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Carl Schmitt's Conception of Sovereignty, the UN Security Council, and the Instrumentalization of the "State of Exception"^{*}

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For Carl Schmitt, the essence of sovereignty lies in the power to decide on the state of exception.¹ In his conception, the state's legal order only makes sense if there exists a kind of primordial order, that is, a real, not merely normative, system that reflects the stability of state and society.² The "sovereign" is the supreme arbiter who alone decides whether there exists such an actual, "normal," order or not.³ In his definition of sovereignty, Schmitt further explains his rather dogmatic, *decisionist* (in a certain sense, existentialist)⁴ approach, arguing that the "state of exception" ("Ausnahmezustand") is most suitable for the legal definition of sovereignty, simply because "a decision on exception is ... decision par excellence."⁵ The existentialist pathos becomes more than obvious in how he characterizes the exception: "First and foremost, a philosophy of concrete life must not shy away from the exception."⁶

Because Schmitt confuses the legislative and executive aspects of power, his decisionist-existentialist notion of sovereignty is not compatible with an understanding based on the autonomy of the citizen (for example, in the Kantian

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sense) as source of legitimacy of the legal order.⁷ Identifying rule on the basis of a temporary *exception* from the law (an element of *executive* power) as primordial aspect of sovereign power (which is paradigmatically expressed in the authority of the people as *legislator*) is a typical case of what German philosophy describes as "*Kategorienvermengung*" ("confusion of categories"). Also, as Andrew Norris has pointed out, Schmitt's conception is "excessively metaphysical."⁸

In modern (secular) state theory, shaped by the Enlightenment, the constitution must be derived from the will of the citizens as founders of the *res publica*. Ideally, the popular will is expressed in the form of a referendum. Accordingly, in any democratic constitution, the state of exception is not the paradigmatic expression of sovereignty. Unlike in a framework of totalitarian (absolutist) power, emergency rule is not an end in itself, but has the sole purpose to preserve the very order of the constitution, established by the community of citizens. Any temporary suspension of laws must be seen as subordinated to that goal and integrated into a system of checks and balances, with the legislative and judicial branches being able to review and revise the acts of executive power.

This was also the case, after World War I, with the constitution of the German Weimar Republic (*Weimarer Reichsverfassung*). Schmitt referred specifically to this constitution in his effort to demonstrate the nature of sovereignty.⁹ The *Reichsverfassung* ultimately subordinates the emergency powers of the President to the authority of Parliament. However, this is exactly what Schmitt rejects, almost abhors, in terms of his absolutist understanding of sovereignty: that the German Parliament (*Reichstag*) is empowered to repeal any emergency measures taken by the President.¹⁰ For Schmitt, the provision indicates that the Weimar Constitution

seeks to avoid as much as possible addressing the crucial question of sovereignty. In his assessment, any arrangement based on a separation of powers follows such an evasive approach.¹¹

In a democratic constitution, sovereignty is, as noted, not, *per se*, about the authority to declare an exception (emergency) or suspend laws or the constitution in its entirety. Emergency powers are only a secondary (instrumental) aspect of sovereignty as an authority to create law by virtue of decisions of the free—sovereign—people, which is its primary aspect.¹² Therein lies the difference between democratic decisionism and Schmitt's absolutist version of it. Not unlike legal positivism,¹³ Schmitt links legal norms to acts of will: "As in any order, the legal order too is founded on a decision, not a norm."¹⁴ Thus, Schmitt's decisionism—or voluntarism—has certainly something in common with Hans Kelsen's theory of the "validity of norms" (*Rechtsgeltung*). As Tomas Berkmanas argues, both approaches can be interpreted as "essentially identical models of exclusionary-inclusion of life into the domain of law."¹⁵ Schmitt, however, obscures or mystifies the act of decision in a *totalitarian* sense. Neglecting all considerations of a separation of powers and the rule of law, he states: "The decision frees itself from any dependence on norms and becomes absolute in the true sense."¹⁶ This approach is also evident in Schmitt's affirmative reference to Thomas Hobbes's dictum that "it is authority, not truth, which makes the law."¹⁷ Schmitt identifies Hobbes as classic representative of the decisionist approach towards sovereignty.¹⁸ Yet, the quasi-absolute power to decide on the state of exception, contemplated by Schmitt, must not be confused with the state's "monopoly of violence" as defined by Max Weber.¹⁹ The latter relates to the

enforcement of norms within a state's constitutional order, in general. It is the *differentia specifica* between a state of anarchy and the rule of law.

In the context of “democratic decisionism,” the declaration of a state of exception by the holders of executive power is, as outlined here, only an act to *protect* the legal order, not to *abrogate* it. In that regard, Schmitt’s emphasis on the exercise of a “derived” competence as paradigmatic act of sovereignty is misleading. He makes repeated efforts to bend the interpretation of the concept in favor of his position. Commenting on Jean Bodin’s definition,²⁰ he describes “the authority to annul the law in force”²¹ as the very essence of sovereignty, instead of recognizing the merely auxiliary role of such authority. In the Schmittian logic, sovereignty, as a “borderline concept” (*Grenzbegriff*)²² in the strict sense,²³ means to be above the law.²⁴ For Schmitt, as Jef Huysmans puts it, “the norm does not define the exception but the exception defines the norm.”²⁵ This means that under the state of exception, “the law suspends itself.”²⁶

It is no coincidence that this interpretation—since it was first developed in the years after World War I²⁷—has been exploited by those who have sought an ideological justification for authoritarian or totalitarian rule as an end in itself. As Zoe A. Thomson stated bluntly in a recent analysis of global developments, “emergency has become the new normal.”²⁸ Under the pretext of what is described by the Roman dictum, “*necessitas non habet legem*” (“necessity has no law”), Schmitt’s conception—in different contexts and under different circumstances—has served to legitimize, in the name of national sovereignty, emergency rule up to the present day.

