

RULE OF LAW IN A STATE OF EMERGENCY

Subrata Roy Chowdhury

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**The Paris Minimum Standards of Human
Rights Norms in a State of Emergency**

Subrata Roy Chowdhury



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List of the Paris Minimum Standards Approved by the ILA Conference Paris 1984

Section A Emergency: Declaration, Duration and Control

- 1 a and b
- 2
- 3 a, b, c, d
- 4
- 5
- 6 a, b
- 7

Section B Emergency Powers and the Protection of the Individual

General Principles

- 1
- 2 a, b
- 3 a, b, c
- 4 a, b, c
- 5

The 16 non-derogable rights

- Article 1 Right to a legal personality
- Article 2 Freedom from slavery and servitude
- Article 3 Freedom from discrimination
- Article 4 Right to life
- Article 5 Right to liberty
- Article 6 Freedom from torture
- Article 7 Right to a fair trial
- Article 8 Freedom of thought, conscience, and religion
- Article 9 Freedom from imprisonment for inability to fulfil a contractual obligation
- Article 10 Rights of minorities
- Article 11 Rights of the family

- Article 12 Right to a name
- Article 13 Rights of the child
- Article 14 Right to nationality
- Article 15 Right to participate in government
- Article 16 Right to remedy

Foreword

Subatra Roy Chowdhury, the well-known Indian human rights lawyer and advocate, has written what undoubtedly will become the leading reference work on the international law norms governing national states of emergency. It comes in the form of an exhaustive and scholarly exegesis on the International Law Association's Paris Minimum Standards of Human Rights Norms in a State of Emergency. In his Preface and Introduction the author explains both the origins of the Paris Minimum Standards and the process by which they were originally drafted and subsequently revised by the ILA, the premier non-governmental organization of international lawyers with United Nations consultative status. This Foreword, therefore, need focus only on how this book contributes to the elucidation of the Paris Minimum Standards and, hence, to the elaboration of the basic human rights guaranteed individuals by contemporary international law.

From the beginning of the effort to codify international human rights law forty years ago, it has been recognized by everyone involved in the process that states should be allowed to restrict or even suspend some human rights in cases of genuine emergency. Yet, even in such an emergency, a state is not entitled to suspend rights — such as the right to life or the prohibition against torture — that are non-derogable under the human rights treaties to which it is a party, including the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms and the American Convention on Human Rights. The difficulty that arose, however, and the basic objective of the ILA's studies so ably directed by the author of this book, was to identify the meaning, scope and effect of such treaty obligations.

The Paris Minimum Standards, which took six years to draft, revise and receive ILA approval, are divided into three main parts concerning (a) declaration, duration and control; (b) general principles for emergency powers and the protection of individuals; and (c) non-derogable rights and freedoms. Each part is accompanied by an extensive commentary

citing relevant legal and factual sources. In particular, they draw upon the work of Special Rapporteur Mme Questiaux for the UN Subcommission on Prevention of Discrimination and Protection of Minorities, the work of Special Rapporteur Mrs Daes for the same Subcommission, a study entitled *States of Emergency* by the International Commission of Jurists, and the writings of a number of scholars, especially Judge Buergenthal and Professors Hartman and Higgins.

The Paris Minimum Standards, which the ILA adopted and disseminated in 1984, were the idea of Subrata Roy Chowdhury, and the commentary to them was primarily his work too. They responded to the widespread international concern for an elaboration of the norms governing states of emergency, which are a frequent occurrence and often characterized by gross and persistent violations of the most fundamental human rights. This concern also led to the formulation in the same year of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, prepared in May 1984 by a group of international experts convened by several non-governmental organizations. It was at the conference that adopted the Siracusa Principles that the undersigned urged the author of this book to write it, building upon the extensive commentary to the Paris Minimum Standards, much of which the author himself had drafted.

