these additions to the explicitly listed non-derogable rights are the additions of the right to *habeas corpus* and the protection of the due process rights outlined in article 14 of the ICCPR.

The existence of *habeas corpus* rights and the protection of judicial remedies for violations of the ICCPR are articulated in article 2. While not being listed in article 4(2) as a non-derogable right, the rule of law and logic dictate that such rights would still be in place during a state of emergency. Article 4 allows derogations from the ICCPR, not the suspension of the entirety of the Covenant; the listing of non-derogable article in 4(2) makes this clear. In consequence, the measures outlined in article 2 for ensuring individuals are able to seek remedy for violations of rights protected by the ICCPR would logically be required to remain in force in order to ensure that these non-derogable rights are not being violated, as article 2 is intended to ensure the enforcement of the ICCPR by domestic courts.

The ability of individuals to enforce their rights under the ICCPR, with the exception of those being legitimately derogated, requires that the rights to a fair trial outlined in article 14 of the Covenant remain in force. The view that article 14 cannot be derogated has been expressly stated by the HRC in its responses to periodic reports.⁷⁷

⁷⁷ *Supra* note 39 at para. 111.

Furthermore, in response to a request from the Sub-Commission that a protocol be drafted declaring articles 3, 9 and 14 to be non-derogable, the HRC stated that it felt this not to be necessary as parties to the agreement already understood these articles to be non-derogable.⁷⁸ Again, the same logic which applied to article 2, applies in the case of article 14; if the non-derogable rights are to be protected, it is necessary that individuals have access to fair and impartial hearings in order to challenge any violations of their rights.

Syria's emergency courts, by not permitting evidence on the pre-trial actions of security officers, remove the necessary checks on Syria's emergency laws to ensure the laws are being applied in a way that most minimally infringes on the rights of Syrians. By not allowing Syrians to challenge the continuation of the emergency laws, or their legitimacy under the ICCPR, any protections offered by the ICCPR to Syrians are effectively removed and the supposed incorporation of the Covenant into Syria's domestic law rendered meaningless. The UN has taken a prudent step by viewing articles 2 and 14 to be non-derogable, as it is the combination of these two articles on which the entire ICCPR relies in order to maintain any hope of being enforceable against a state by its citizens. However, as the situation in Syria clearly evidences it is not enough for the UN to simply state that these articles cannot be derogated from; this proposition must itself be enforced.

⁷⁸ *Supra* note 39 at para. 111.

VIII. Recommendations and Observations

Given the violations of human rights occurring in Syria as a result of emergency laws and the fact that both the emergency laws themselves and their application by the Syrian Government grossly violate both the ICCPR and the principles which govern derogation from it, one question arises: How has this situation been permitted to continue for over 40 years? There are several reasons, and the UN should not take all of the blame.

As mentioned in the above discussion of actions taken by the UN to address the situation in Syria, there are several political factors which contributed to the lack of action. Also, much of the blame for the failure to effectively address Syria's misuse of emergency measure falls squarely on the ICCPR itself. By not clearly stating that articles, such as article 2 and article 4, are non-derogable, and having to rely on these principles being stated by academics and then by the UN through general comments and responses to periodic reports delays any response to their derogation and misleads states as to their ability to derogate from these articles. Having allowed Syria's emergency courts to operate in the way they have for years, it becomes difficult to persuade them to change such practices through the issuing of such broad general statements, not aimed at Syria in particular.

The ICCPR also includes no firm enforcement mechanisms. As seen in Syria, individuals living within a state party are not always given the opportunity to enforce their rights under the covenant through domestic mechanisms as anticipated by article 2. In such a case they truly have little to fall back on, as other states' ability to file

grievances to the HRC regarding a states' failure to fulfil its obligations under the Covenant is severely limited under article 41, and the self-reporting of states under article 40 has no enforcement mechanism itself. Exemplified by Syria's 24-year absence from reporting, if a state chooses not to file its reports under article 40 for an extended period of time, it simply falls off the HRC's radar screen.⁷⁹

This being said, the UN can do more to prevent such gross and long-term violations of the ICCPR. Prolonged states of emergency are key indicators of a state that is likely committing serious human rights violations and in many cases these are the same states that have not filed declarations under article 41 and are more likely to be uncooperative with the HRC; this is especially true where the state fails to notify the Secretary-General of the state of emergency and its intent to derogate from the ICCPR. It is for this reason that the Human Right Committee made the wrong decision in deciding not to appoint another Special Rapporteur for States of Emergency after the end of Special Rapporteur Despouy's term. The Committee opted to do less with regard to states of emergency, when they should have opted to do more. Already the annual lists of states which declared states of emergency were not enough to effectively monitor the realities of the situation, and so the move to bi-annual lists only exacerbates this problem. These decisions run counter to Despouy's recommendations in his final report, which were fully endorsed by the Sub-Commission. The continuation of the position of Special Rapporteur on States of Emergency is the lowest level of monitoring for which the HRC should have opted.

⁷⁹ *Supra* note 66.