A case in point is how Eric Posner and Adrian Vermeule have applied Schmitt’s theory in their analysis of contemporary politics—or better, its

instrumentalization.²⁹ Their research paper entitled “Demystifying Schmitt,” can be seen as justifying an ever more expansive interpretation of executive power in the United States in the period after September 11, 2001,³⁰ a development characterized, in a commentary on the Trump Administration, as an “intentional turn toward an aggressive view of executive power.”³¹ In his treatment of the emergency policies of the United States—in particular, the 2001 *United States Patriot Act* of October 24, 2001³² and President George W. Bush’s military order of November 13, 2001³³—Giorgio Agamben sees Schmitt’s doctrine at work, implying that the state of exception has become a “paradigm of government.”³⁴ To him, these measures reveal the “biopolitical significance of the state of exception as the original structure in which law encompasses living beings by means of its own suspension.”³⁵ In the case of President Bush’s military order, however, the constitutional separation of powers was at work. In its decision of June 29, 2006, the United States Supreme Court ruled that international legal obligations³⁶ also apply to emergency decrees of the President, thus rejecting a Schmittian interpretation of executive power under the rule of exception.³⁷

Since “9/11,” the “exceptional” approach has also been pertinent—under the Trump Administration in particular³⁸—in an excessive use of unilateral sanctions by the United States, and their frequent extraterritorial application, on the basis of presidential declarations of a national emergency.³⁹ The *International Emergency Economic Powers Act* (IEEPA) of 1977 grants the President wide discretionary powers to initiate and perpetuate such punitive, essentially hostile measures against sovereign states,⁴⁰ notwithstanding his obligation to consult with and report to Congress.⁴¹

Because of the lack of a separation of powers, any emergency regime of the executive branch, which does not include specific provisions for its termination, depending on a determination by the legislative branch, is incompatible with the rule of law. Furthermore, an *indefinite* perpetuation of emergency rule is against the very notion of such a rule, which is meant to be *temporary*. Thus, similar to Germany's Weimar *Verfassung*, exception clauses in most contemporary constitutions are in sharp contrast to Schmitt's "absolutist" conception that systemically confuses the executive (secondary) and legislative (primary) aspect of sovereignty. The strict distinction between these two dimensions is evident, for example, in the "emergency decree authority" (*Notverordnungsrecht*) of Article 18, Paragraph 3 of the Constitution of the Republic of Austria. The provision strictly integrates emergency authority into the constitutional separation of powers, obliging the President to lift such measures without delay if so requested by Parliament.⁴²

At first glance, a democratic-constitutional approach, which is itself decisionist, does not contradict Schmitt's evaluation of emergency powers as far as the publicly stated goal is concerned—namely, the preservation of the sovereign state. The difference lies in the constitutional procedures (in terms of the separation of powers) and, especially, in the doctrinal implications, that is, Schmitt's unequivocal subordination of law to power. For him, the essence of rule (*Herrschaft*) under the state of exception is, "that the state continues to exist while the law steps back."⁴³ In Schmitt's doctrine, the continued existence of the state is "undoubtedly superior to the validity of the law [the legal norm]."⁴⁴

In a certain respect, this also seems to have been the rationale of the International Court of Justice's *Advisory Opinion* on the question of the legality of the

use of nuclear arms. Responding to a question put before it by the General Assembly of the United Nations, the Court stated that it “is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake.”⁴⁵

Apart from this apocalyptic challenge, where contemporary international law is somewhat ambiguous, Schmitt’s interpretation of sovereignty is—in addition to its unconstitutionality in a modern democratic context—also incompatible with international obligations of states. A case in point is the public emergency clauses of the *International Covenant on Civil and Political Rights*,⁴⁶ which strictly limit emergency powers. According to Article 4, Paragraph 5, no derogation is possible from norms of *jus cogens* such as the right to life, the prohibition of torture and slavery, as well as freedom of thought, conscience and religion.⁴⁷ The same applies to other international legal instruments, such as the 1949 Geneva Conventions.⁴⁸ Schmitt’s definition of sovereignty as *absolute* power, modeled on the exception (from the very law sovereignty is meant to found),⁴⁹ fits more into a doctrine of political realism than into a theory of law. In Schmitt’s analysis, sovereignty is defined by the power “to suspend the existing [legal] order in its totality.”⁵⁰

The UN Security Council’s P5 as Schmittian Ruler

It is exactly in the domain of international affairs—namely, in relations between sovereign states—where Schmitt’s absolutist notion of sovereignty, embodied in the unrestrained power to declare a state of exception, holds sway. Surprising to many, and almost counterintuitively, it is the Charter of the United Nations Organization

that appears as a blueprint for the application of this realist doctrine. The definition of the powers of the Security Council under Chapter VII of the UN Charter strikingly resembles Schmitt's description of sovereign authority under a state of exception. According to Article 25 of the Charter, the Security Council possesses the authority to take coercive measures that are legally binding upon all member states—irrespective of considerations of national sovereignty. Furthermore, the Council's decisions under Chapter VII can be enforced by any measures, including the use of armed force (Articles 41 and 42).