Four years and much additional work later, the author has completed this fine book, which not only expands upon the text he had prepared for ILA purposes but also includes recent practice concerning states of emergencies emanating from numerous international bodies including the Inter-American Commission on Human Rights, the European Commission on Human Rights, and the Human Rights Committee established under the International Covenant on Civil and Political Rights. There is no doubt that these bodies, as well as the private parties and the states appearing before them, will benefit from the data gathered and the insights contained herein. Indeed, considering the approach to customary international law taken by the International Court of Justice in the *Nicaragua* case, this volume may have far wider relevance than the author might originally have thought, for under the *Nicaragua* approach the norms contained in the Paris Minimum Standards arguably have relevance now well beyond the treaty regimes on which they were based.

In conclusion, one need not agree with all the author's views — the undersigned, for instance, still has a problem with the author's apparent sympathy for States who declare emergencies in times of economic hardship, surely an invocation not contemplated by the drafters of the various treaties and certainly not a wise one to advocate given past abuses — to recognize that his exhaustive labors over the years have

produced a volume of great use to everyone concerned with International human rights law. It is a work greatly to his credit and that of the ILA which originally supported the endeavor.

Richard B. Lillich

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University of Virginia

Chairman, International Committee
on the Enforcement of Human Rights
Law, International Law Association

Charlottesville, Virginia
November 1988

Preface

In the introductory chapter I try to explain the background, scope and purpose of the International Law Association (ILA) research project for developing certain minimum standards for a rule of law in a state of emergency. A modest endeavour at the elucidation of those standards, approved at the Paris conference of the ILA in 1984, is the main purpose of the present study. A comprehensive treatment of the complex problems connected with states of emergency within the short compass of the present work is almost an impossible task; no one is more conscious than myself of the inadequacy of this study.

The valuable contributions made by the ILA's international committee on human rights over a period of eight years to formulate the reference model of the Paris Minimum Standards is a matter of record. The entire exercise was carried out at the initiative and guidance of the former chairman of the committee, Judge Harry Batshaw, and his successor, Professor Richard B. Lillich. The work of the committee received unfailing support from the Rt Hon Lord Wilberforce, chairman of the executive council, and Professor Ian Brownlie QC, director of studies, ILA. Indeed, I am doubly indebted to Professor Brownlie, Chichele Professor of Public International Law, University of Oxford, and Professor Lillich, Howard W. Smith Professor of Law, University of Virginia since they also read through the typescript, making comments and suggestions which helped considerably in improving the content and layout of the book.

I would like to record my profound thanks and deep appreciation to all my colleagues on the international committee and its erstwhile special subcommittee, with whom I have had discussions over the years on the topics covered by this book. In particular, I owe much to Judge T.O. Elias and Judge Shigeru Oda of the International Court of Justice, Dr Andrés Aguilar, Professor Hugo Caminos, Mr Justice Dennis Mahoney, Mr Frits W. Hondius and Dr Kamal Hossain. I must, however, add that any work on Paris Minimum Standards is to be considered a product of the collective wisdom of the members of the

ILA who have participated at one stage or another in this challenging undertaking.

I received considerable help from Mr Bruce Mauleverer QC and Ms Barbara Osorio, Professor Paul de Waart, Mr Biswarup Gupta, Mr C.R. Datta, Mr Bhaskar Sen, Dr Uttam Sen, Mr R.N. Jhunjhunwala, my librarian Mr T. Mukherjee and his assistant Mr Ajit Sardar in collecting useful data and for extending many facilities necessary for the preparation of this book. I am grateful to Mr B.P. Khaitan, a senior and distinguished lawyer, for his continuous encouragement. Thanks are due to my wife Nora and my son Ranjan for their unfailing background support and to Mr K.R. Menon, my secretary, for typing the final manuscript.

