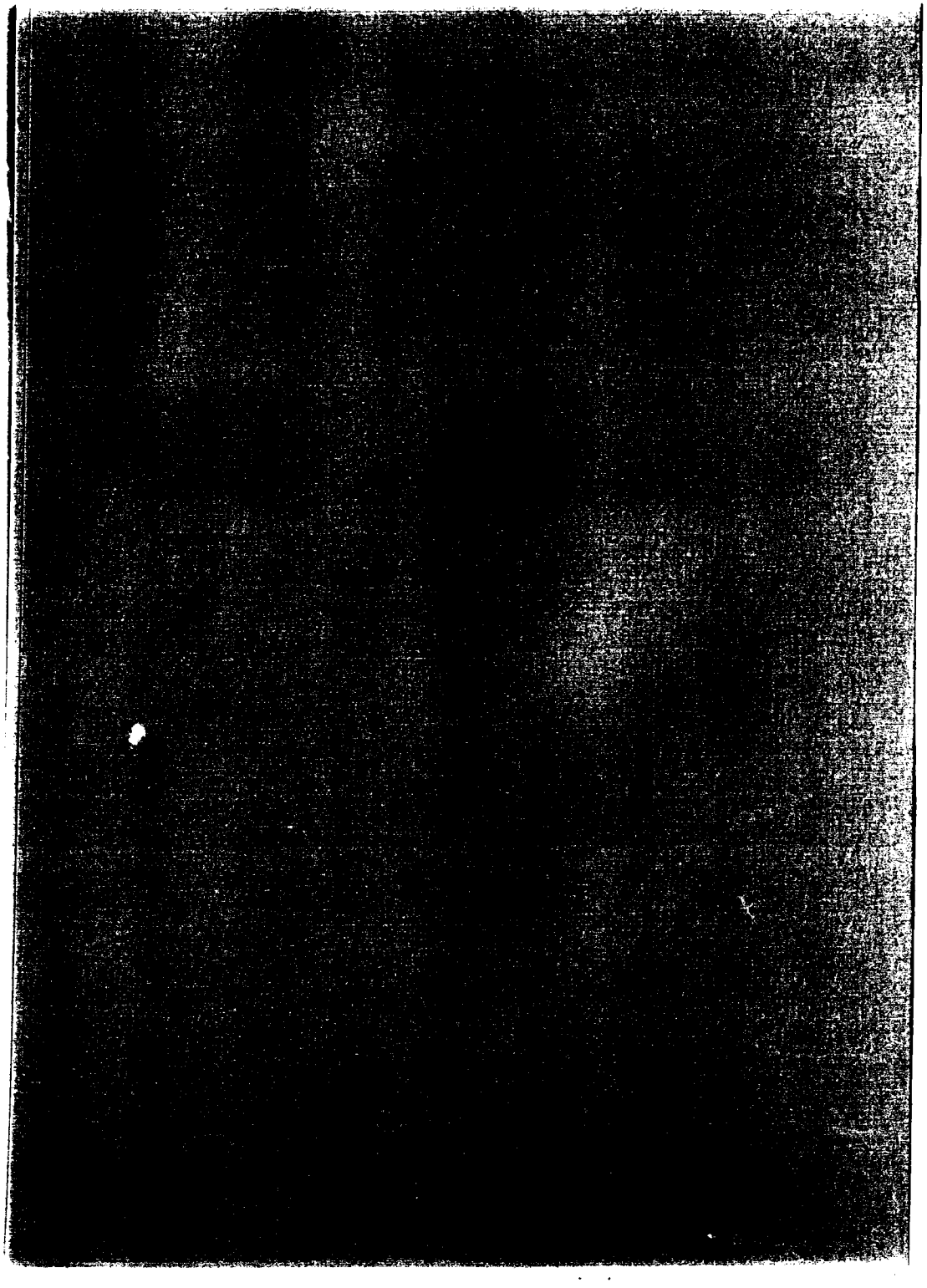
Human Rights in Crisis

The International System for Protecting Rights During States of Emergency

Joan Fitzpatrick

Volume 19, Procedural Aspects of International Law Series

University of Pennsylvania Press
Philadelphia



Human Rights in Crisis

Procedural Aspects of International Law Series

Richard B. Lillich, Editor (1964–1977)
Robert Kogod Goldman, Editor (1977–)

A complete list of the books in this series appears at the back of this volume.