In the specific provisions of Chapter VII,⁵¹ there are structural similarities to how Schmitt describes the state of exception and the emergency powers related to it. According to his decisionist doctrine, the epitome of sovereign rule is the decision about the state of exception. It is the “sovereign” who decides (1) on the existence of a national emergency and (2) on the measures to be taken to deal with it.⁵² Similarly, three centuries earlier, Thomas Hobbes, commented, in the *Leviathan*,⁵³ on this double dimension of sovereign power: “The Soveraigne Is Judge Of What Is Necessary For The Peace And Defence Of His Subjects/And because the End of this Institution is the Peace and Defence of them all; and whosoever has the right to the End, has the right to the Means ...”⁵⁴ Furthermore, (3) according to Schmitt, the “sovereign”, under the state of exception may effectively “obliterate” (*vernichten*) existing legal norms.⁵⁵

The sovereign authority under (1) resembles the Security Council's powers under Article 39 of the Charter: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression.” A situation thus defined constitutes the *emergency of the international order*. That order's very

existence, based on non-interference in the internal affairs⁵⁶ and the prohibition of the threat or use of force between states,⁵⁷ is at stake under these circumstances. The Council *alone* defines the criteria for such a determination, which is final. There is no separation of powers of any kind within the UN system. The General Assembly does not possess legislative authority, and the International Court of Justice is not competent to decide on resolutions of the Council adopted under Chapter VII.⁵⁸ Thus, a determination under Article 39 may eventually trigger the imposition of coercive measures, including the use of force, against which no appeal is possible. The Council's definitional authority under Article 39 perfectly mirrors Schmitt's description of sovereignty: "that sovereignty, and therefore the state as such, consists [...] in the power to determine the concept of public order and security, as well as to determine the existence of a threat to this order, et cetera."⁵⁹

The power of the sovereign as defined by Schmitt as well as Hobbes, to decide on specific measures to be taken in an emergency declared by the sovereign (point [2] above) also resembles the authority given to the Security Council under Articles 41 and 42 of the Charter. As it is put in Article 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions." The subsequent sentence of this Article lists comprehensive and partial economic sanctions as such measures. That it begins with the phrase "These may include" indicates a *taxative*, not exhaustive, enumeration of measures, which allows the Council almost total arbitrariness in its coercive action, that is, in the choice of means. Indeed, the Council interpreted this authority rather liberally in the years after the end of the Cold War, when even the establishment of criminal courts was considered as "coercive measure" in the meaning of Article 41.⁶⁰ The risk of

arbitrariness in the choice of means is even more obvious—and more consequential—in the authority given the Council under Article 42, namely to resort to the use of armed force should it consider that measures under Article 41 “would be inadequate or have proved to be inadequate.” According to Article 42, the use of such measures is at the sole discretion of the Council. It “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

Sovereign authority under (3) resembles an “exceptionalist” power of the Security Council under Article 2(7) of the UN Charter. The norm prohibiting interference into the internal affairs, an essential aspect of sovereign equality of states, is effectively not valid when the Council exercises its coercive powers.⁶¹ As implied in the wording of the Charter, the Council, in that regard, stands effectively *above the law*.

As already indicated, for all binding resolutions under Chapter VII of the UN Charter, once adopted, the power of the Council cannot be challenged by member states of the United Nations or courts, whether domestic or international. This state of affairs, in terms of the legal statute of the world organization, exactly matches Schmitt’s description of emergency powers: “Here, preconditions [for the invocation of a state of exception] as well as content [scope] of authority are necessarily undetermined [that is, without limits].”⁶²

Furthermore, because of the veto provision of Article 27(3) of the UN Charter, decisions on coercive measures cannot be revoked without the consent of the Council’s five permanent members (P5).⁶³ The consequences of this statutory monstrosity can be severe as has been evident in the perpetuation of comprehensive

sanctions against Iraq for over a decade. No appeal to human rights or legal challenge (invoking the *jus cogens* nature of fundamental rights) was able to convince the permanent member that had regime change in mind, that is the United States, to agree to the lifting of these measures, which amounted to the most severe and brutal form of collective punishment ever enacted in the name of the United Nations.⁶⁴ The voting privilege of the P5, marginalizing the votes of the majority of the Council's members, has made the absence of statutory checks and balances in the Charter even more consequential.

In a decision on a dispute involving two permanent members of the Security Council, the International Court of Justice frankly admitted that it considers itself only competent to review decisions of the Council under Chapter VI of the Charter⁶⁵ (which have the character of mere recommendations). Thus, for the sake of world peace—this, after all, was the rationale for granting the Council such expansive powers—Chapter VII resolutions, including those that violate basic human rights of an entire people,⁶⁶ stand effectively above the law.