I wish to conclude somewhat unconventionally with a note of reminiscence about one of the kindest persons I have ever known, Professor Charles John Hamson, to whom the book is dedicated. Nora and I were deeply grieved on hearing news of his death from our mutual friend, Professor Gareth Jones, Vice-Master of Trinity College, Cambridge. An acknowledged authority on French administrative law, an internationally respected comparative lawyer who held the chair at Cambridge for twenty years (1953–73), a distinguished fellow of Trinity College from 1934 until his death on 14 November 1987, a dedicated teacher and an excellent public speaker who always kept his audience spellbound, Jack Hamson will always be remembered as an outstanding and colourful personality. The University of Calcutta offered him the highest honour in the field of legal studies — a Tagore Law Professorship; unfortunately he could not keep the assignment for unavoidable reasons.

My first contact with Hamson was in 1945 when he returned to Cambridge after his internment in Germany. He was my director of studies and supervisor when I was doing my Law Tripos at Trinity. I used to go to his rooms in Whewell's Court thrice a week. The method of his teaching was unique and a reflection of his versatile and original mind. After a lucid but brief exposition of an abstract proposition of law, Hamson would immediately set a series of intricate problems for me to unravel. The tasks were demanding ones and would require studying original law reports and their application to a difficult set of facts which he put before me. He would then critically examine my work, often wounding my ego; invariably, though, the session would end cordially over a glass of sherry. It came as a pleasant surprise at the end of each term to be told by my senior tutor, Professor Patrick Duff, that my progress report from Jack Hamson was an encouraging one. Our association gradually developed into a deep friendship and our families have kept in close contact since my college days.

The little commitment to the cause of civil liberties that I might have developed over the years, I must attribute to the inspiration and guidance of Jack Hamson. It was he who first taught me at Cambridge the serious impact of the majority view in *Liversidge v. Anderson* on the right to

liberty of an individual in time of public emergency. It was interesting to note what Basil Markesinis said of Jack Hamson in the *Independent* of 24 November 1987:

Thus, of *Liversidge v. Anderson* (a majority decision of the House of Lords dealing with ministerial powers of detention during the Second World War), he once said that he 'refused to believe that even the House of Lords could even in wartime have delivered so monstrous a judgment'. He then added, with characteristic Hamsonian mischievousness, 'but I was still a young man then, and I had not yet become reconciled to the random element of their Lordships' infallible judgments. It was only later that I appreciated that it adds a never failing liveliness and vitality to the law.'

Jack Hamson encouraged me every time my work was published. He was fully aware of the work I was doing as a member of the different international committees of the International Law Association, particularly in the field of human rights, which he greatly appreciated. However, out of his kind concern for me he wrote in February 1984: 'I marvel at your International energy when you have to deal with a busy practice of your own. Do watch your step . . . I'll have to write to Nora to urge her to keep an eye on you.'

This book is my humble tribute to a noble man whom I had the privilege to consider my teacher, friend and guide for the last forty-three years.

Subrata Roy Chowdhury

Calcutta

31 January 1988

Recent events in Chile, Malaysia, Bangladesh and Pakistan have necessitated the rewriting of parts of the text since the date given above.

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Introduction

1. The Paris Minimum Standards: Eight years of study by the ILA (1976–84)

Professor Richard B. Lillich, Chairman of the Committee on the Enforcement of Human Rights Law, International Law Association (ILA), has summed up the genesis and the culmination of eight years' work by the ILA in this area as follows:

After six years of study by the special subcommittee (chaired by Mr Subrata Roy Chowdhury of India) and two additional years of revision by the full Committee on the Enforcement of Human Rights Law, the 61st Conference of the International Law Association, held in Paris from 26 August to 1 September, 1984, approved by consensus a set of minimum standards governing the declaration and administration of states of emergency that threaten the life of a nation, including sixteen articles setting out the non-derogable rights and freedoms to which individuals remain entitled even during states of emergency.