Some commentators have noted that the Special Rapporteur already had difficulties obtaining all the information he needed on the emergency measures states had adopted.⁸⁰ This would suggest a need to provide the Special Rapporteur with greater resources to obtain this information, not abolishing the position and further limiting the resources allocated to states of emergency by handing off the duties to the already overworked office of the High Commissioner for Human Rights. As was recommended by Despouy in his final report, the HRC should appoint a special working group to monitor and investigate states of emergency.⁸¹ With more people involved in the monitoring of states of emergency, a working group would be able to do more than simply publish annual lists which contain little information, or only information provided by the states themselves, but could actually conduct on-site visits to states with long-standing, or questionable adoptions of emergency measures, and see for themselves what the conditions are on the ground in that state.

With more information, a working group would be in a better position to apply more pressure to states to ensure they conform with the principles governing states of emergency. This was a major failure of the Special Rapporteur; although able to develop the principles which should govern the use of emergency measures by state parties to the ICCPR, he was unable to apply any effective pressure on states, or open up much in the way of meaningful dialogue with states, that would actually put these principles to use.⁸²

More could also be done in terms of the overall monitoring of compliance with the ICCPR by the HRC. Instead of allowing states to go for prolonged periods of time

⁸⁰ *Supra* note 41 at 120.

⁸¹ *Supra* note 39 at para. 188.

⁸² *Supra* note 41 at 122.

without submitting reports under article 40, allowing them to evade the attention of the committee, the HRC must take steps to encourage states to file their reports on time. In such situations it is not enough for the HRC to simply accept that they do not have enough information on the status of a state's compliance with the ICCPR, and continue requesting that the state submit a report. With the increased involvement of NGOs in submitting shadow reports, the Committee should work with the information provided by NGOs, or through their own research, provided by the working group, and write their concluding observations much the way they would have if the state had submitted a report. Many states, especially those violating the terms of the ICCPR, are dishonest in their periodic reports, so the Committee would not really suffer a significant loss in information by proceeding in such a fashion and it would provide an incentive for states to submit their reports, as it would provide them the opportunity to present their side of the story.

In order to deal with the present situation in Syria, it is important to keep in mind the conditions which lie at the root of the problem: the history of foreign occupation, the relative newness of Syria as an independent nation, the political instability of the region and Syria's diverse ethnic make-up. The UN must work with the Syrian Government and regional groups to reform Syria's legal system and lift the state of emergency. In doing so, they must avoid the perception that a solution is being imposed on Syria by "the West," as Syria's past betrayals and long history of foreign intrusions in its politics are what has led to the current political situation in the first place. Similar political situations are faced by many states in the Arab world and the UN must do what it can to facilitate

dialogue between these states and encourage solutions that will lead to a greater respect for human rights across the region.

Efforts must also continue to be made to encourage Israel's withdrawal from the Golan and to normalize relations between these two states, to remove this perceived threat as a possible justification for the emergency laws. However, as history has shown this is a long and difficult process, to which there is no easy solutions. The re-opening of dialogue between the two states would be a positive first-step in the reconciliation process, and should be a focus for the UN.

IX. Conclusion

With regards to Syria, some progress is finally being made with regards to the loosening of the state of emergency. With the submission of Syria's *Second Periodic Report* in January of 2000, the HRC was finally able to address Syria's entrenched state of emergency and its many breaches of the ICCPR, requesting that Syria bring its emergency laws in line with the ICCPR and that the state of emergency be brought to an end as soon as possible.⁸³ Syria's *Third Periodic Report* in 2004, elicited similar comments from the Committee. As such, a dialogue seems to have opened up between the Syrian Government and the Committee on the issue of the state of emergency and the numerous human rights breaches flowing from it. Increased attention on Syria from the international community in the wake of September 11th and now as a result of the Rafiq Al Hariri assassination and the imprisonment of Maher Arar, as well as an increased push for democracy throughout the Arab world have lead to mass releases of political

⁸³ *Supra* note 66 at paras. 6 and 7.

prisoners in recent years and much talk of scaling back the state of emergency and other political reforms in Syria.

It is too soon to say for sure what will come of this talk of reforms, but what is certain is that this dialogue with Syria could have been opened earlier if the above mentioned reforms would have been in place to catch Syria's illegitimate state of emergency sooner. Whether or not this would have led to an earlier lifting of the state of emergency cannot be known, but the opening of a dialogue with Syria on the issue would at the very least have let the Syrian Government know they would have to answer for their actions.

The situation that has developed in Syria is important because it exposes a major weakness in the UN's treaty monitoring system; a state has been severely violating the ICCPR for the entirety of the period since it has come into force, with virtually no consequences resulting from these breaches. Such severe breaches should not be allowed to happen. The need for reform of the UN's monitoring of states of emergency — declared or de facto — must be stepped up. If states such as Syria, can formally declare states of emergency for such extended periods that they essentially become the law, without consequence and without attracting much attention from the UN, how is the UN to deal with the rash of security laws being implemented across the globe in response to perceived terrorist threats? These laws are being enacted not as emergency provisions, but as permanent legislation, yet they offend many of the same articles of the ICCPR as Syria's emergency laws. If the UN is ineffective against gross violations of these laws by small states like Syria, how is it to respond to the more covert violations of these principles by the world's major powers?

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