Because of those statutory provisions, the Security Council is not, as suggested in Article 24 of the Charter,⁶⁷ the agent of all member states in matters of collective security. It is, *de facto*, a tool of power politics in the hands of its permanent members. Those five states (1) can under no circumstances be the target of any enforcement action against their own transgressions of the law (because of the veto), and (2) their leaders are, in most cases, effectively immune from any international investigation or prosecution for the commission of international crimes, in particular the crime of aggression. The latter is (a) due to the power of those countries to block, by virtue of their veto, any referral of a situation in which international crimes may

have been committed to the International Criminal Court (ICC),⁶⁸ and (b) due to the Security Council's privilege—under the Statute of the ICC—to determine the existence of a case of aggression on the basis of Chapter VII.⁶⁹ In regard to (a), the leaders and officials of the permanent member states that are not States Parties of the International Criminal Court⁷⁰ enjoy virtual impunity from any international prosecution for “international crimes” (war crimes, crimes against humanity, and genocide). In regard to (b), concerning the crime of aggression, the leaders, officials and personnel of all P5 countries can act with full impunity, simply because of the Security Council’s definitional privilege.

The special provisions of the UN and ICC statutes combined have, indeed, become a blueprint for a Machiavellian exercise of power by some of the most powerful—and most legally privileged—member states of the United Nations. As regards the crime of aggression, the countries referred to under (2)(b) above and their leaders are effectively above the law and may, each individually, proceed with their agenda of power politics, including the use of force, at their own discretion. This state of affairs mirrors Schmitt’s description of the quasi-absolute powers of “the sovereign.” In Schmittian terms, the sovereign (ruler) “stands outside of the normally valid legal order while, at the same time, being part of that very order.”⁷¹ The sovereign creates the law, but is not bound by it. Using a play on words (in German), Schmitt again asserts, “daß sie [die staatliche Autorität], um *Recht zu schaffen*, nicht *Recht zu haben braucht*” (“that [the authority of the state] does not need to act lawfully in order to create law”) (emphasis by H.K.).⁷²

This is also, how John Foster Dulles, who helped draft the Preamble of the UN Charter and who later became U.S. Secretary of State in the Eisenhower

Administration, described the role of the Security Council shortly after the world organization's foundation: "The Security Council is not a body that merely enforces agreed law. It is a law unto itself."⁷³ The same logic of power politics is also visible in a statement of one of his predecessors as Secretary of State, Cordell Hull, who commented on the veto privilege in the following way: "... our government would not remain there [in the United Nations] a day without retaining the veto power."⁷⁴

Thus, Schmitt's description of sovereign authority is what sovereignty means for the most powerful member states of the United Nations, the Council's permanent members. By virtue of their coercive resolutions, they not merely *execute* existing (international) law (in terms of the prohibition of the use of force); they are in a position to operate outside the scope of a basic norm of international law, namely "sovereign equality" (as is evident in the wording of Article 2[7] of the Charter);⁷⁵ and they are also able to *legislate*, that is to create norms that are binding upon all.⁷⁶

In the years following the collapse of the power balance of the Cold War, the Security Council evolved even further beyond its "traditional" role as supreme executive organ of the United Nations. This has particularly been the case with the Council's counter-terrorism measures since 2001, especially resolution 1373 (2001),⁷⁷ which established a so-called "Counter-Terrorism Committee" with vast discretionary powers in terms of policies binding upon all member states.⁷⁸ In the UN General Assembly, the Council's assumption—or rather arrogation—of the role of "emergency legislator" was heralded as a new era in international relations. The Permanent Representative of Costa Rica solemnly stated: "for the first time in history, the Security Council enacted legislation for the rest of the international community."⁷⁹ The Council's self-arrogated role as legislator without legislative

mandate again became evident in resolution 1540 (2004) related to the non-proliferation of weapons of mass destruction.⁸⁰ Again, the then President of the Council, Ambassador Günter Pleuger of Germany, described the resolution as “the first major step towards having the Security Council legislate for the rest of the United Nations’ membership.”⁸¹

That the Security Council—in the vacuum resulting from the collapse of the global power balance after the dissolution of the Soviet Union—was able to abuse its authority under Chapter VII of the Charter and assume de facto legislative and even judicial⁸² powers, was, to a large extent, facilitated by the virtual immunity of the Council’s permanent members due to their voting privilege. In the absence of checks and balances within the Charter, the “unilateral” expansion of the Council’s mandate by way of Chapter VII resolutions, and the Council’s intrusion into the legislative and judicial domains, could not be challenged in any procedural (legal) way. Accordingly, as long as a consensus exists among the P5, those countries may use the Council almost exclusively in the pursuit of their agenda due to their wide margin of discretion in terms of determinations under Article 39 as well as the choice of means of enforcement. This is the lesson of the post-Cold War period. However, the consensus has come under strain recently in the course of the crises in Libya and Syria, a development that has made Chapter VII resolutions almost unachievable for the time being.⁸³

It goes without saying that a genuine power balance among the P5—elements of which existed among the victors of WWII, when the organization was founded—can mitigate the “Schmittian power” of the permanent members as a group, simply because there will be fewer Chapter VII resolutions.⁸⁴ However, as history has

demonstrated, this effectively means paralysis of the organization in its core function, the management of collective security. The voting provisions of Article 27(3) of the UN Charter put the supposedly legally equal non-permanent members in an unenviable dilemma: either being subjected to the arbitrary power of the P5 (when those countries concur) or being faced with the unrestrained projection of power of each of these states individually, with the sole “protection” being the right to individual or collective self-defence (under Article 51 of the Charter).