These standards, designated the Paris Minimum Standards of Human Rights Norms in a State of Emergency, are intended to help ensure that, even in situations where a bona fide declaration of a state of emergency has been made, the state concerned will refrain from suspending those basic human rights which are regarded as non-derogable under article 4 of the International Covenant on Civil and Political Rights, article 15 of the European Convention on Human Rights and article 27 of the American Convention on Human Rights.¹

1 'The Paris Minimum Standards of Human Right Norms in a State of Emergency', Richard B. Lillich (1985) 79 American Journal of International Law (Hereafter, AJIL) 1072 (without notes). For the full text of the Paris Minimum Standards (Sections A, B and C) *ibid*, 1073–81. Also see report of the 61st conference (Paris 1984) of the ILA Committee of the Enforcement of Human Rights Law with introduction, texts of three sections A, B and C in black letter accompanied by comments on each section and footnotes.

Resolution no 1 of 1984 of the ILA's Paris conference, *inter alia*, states: '(1) Approves the Draft Minimum Standards of Human Rights Norms in a State of Emergency included in the Report as amended; (2) recommends that the above draft minimum standards be designated the "Paris Minimum Standards of Human Rights Norms in a State of Emergency"; (3) recommends further that this Resolution, together with the Report, be transmitted by the Secretary-General of the ILA to: (a) the Secretary-General of the United Nations for submission, *inter alia*, to the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities; (b) the Secretary-General of the Council of Europe for submission to the organs set up under the European Convention on Human Rights; (c) the General Secretariat of the Organization of American States for submission to the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights; and (d) the Secretary-General of the Organization of African Unity for submission to the African Commission on Human and Peoples' Rights.' *Ibid*, 1.

The task began towards the end of 1976 when the Executive Council of the ILA approved a resolution adopted at the Madrid Conference of the ILA (29 August–4 September 1976)² and decided to set up the Subcommittee on Regional Implementation of Human Rights (hereafter referred to as the ILA subcommittee). The members of the subcommittee were: Mr Subrata Row Chowdhury (Chairman), Dr Kamal Hossain of Bangladesh (Rapporteur), Ambassador Andrés Aguilar (Venezuela), Dr Hugo Caminos (Argentina), Judge Taslim O. Elias (Nigeria), Judge Shigeru Oda (Japan), Mr Justice Dennis Mahoney (Australia) and Dr Frits W. Hondius (Netherlands).

At the first meeting of the subcommittee, held on 22 October 1977 in the judges' common room at the Peace Palace at The Hague, Judge Elias made two important points. First, he stressed that the standards set by the Universal Declaration of Human Rights should be taken as the basis of the work of the subcommittee and any difficulties encountered in their implementation should not be a ground for lowering the standards. Second, the paramount importance of 'striving for ratification of the United Nations Covenants by *all* states' (at least 85 per cent of all states within the next five years) was, in his view, 'a precondition for the effective implementation of human rights as much at the international as at the regional level.' Judge Oda emphasized that while focusing attention upon regional problems and elaborating a regional machinery for implementation of human rights, care should be taken not to detract from the obligation of universal ratification of the International Covenants on Human Rights.³

ILA's Manila report (1978)

The first report of the subcommittee, incorporated as a part of the main report of the International Committee on Human Rights, therefore dealt with international implementation procedures both under the United Nations Covenants as well as those developed pursuant to the resolutions of the Economic and Social Council (ECOSOC), apart from outlining the status of regional implementation of human rights in Asian, African and Latin American countries.⁴

2 The report of the 57th conference on the ILA (Madrid, 1976) 505–6.

3 Report of the 58th conference of the ILA (Manila, 1978) 79–80, 108–9.

4 Ibid, 108–17, first preliminary report of the subcommittee signed by all the members; for interventions of delegates at the working sessions, see 135–58. The chairman and rapporteur of the subcommittee particularly described the patterns of violations of human rights in the regions concerned with states of exception as a common phenomenon. The consensus for regulating states of emergency by the ratification and enforcement of the UN Covenants was overwhelming.