Human Rights in Crisis

The International System for Protecting Rights During States of Emergency

Joan Fitzpatrick

Volume 19, Procedural Aspects of International Law Series

University of Pennsylvania Press
Philadelphia

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data
Fitzpatrick, Joan.
Human rights in crisis: the international system for protecting rights during states of emergency / Joan Fitzpatrick.
p. cm. — (Procedural aspects of international law series: v. 19)
Includes bibliographical references (p.) and index.
ISBN 0–8122–3238–0
1. Human rights. 2. War and emergency legislation. 3. International law. 4. Treaties. I. Title. II. Series.
K3240.4.F534 1994
341.4'81—dc20 93–30873
CIP

Contents

Editor's Foreword

Human Rights in Crisis is the most recent book in the Procedural Aspects of International Law Series and the first to be published by the University of Pennsylvania Press. Its author, Joan Fitzpatrick, Professor of Law at the University of Washington, is a respected scholar who has a particular expertise in the subject of states of emergency and their impact on the protection of human rights. From 1985 to 1991 she was Rapporteur to the Committee on the Enforcement of Human Rights Law of the International Law Association. In that role, Professor Fitzpatrick prepared three important analytical reports for the Committee on monitoring human rights during emergency situations.

While there is no dearth of scholarly publications on states of emergency, most published material on the subject generally focuses on a particular study or on the effects of an emergency situation in a particular country or region. In contrast, Professor Fitzpatrick's work is thoroughly global in scope and addresses the most recent developments in the field.

She begins by defining and categorizing various kinds of emergency situations, and then examines the adverse effects that such situations typically have on the protection of human rights and the rule of law in a particular society. In a chapter on standard setting, Professor Fitzpatrick does a comparative analysis of treaty-based standards applicable to states of emergency and discusses the efforts of official and private groups, confronted with the gaps and deficiencies in existing law, to elaborate new, non-treaty-based guidelines to protect the basic rights of those affected by emergency situations.

The remainder of the book is devoted to an in-depth examination of the effectiveness of various treaty implementation bodies and other institutions in monitoring states of emergency. This encompasses a critical assessment of the performance of all relevant UN treaty and non-treaty-based organs, including the Human Rights Committee, the Human Rights Commission and its Sub-Commission on the Preven-

tion of Discrimination and Protection of Minorities, various *ad hoc* investigative mechanisms, and the controversial advisory services program. The innovative use of "theme" mechanisms having a global mandate to monitor specific human rights abuses is also assessed.

On the regional level, the author similarly critiques the operations and impact of the supervisory machinery established by the Organization of American States, (i.e., the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights) and of the principal human rights organs of the Council of Europe (i.e., the European Commission on Human Rights and European Court of Human Rights).

Professor Fitzpatrick devotes a full chapter to describing the substantial and important contributions of non-governmental human rights organizations in the study, documentation, and exposure of gross abuses by governments during emergency situations, as well as their efforts to set new standards in the field. Unlike many other writers on the subject, Professor Fitzpatrick does discuss the unique mandate and operations of the International Committee of the Red Cross in assisting victims of internal armed conflicts and lesser forms of civil strife. Given Professor Fitzpatrick's exhaustive treatment of the subject, *Human Rights in Crisis* should prove to be an invaluable source of information for students and practitioners of human rights law.

* * *

On a personal note, I wish to acknowledge with thanks the very considerable contributions made by my Dean's Fellow, Paul A. Barkan, in editing this volume.

Robert Kogod Goldman
Washington, D.C.

Acknowledgments

This study is the culmination of more than a decade of work on the problem of protecting human rights during states of emergency, which began with the preparation of a thesis under the supervision of Maurice Mendelson, then of St. John's College, Oxford. Special thanks go to Professor Richard Lillich of the University of Virginia for his constant encouragement and assistance throughout the drafting of the three reports for the Committee on the Enforcement of Human Rights Law of the International Law Association, which led up to the present study. The comments of other members of the Committee, especially Subrata Roy Chowdhury, are gratefully acknowledged.

I am extremely thankful for financial support for research provided by the University of Washington Law School Foundation and the Ford Foundation. The Ford Foundation also provided funding that enabled me to obtain the services of three extremely fine research assistants, Alice Miller, Laurie Powers, and Matthew Miller. Their help and that of my secretary, James Thompson, were indispensable for the completion of this work.

I am also grateful to Professor Robert Kogod Goldman of American University, the editor of the Procedural Aspects of International Law Series, for his valuable help in revising the manuscript.