Conclusion

Based on his absolutist doctrine of sovereignty, Carl Schmitt’s analysis of the state of exception has caused major confusion about the relationship of power and law in a constitutional context. With its decisionist pathos, the concept challenges the very foundations of the rule of law, domestically as well as internationally. Schmitt’s “exceptionist” dogma, subordinating law to power⁸⁵ and confusing the distinction between legislative and executive authority, elevates the “emergency” to the status of a general norm where, in the words of Schmitt, the “essence of state authority” is most clearly revealed.⁸⁶ He puts this assertion in an eminently political context: “In the exception, the power of real life cuts through the crust of a [state] system, ossified in mechanical repetition.”⁸⁷ It is no surprise that this kind of decisionist rhetoric has, at the domestic (national) level, encouraged populist and totalitarian tendencies particularly in the industrialized world—in the interwar period during the 20th century and, again, in the post-September 11 era of the 21st century.

What Schmitt referred to as power in itself beyond any limits⁸⁸—and what, for him, constitutes the essence of rule under the state of exception—characterizes,

mutatis mutandis, the status of the permanent members of the Security Council. In terms of the Charter, they enjoy power (legal authority) beyond any limits. Only for them, deciding on the existence of a “threat to the peace, breach of the peace, or act of aggression,”⁸⁹ does sovereignty exist in the genuine sense, according to Schmitt’s dictum “Sovereign is who decides on the state of exception.”⁹⁰ For all others, the UN Charter’s principle of “sovereign equality”⁹¹ means *relative* sovereignty,⁹² that is, a status of subordination to the “exceptional” powers of five countries specifically mentioned in the Charter.⁹³ Whatever may be said to the contrary, the Council’s non-permanent (non-veto-wielding) members can only play a marginal role because their votes only count if they are “validated” by the permanent members.

Realism trumps idealism. In the clothes of a commitment to “peace,” “equality” and “international rule of law,” the United Nations Charter puts the “enforcers” of the law, *in the name* of the law, outside that very law. In tandem with the Council’s emergency powers under Chapter VII—beyond and above judicial scrutiny—and due to the non-obligation to abstain from voting in all decisions on coercive measures,⁹⁴ the veto privilege of the permanent members has effectively made them the sole arbiters of global peace.

If there is a “Schmittian ruler” in the contemporary global order, it is the small group of the Security Council’s permanent members as embodied in their collective action under Chapter VII of the UN Charter but also in the individual measures pursued by each of them in the implementation—and perpetuation—of a coercive decision once taken.

Endnotes

¹ "Sovereign is who decides on the state of exception." Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, 8th ed. 2014 (Berlin: Duncker & Humblot), 13. All English translations of foreign language quotes, including those from the works of Carl Schmitt, are by the author.

² In German: "Die Ordnung muß hergestellt sein, damit die Rechtsordnung einen Sinn hat." Schmitt, *Politische Theologie*, 19.

³ In German: "... souverän ist derjenige, der definitiv darüber entscheidet, ob dieser normale Zustand wirklich herrscht" ["... he is sovereign who ultimately decides whether such a normal condition actually exists"]. Schmitt, *Politische Theologie*, 19.

⁴ Cf. the early critique of Karl Löwith (alias Hugo Fiala), "Politischer Dezisionismus," *Internationale Zeitschrift für Theorie des Rechts*, 9 (1935): 101–123.

⁵ In German: "Die Entscheidung über die Ausnahme ist (...) im eminenten Sinne Entscheidung." Schmitt, *Politische Theologie*, 19.

⁶ In German: "Gerade eine Philosophie des konkreten Lebens darf sich vor der Ausnahme nicht zurückziehen ..." Schmitt, *Politische Theologie*, 21.

⁷ For details see Köchler, "Sovereignty, Law and Democracy versus Power Politics," in: *Force or Dialogue: Conflicting Paradigms of World Order. Collected Papers*. Ed. David Armstrong. (New Delhi: Manak, 2015), 55–72.

⁸ Andrew Norris, "Sovereignty, Exception, and Norm," *Journal of Law and Society*, 34, no. 1 (March 2007): 31.

⁹ Schmitt, *Politische Theologie*, 18.

¹⁰ German: "Die Maßnahmen sind auf Verlangen des Reichstages außer Kraft zu setzen." ["The [emergency] measures must be suspended if Parliament so demands."] Article 48(3) of the Weimar Constitution (*Reichsverfassung*).

¹¹ In German: "Diese Regelung entspricht der rechtsstaatlichen Entwicklung und Praxis, welche durch eine Teilung der Zuständigkeiten und gegenseitige Kontrolle die Frage nach der Souveränität möglichst weit hinauszuschieben sucht." ["This regulation corresponds with the legal-constitutional development and practice according to which the division of responsibilities and mutual control [checks and balances] are used to defer the question of sovereignty as much as possible."], Schmitt, *Politische Theologie*, 17f.

¹² Cf. Köchler, "Sovereignty, Law and Democracy versus Power Politics," 55ff.

¹³ See Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*. Ed. Matthias Jestaedt (Tübingen: Mohr Siebeck, 2008 [1st ed. 1934]).