It was mainly in the context of the Manila report of the subcommittee and the deliberations at the working sessions that the resolution on human rights adopted by the Manila conference in 1978 urged that the States unless they have already done so, should:

- (a) take prompt steps to ratify the UN Covenants on Human Rights;
- (b) adopt an 'integrated approach' to the realization of civil and political rights on the one hand, and economic, social and cultural rights on the other;
- (c) refrain from suspension, even in situations where a bona fide proclamation of emergency has been made, of those rights which were recognized as non-suspendable, by article 4 of the UN Covenant on Civil and Political Rights;
- (d) assure to persons accused of committing a crime, including a crime against the state or a political crime, the rights and safeguards extended to an accused person by the UN Covenant on Civil and Political Rights.⁵

ILA's Belgrade report (1980)

At meetings held at Oxford (15–16 March 1979) the subcommittee decided that its next report should focus on the broad issues which the Manila resolution had highlighted. For this purpose several further meetings were held in London and Madrid in 1979 where the draft report for the Belgrade conference was discussed in depth; the chairman of the subcommittee also discussed the draft report with Dr Caminos and Ambassador Aguilar in New York in October 1979.⁶ The broad issues covered by the Belgrade report were:

- (a) The problems of the implementation of human rights which arise from resort to means such as proclamations of emergency.
- (b) The priority accorded by many states to economic development, which raises the questions of the relationship of civil and political rights to economic, social and cultural rights, and of an integrated approach to their realization.
- (c) An examination of regional machinery for the implementation of human rights: the American Region.

The subcommittee dealt with topic (a) under three broad headings:

- (i) First, a descriptive explanation is given of the factual situations which can attend the various types of states of emergency that can arise and their legal background.
- (ii) Second, the special problems of the proclamation and duration of an emergency are examined.

⁵ Ibid, 1–2.

⁶ Report of the 59th conference of the ILA (Belgrade, 1980), 89.

- (iii) Third, the special problems attending the protection of the individual when emergency measures are in force are examined.⁷

Seven patterns of persistent derogations from basic human rights during a state of emergency were studied in some detail in the Belgrade report.

First, the government in power is replaced by an authoritarian regime through a *coup d'état*, violent or peaceful. The constitution is suspended; the duly elected parliament is dissolved; the country is governed by decrees promulgated by the ruling authority.

Second, the most important of the human rights — namely, the inherent right to life — is seriously imperilled. Summary executions of political adversaries; death penalties carried out without the final decision of a competent court and without allowing any opportunity to exercise the right to seek pardon or commutation; execution of death sentences in respect of persons below eighteen years of age; death penalties for the commission of *ex post facto* crimes; and the phenomenon of 'disappeared persons' — all are illustrations of such violations.

Third, frequent use of preventative detention laws without the minimum safeguards recognized by international standards. such as communication of the grounds of detention to the detainee; the remedy of habeas corpus and amparo; the right to legal counsel; the right to a periodic review of the detention order by judicial or impartial, independent authority; detention for an indefinite, prolonged period without framing any charge or bringing the detainee to trial; and keeping the detainee incommunicado.

Fourth, suspension of other basic civil liberties such as freedom of association and of expression. Political parties are banned, public meetings are prohibited. The recognized rights of trade unions are abrogated. The freedom of the press is taken away by censorship or self-censorship, by government ownership of the press and the media. For instance, a 'Prohibition of Rumours Decree' in an African country provides that any person who, with intent to bring the head of state or senior members of the government into hatred, ridicule or contempt, publishes any insulting matter by writing, print or word of mouth shall be guilty of a crime punishable by five to ten years of imprisonment. In another country in the same region, criticism of the head of state and of the basic national philosophy, 'Humanism', is not allowed; criticism of the president is punishable by fine or imprisonment.

Fifth, freedom from *ex post facto* criminal laws is derogated from by the creation of new crimes, such as criticizing the government or its laws and imposing heavy penalties including the death sentence for such offences.

7 Ibid, 89–90.