Chapter I
Defining the Problem

A. Introduction

That human rights may be imperiled during states of emergency[1] is self-evident. Whether patterns of human rights abuse during states of emergency are sufficiently in a class by themselves to justify, or even to demand, distinct monitoring[2] is far less clear. Yet enough people have thought so, and even attempted to do so, that there is a wealth of material to analyze in this study.

Indeed, the major problem with an examination of systems for

1. The most useful terminology is a matter of debate. "States of exception" is a more general term which emphasizes the fact that exceptions are being made to the normal legal regime, thus stressing the formal legal aspect of the phenomenon and the notion that there is a preexisting paradigm of normality during which rights are protected to a higher degree. But this phrase has the drawback of describing more accurately the situation in civil law systems and is not a particularly apt term for emergencies in common law systems or in more chaotic *de facto* situations of crisis. Likewise, "derogation" implies that the state is a party to a particular human rights treaty whose provisions it is temporarily suspending to some degree. Since universal ratification of the key treaties has not occurred, this term has obvious defects. "States of emergency" has the drawback of having a technical legal meaning in certain civil law systems, as a state of exception of lesser gravity than the "state of siege." The term "state of siege" shares this drawback if used as a generic term. However, "states of emergency" possesses the advantages of breadth of reference to a wide variety of factual circumstances, de-emphasis upon any particular pattern of formal legal alterations, stress upon the temporary crisis aspect of the situation, and a hint of danger. "States of emergency" thus will be used throughout this book in its generic rather than technical sense.

2. The term "monitoring" is intended to encompass scrutiny by a variety of organs, including treaty implementation bodies such as the European or Inter-American Commissions on Human Rights and the Human Rights Committee; non-treaty-based intergovernmental bodies such as the United Nations Commission on Human Rights; non-governmental organizations concerned with human rights matters; the press, and so on. The term "enforcement" overstates the capacity of these bodies to force compliance by governments with their human rights obligations.

monitoring human rights abuse during states of emergency is that one must canvass essentially *all* of the human rights monitoring mechanisms that have emerged in the past half-century, and some of even earlier origin. The phenomenon of human rights abuse during emergencies is a matter of concern to all human rights monitors, from those with the most broadly defined agendas to those with the narrowest, but not necessarily because of the correlation of the abuse with the emergency. One undercurrent that will run throughout this study is the question whether these monitors should behave in a distinct manner when they encounter human rights abuses coincident to states of emergency. No single answer will fit every monitor.

Two major obstacles bedevil any attempt to devise special monitoring mechanisms for states of emergency: first, the difficulty in defining a coherent and predictably determinable category of situations that fall under the heading of "states of emergency," to the clear exclusion of other situations in which human rights abuses also might be occurring; and, second, the fact that only some, but not all, emergencies produce human rights abuses of especial severity or of distinct types. As one writer noted, "Hitler could shout 'necessity!' as easily as Lincoln,"[3] and both did. Yet one could argue that the human rights abuses of a Hitler call for monitoring on an order entirely different from the abuses of a Lincoln, despite the common context of emergency.

Thus, the first task of this introductory chapter is to attempt to define and categorize states of emergency, to see if a usable, reasonably coherent concept will be available for emergency-specific monitoring. Second, patterns of human rights abuse that tend to be associated with states of emergency (though without any perfect congruence) will be described, in order to set the stage for analyzing the proper roles of human rights monitors.

Looking at the pieces of the puzzle individually can be a useful prelude to determining whether the pieces, when placed together, form any pattern. The creation of a typology of emergency situations has been attempted several times. Three such attempts will be examined here: (1) that offered by the Committee on the Enforcement of Human Rights Law of the International Law Association (ILA), for which the author acted as rapporteur;[4] (2) the "reference model" and various

3. C. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 12 (1948) [hereinafter ROSSITER].

4. The author prepared three reports for the Committee on the Enforcement of Human Rights Law on the question of monitoring human rights abuses during states of emergency: the Interim Report to the Sixty-Second Conference of the International Law Association in Seoul in 1986 (hereinafter 1986 Seoul Report), the Second Interim Report to the Sixty-Third Conference of the International Law Association in Warsaw in 1988

"deviations" therefrom identified by Nicole Questiaux in her 1982 study for the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities;[5] and (3) Clinton Rossiter's study of the wartime regimes in the United Kingdom, Germany, France and the United States in which he notes interesting differences among the civil law and common law traditions of emergency powers.[6]