¹⁴ German: "Auch die Rechtsordnung, wie jede Ordnung, beruht auf einer Entscheidung, nicht auf einer Norm." Schmitt, *Politische Theologie*, 16.

¹⁵ Tomas Berkmanas, "Schmitt v. (?) Kelsen: The Total State of Exception Posited for the Total Regulation of Life," *Baltic Journal of Law & Politics*, 3, no. 2 (2010): 106. Interpreting Schmitt's introductory reflections on sovereignty, Berkmanas assesses that "decision/decisionism should be an integral part of the positivist theory of law," 108.

¹⁶ In German: "Die Entscheidung macht sich frei von jeder normativen Gebundenheit und wird im eigentlichen Sinn absolut." Schmitt, *Politische Theologie*, 18.

¹⁷ "Authoritas, non Veritas facit Legem." See *Leviathan, Sive De Materia, Forma, & Potestate Civitatis Ecclesiasticae Et Civilis*, Part II (*De Civitate sive Republica*), ch. 26 (*De Legibus Civilibus*), (Amsterdam: Ioannes Blaeu, 1670), 133. (Full quote, 132f: "In Civitate constituta, Legum Naturae Interpretatio non à Doctoribus & Scriptoribus Moralis Philosophiae dependet, sed ab Authoritate Civitatis. Doctrinae quidem verae esse possunt; sed Authoritas, non Veritas facit Legem.")

¹⁸ Schmitt, *Politische Theologie*, Ch. II ("Souveränität als Problem der Rechtsform und der Entscheidung" ["Sovereignty as Problem concerning the Form of Law and Problem of Decision"]): "Der klassische Vertreter des (...) dezisionistischen Typus ist Hobbes," 39.

¹⁹ Max Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* [1921/22]. Ed. Johannes Winckelmann. 5th rev. ed. (Tübingen: Mohr, 2009), § 17 ("Politischer Verband, Hierokratischer Verband").

²⁰ "... la souveraineté est la puissance absolue et perpetuelle d'une République" ["... sovereignty is the absolute and perpetual power of a Republic"]; *Les Six Livres de la République* (Paris: Iacques du Puys, 1576. Livre I, Chapitre IX: *De la souveraineté*), 152.

²¹ In German: "Die Befugnis, das geltende Gesetz aufzuheben", Schmitt, *Politische Theologie*, 16.

²² "Dem entspricht, daß seine Definition nicht anknüpfen kann an den Normalfall, sondern an einen Grenzfall." ["To this corresponds that its definition [i.e. the definition of the concept of sovereignty] cannot be drawn on the regular case, but must be derived from the borderline case."], Schmitt, *Politische Theologie*, 13.

²³ Cf. Bruno Gullì, "The Sovereign Exception: Notes on Schmitt's Word that Sovereign Is He Who Decides on the Exception," *Glossator*, 1 (Fall 2009): 23.

²⁴ Cf. Michael McConkey, "Anarchy, Sovereignty, and the State of Exception," *The Independent Review*, 17, no. 3 (Winter 2013): 417.

²⁵ Jef Huysmans, "International Politics of Exception: Competing Visions of International Political Order between Law and Politics," *Alternatives: Global, Local, Political*, 31, 2 (2006), 136.

²⁶ Schmitt, *Politische Theologie*, 20: "... [der Fall] in welchem das Recht sich selber suspendiert" "[the case] where the law suspends itself"]. (Emphasis by Schmitt).

²⁷ The first edition of *Politische Theologie* appeared in 1922 (Munich: Duncker & Humblot).

²⁸ Zoe A. Thomson, "Fear and the Sovereign: A Debate on the State of Exception" (2017). Accessed October 10, 2018. <http://hdl.handle.net/10230/33736>.

²⁹ Eric Posner and Adrian Vermeule, "Demystifying Schmitt," *Harvard Law School Public Law & Legal Theory Research Paper Series*, Paper No. 10-47 / *Chicago Law School Public Law & Legal Theory Research Paper Series*, Paper No. 333 (December 10, 2010). Accessed October 10, 2018. <https://ssrn.com/abstract=1723191>.

³⁰ Cf., *inter alia*, Jens David Ohlin, *The Assault on International Law*. Oxford and New York: Oxford University Press, 2015.

³¹ Quinta Jurecic, "Donald Trump's State of Exception," *LAWFARE*, December 14, 2016. Accessed October 10, 2018. <https://www.lawfareblog.com/donald-trumps-state-exception>.

³² *USA PATRIOT ACT (H.R. 3162)*. HR 3162 RDS, 107th CONGRESS, 1st Session, H. R. 3162, IN THE SENATE OF THE UNITED STATES, October 24, 2001.

³³ *Presidential Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*. The White House, November 13, 2001.

³⁴ Giorgio Agamben, *State of Exception*. Translated by Kevin Attell. Chicago and London: The University of Chicago Press, 2005. We refer here to the title of the first (introductory) chapter: "The State of Exception as a Paradigm of Government."

³⁵ Agamben, *State of Exception*, 3.

³⁶ In the particular case: Common Article 3 of the Third Geneva Convention (*Convention [III] relative to the Treatment of Prisoners of War*. Geneva, 12 August 1949).

³⁷ SUPREME COURT OF THE UNITED STATES. HAMDAN v. RUMSFELD, SECRETARY OF DEFENSE, et al. – *CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT* – Argued March 28, 2006 – Decided June 29, 2006, No. 05-184.

³⁸ Jurecic even asks whether Donald Trump may have become the United States' "first Schmittian President." See Jurecic, "Donald Trump's State of Exception."

³⁹ For details, see Köchler, "Sanctions and International Law," *International Organisations Research Journal*, 14, no. 3 (2019), 27–47.

⁴⁰ "Any authority granted to the President by section 203 may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." (*International Emergency Economic Powers Act*. Title II of Public Law 95-223, 91 Stat. 1626, December 28, 1977, Sec. 202[a])

⁴¹ *Loc. cit.*, Sec. 204.

⁴² For details see Ewald Wiederin, "Das Notverordnungsrecht des Bundespräsidenten," *Beiträge zur Rechtsgeschichte Österreichs* (Vienna: Verlag der Österreichischen Akademie der Wissenschaften), 8, no. 2 (2018), 385–395.

⁴³ In German: "daß der Staat bestehen bleibt, während das Recht zurücktritt", Schmitt, *Politische Theologie*, 18. Cf. also 18f: "Im Ausnahmefall suspendiert der Staat das Recht, kraft eines Selbsterhaltungsrechtes, wie man sagt" ["Under the state of exception, the State suspends the law, due to its right of self-preservation, as the saying goes"].

⁴⁴ "Die Existenz des Staates bewahrt hier eine zweifellose Überlegenheit über die Geltung der Rechtsnorm." Schmitt, *Politische Theologie*, 18.

⁴⁵ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, Paragraph 96.

⁴⁶ Adopted by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966. The treaty entered into force on 23 March 1976.

⁴⁷ The Covenant lists rights under Articles 6, 7, 8, 11, 15, 16 and 18 as non-derogable.

⁴⁸ *The Geneva Conventions of August 12, 1949*. Geneva: International Committee of the Red Cross, 1983.

⁴⁹ For Schmitt, in the case of exception, the legal norm is not merely meant to be suspended, but "obliterated" ("[...] wird im Ausnahmefall die Norm vernichtet"), Schmitt, *Politische Theologie*, 19. (Emphasis by H.K.).

⁵⁰ In German: "Suspendierung der gesamten bestehenden [Rechts-] Ordnung," Schmitt, *Politische Theologie*, 18.

⁵¹ Entitled, "Action with respect to threats to the peace, breaches of the peace, and acts of aggression."

⁵² In German: "Er [der Souverän / H.K.] entscheidet sowohl darüber, ob der extreme Notfall vorliegt, als auch darüber, was geschehen soll, um ihn zu beseitigen" ["He [the sovereign] decides whether there exists a situation of extreme emergency as well as what should be done to eliminate it."]. Schmitt, *Politische Theologie* 14.

⁵³ Schmitt's conception resembles Hobbes's doctrine of power and sovereignty in basic respects. Cf. John Dunn, "The Significance of Hobbes's conception of power," *Critical Review of International Social and Political Philosophy*, 13, nos. 2–3 (2010): 417–433.

⁵⁴ Thomas Hobbes, *Leviathan, or The Matter, Forme, & Power of a Common-wealth Ecclesiastical and Civil*. London: Andrew Crooke, 1651, Part 2 (*Of Common-wealth*), Chapter 18 (*Of the Rights of Sovereigns by Institution*), Article 6, 136.

⁵⁵ Schmitt, *Politische Theologie* 19. See note 49 above.

⁵⁶ Article 2(7) of the UN Charter.

⁵⁷ Article 2(4).

⁵⁸ Cf. the ruling of the International Court of Justice in the case of a Libyan application in connection with the Lockerbie air disaster. The Court asserted its competence in

the case, but only because Libya had filed its application for provisional measures before the Security Council had, in this matter, adopted resolutions on the basis of Chapter VII (International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie [Libyan Arab Jamahiriya v. United States of America], Preliminary Objections, Judgment, I.C.J. Reports 1998*, 27 February 1998, Paragraphs 36 and 37).

⁵⁹ In German: "daß aber die Souveränität, und damit der Staat selbst, darin besteht, (...) definitiv zu bestimmen, was öffentliche Ordnung und Sicherheit ist, wann sie gestört wird usw." *Op. cit.*, 16.

⁶⁰ On the legal problems of the expansive interpretation of the Council's powers see Köchler, *The Security Council as Administrator of Justice? Studies in International Relations*, Vol. XXXII. Vienna: International Progress Organization, 2011.

⁶¹ Article 2(7): "... but this principle [of non-interference] shall not prejudice the application of enforcement measures under Chapter VII."

⁶² In German: "Voraussetzung wie Inhalt der Kompetenz sind hier notwendig unbegrenzt." *Op. cit.*, 14.

⁶³ For the legal implications, cf. Köchler, *The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction and its Consequences on International Relations*. Studies in International Relations, Vol. XVII (Vienna: International Progress Organization, 1991).