B. The ILA Study

The ILA has a long-standing interest in the problem of protecting human rights during states of emergency, going back at least as far as 1976, when one of its subcommittees began to examine regional difficulties in implementing human rights norms.[7] This subcommittee concentrated upon the elaboration of substantive standards to which states should conform even during times of emergency. In 1984, after the adoption of the Paris Minimum Standards of Human Rights Norms in a State of Emergency,[8] the ILA's Committee on the Enforcement of Human Rights Law turned its attention to problems in the monitoring of human rights abuses during states of emergency. A rough survey at the time of the 1986 ILA report revealed approximately seventy states

(hereinafter 1988 Warsaw Report), and the Final Report on Monitoring States or Emergency: Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency to the Sixty-Fourth Conference of the International Law Association in Queensland in 1990 (hereinafter Queensland Report). This book draws upon those studies, which were funded by several grants from the Ford Foundation, the University of Washington Law School Foundation, the European Human Rights Foundation and the University of Virginia Center for Law and National Security.

5. N. Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, U.N. Doc. E/CN.4/Sub.2/1982/15, at 22–28 (1982) [hereinafter Questiaux Report].

6. *See supra* note 3.

7. The Subcommittee on Regional Problems in the Implementation of Human Rights, under the chairmanship of Subrata Roy Chowdhury, prepared a series of three reports concerning states of emergency which were presented to the ILA conferences in Manila in 1978, Belgrade in 1980, and Montreal in 1982. The work of this Subcommittee was merged into the Committee on the Enforcement of Human Rights Law, which drafted the Paris Minimum Standards of Human Rights Norms in a State of Emergency (hereinafter Paris Minimum Standards) adopted by the ILA in 1984. The work of the ILA in drafting substantive standards for protection of human rights during states of emergency is described briefly in the 1986 Seoul Report, *supra* note 4, at 108–110. *See* S.R. Chowdhury, RULE OF LAW IN A STATE OF EMERGENCY: THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY (1989) (providing extensive background information and analysis of the ILA's standard-setting work in this area).

8. *See supra* note 7. The Paris Minimum Standards were drafted under the chairmanship of Professor Richard Lillich of the ILA Committee on the Enforcement of Human Rights Law. Paris Minimum Standards, *reprinted in* 79 AM. J. INT'L. L. 1072 (1985).

that were undergoing some type of emergency with varying consequences for the enjoyment of human rights.[9] Not all of these emergencies follow upon an official proclamation under procedures laid out formally in the national constitution or basic law and for a limited duration. The ILA Committee chose not to confine its attention to such narrowly and formally defined emergencies out of concern that many serious human rights abuses may occur in other contexts that nevertheless merit the label of state of emergency.

Moreover, a restriction to formally declared emergencies would itself be problematic. For example, Brunei has repeatedly extended a formal emergency originally imposed on 12 December 1962 in reaction to a revolt on 8–12 December by the North Borneo National Army, which opposed a plan to federate with Malaysia. Although the revolt was completely quelled by British troops under Brunei's security agreement with the United Kingdom, the Sultan has formally renewed the state of emergency every two years, and several persons involved in the 1962 events remained under detention until January 1990. The 1962 Emergency Orders and the Internal Security (Detained Persons) Order of 1964 permit executive detention, expulsion, and exile, and effectively, but not formally, suspend portions of the 1959 Constitution.[10] These measures remain in effect despite the fact that "[s]ince 1962 there have been no disturbances or agitation in Brunei."[11] Defining what is the normal and what is the emergency legal regime of Brunei thus challenges the imagination. The Brunei example has been replicated in a number of other countries around the globe, including Egypt,[12] Turkey,[13] and Paraguay.[14]

9. 1986 Seoul Report, *supra* note 4, at 112, 112 n.7.

10. 1988 Warsaw Report, *supra* note 4, at 143, 143 n.87. *See* COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, U.S. DEP'T OF STATE REPORT SUBMITTED TO THE SENATE COMM. ON FOREIGN RELATIONS AND THE HOUSE COMM. ON FOREIGN AFFAIRS, 102d Cong., 1st Sess. 816 (Joint Comm. Print 1991) [hereinafter COUNTRY REPORTS FOR 1990].