⁶⁴ For details see, *The Iraq Crisis and the United Nations: Power Politics vs. the International Rule of Law – Memoranda and declarations of the International Progress Organization (1990-2003)*. Studies in International Relations, Vol. XXVIII. Vienna: International Progress Organization, 2004. For the humanitarian consequences, see also the report by the Harvard Study Team, *Unsanctioned Suffering: A Human Rights Assessment of United Nations Sanctions on Iraq*. Center for Economic and Social Rights (May 1996). Accessed October 10, 2018.

https://www1.essex.ac.uk/armedcon/story_id/Unsanctioned%20Suffering%201996.pdf.

⁶⁵ The Chapter is entitled, "Peaceful Settlement of Disputes." – Cf. the Libya precedent: Judgement of the ICJ of 27 February 1998; see note 58 above.

⁶⁶ Cf. the statement of the International Progress Organization (I.P.O.) before the United Nations Commission on Human Rights of 13 August 1991. The I.P.O. denounced the comprehensive sanctions regime against Iraq as an abuse of the Council's coercive powers in a way that amounted to a systematic denial of basic human rights of an entire population: *Statement by the delegate of the International Progress Organization, Mr. Warren A. J. Hamerman, on UN sanctions against Iraq and human rights*. United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-third session, 13 August 1991, Doc. E/CN.4/Sub.2/1991/SR.10, 20 August 1991.

⁶⁷ "In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security ..." (Paragraph 1).

⁶⁸ According to Article 13(b) of the Rome Statute of the International Criminal Court. For details see Köchler, *The Security Council as Administrator of Justice?*, 49ff. See also Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads* (Vienna and New York: Springer, 2002).

⁶⁹ Rome Statute of the ICC, Article 15bis, Paragraphs 7 and 8.

⁷⁰ As of 2020, these are three (United States, Russian Federation, and People's Republic of China).

⁷¹ In German: "Er steht außerhalb der normal geltenden Rechtsordnung und gehört doch zu ihr ...". Schmitt, *Politische Theologie*, 14.

⁷² Schmitt, *Politische Theologie*, 19.

⁷³ John Foster Dulles, *War or Peace* (New York: Macmillan, 1950), 194.

⁷⁴ Cordell Hull, *The Memoirs of Cordell Hull*. Vol. 2. (New York: Macmillan Co., 1948), 1664. Cordell Hull was Secretary of State in the phase when the United Nations Charter was drafted.

⁷⁵ Cf. note 61 above.

⁷⁶ For details, see Köchler, *The Security Council as Administrator of Justice?*, 59ff.

⁷⁷ Adopted on 28 September 2001 ("Threats to international peace and security caused by terrorist acts").

⁷⁸ Further details were set out in resolution 1624 (2005) (dealing with the prohibition of incitement to commit terrorist acts), adopted on 14 September 2005.

⁷⁹ United Nations / General Assembly, *Official Records*, Fifty-sixth session, 25th plenary meeting, 15 October 2001, New York, Doc. A/56/PV.25, p. 3 (Agenda item 11: Report of the Security Council, Statement by Mr. Niehaus, Costa Rica).

⁸⁰ Adopted by the Security Council at its 4956th meeting, 28 April 2004.

⁸¹ United Nations, Press Briefing. *Press Conference by Security Council President*, 2 April 2004.

⁸² Cf. the establishment of *ad hoc* courts by way of Chapter VII resolutions. For details see Köchler, *The Security Council as Administrator of Justice?*, 18ff.

⁸³ One of main factors is the mistrust among the P5 because of conflicting interpretations of Security Council resolution 1973 (2011) concerning Libya. For details see *MEMORANDUM by the President of the International Progress Organization on Security Council Resolution 1973 (2011) and its Implementation by a "Coalition of the Willing" under the Leadership of the United States and the North Atlantic Treaty Organization*. International Progress Organization, Doc. P/22680c, Vienna, 26 March 2011. Accessed December 20, 2019. <http://i-p-o.org/IPO-Memorandum-UN-Libya-26Mar11.pdf>.

⁸⁴ See Köchler, "The Precarious Nature of International Law in the Absence of a Balance of Power," *The Use of Force in International Relations: Challenges to Collective Security*. (Vienna: International Progress Organization, 2006): 11-19.

⁸⁵ On the problem of power and law in the international context cf., *inter alia*, Köchler, "The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order," *Chinese Journal of International Law*, 5, no. 2 (2006): 323–340.

⁸⁶ In German: "Der Ausnahmezustand offenbart das Wesen der staatlichen Autorität am klarsten." Schmitt, *Politische Theologie*, 19.

⁸⁷ In German: "In der Ausnahme durchbricht die Kraft des wirklichen Lebens die Kruste einer in Wiederholung erstarrten Mechanik." Schmitt, *Politische Theologie*, 21.

⁸⁸ In German: "grenzenlose Machtvollkommenheit". Schmitt, *Politische Theologie*, 18. Schmitt gave this characterization of sovereignty in a commentary on the emergency provisions of the Weimar Constitution. Cf. notes 9–11 above.

⁸⁹ Article 39 of the UN Charter.

⁹⁰ See note 1 above.

⁹¹ Article 2(1).

⁹² On this normative contradiction in the UN Charter cf. also Köchler, "Normative Inconsistencies in the State System with Special Emphasis on International Law," 179f.

⁹³ Article 23(1).

⁹⁴ On the implications of this "double" privilege of the P5 and its implications in terms of the international rule of law, cf. Köchler, *The Voting Procedure in the United Nations Security Council*, chapter V/b, 29ff.

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