11. COUNTRY REPORTS FOR 1990, *supra* note 10, at 816.

12. AMNESTY INTERNATIONAL, EGYPT: ARBITRARY DETENTION AND TORTURE UNDER EMERGENCY POWERS 3–4 (1989) ("an almost continuous state of emergency" since 1967, with a brief hiatus between 15 May 1980 and 6 October 1981). At the time of a three-year extension in May 1988, "the Prime Minister stated to the People's Assembly that its purpose was to protect democracy, and that an end to terrorism in the near future was not foreseen." *Id.* at 3.

13. At a workshop on states of emergency held at Queen's University in Belfast, Northern Ireland, on 5–6 April 1991, Professor Mehmet Semih Gemalmaz of the University of Istanbul noted that for almost thirty of the sixty-seven years of the existence of the Turkish Republic, the nation had been under some kind of state of exception (martial law, state of siege or state of emergency). *See* M.S. Gemalmaz, *State of Emergency Rule in the Turkish Legal System: Perspectives and Texts*, 11–12 TURK. Y.B. HUM. RTS. 115 (1989–90).

But recognizing the inadequacy of a purely formal definition of states of emergency does not significantly advance inquiry. For one thing, there are varying degrees of formality. Sometimes a new regime will carry over the emergency laws of a predecessor without any formal declaration or suspension of constitutional provisions. For example, in the Occupied Territories under the control of Israel, the powers of administrative detention, deportation, curfews, summary military trials, and the use of force by the Israeli Defense Forces are based upon 1945 Defence (Emergency) Regulations (EDR) issued under the British Mandate in Palestine.[15] Israel asserts that the 1945 EDR were continued by the proclamation of a Jordanian military commander on 24 May 1948, by Jordanian annexation law,[16] and by the 1952 Jordanian Constitution.[17] Israel claims that when it seized the West Bank it simply maintained these provisions in force. Answering the question whether Israel or the Occupied Territories are under any formal state of emergency can be quite vexing.[18]

14. The repeatedly renewed state of siege in Paraguay was allowed to lapse in 1987. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988, U.S. DEP'T OF STATE REPORT SUBMITTED TO THE SENATE COMM. ON FOREIGN RELATIONS AND THE HOUSE COMM. ON FOREIGN AFFAIRS, 101st Cong., 1st Sess. 669 (Joint Comm. Print 1989) [hereinafter COUNTRY REPORTS FOR 1988]. The Inter-American Commission on Human Rights (IACHR) noted in 1987 that implementing legislation required by Article 79 of the Constitution had never been adopted, and that "the provisions of the state of siege have been applied broadly and in an *ad hoc* manner, according to the specific needs of the political moment and the assessment thereof by the executive power." INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN PARAGUAY 20, OEA/Ser.L/V/II.71, doc. 19, rev. 1 (1987). Even more interestingly, the IACHR observed after an on-site visit to Paraguay in February 1990, following General Alfredo Stroessner's fall from power in 1989, that "habits and customs that hamper the full observance of human rights" remain because of the "heavy legacy of three decades of authoritarian government systematically violating human rights." INTER-AM. C.H.R., 1989–90 ANNUAL REPORT 168, OEA/Ser.L/V/II.77, doc. 7, rev. 1 (1990) [hereinafter IACHR 1989–90 ANNUAL REPORT]. Thus, the Paraguayan example raises serious questions as to the relevance of the formal state of emergency as a factor in the enjoyment of human rights.

15. [1945] *Palestine Gazette* (no. 1442) (Supp. 2) 1055.

16. On 24 April 1950, a joint session of the Jordanian parliament adopted a resolution proclaiming the unity of the East and West Banks into the Hashemite Kingdom of Jordan. Y.Z. BLUM, THE JURIDICIAL STATUS OF JERUSALEM 16–17 (1974).

17. *See* INTERNATIONAL COMMISSION OF JURISTS, ISRAEL NATIONAL SECTION, THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL (1981).

18. Two additional factors muddy the waters in the context of the Occupied Territories. When East Jerusalem was annexed by Israel, apparently one result was that the Israeli Defense Forces were no longer regarded as an occupying power and thus lost responsibility for enforcing the EDR in the city. In January 1988, in the early stages of

Common law states, particularly those without written constitutions, may not require a formal proclamation of emergency in order to permit the imposition of extraordinary security laws in times of crisis. Yet, when such states are parties to human rights treaties, they may be required to file formal notices of derogation under the terms of the treaties.

For example, the United Kingdom is a party both to the European Convention on Human Rights[19] and the International Covenant on Civil and Political Rights.[20] The long-standing crisis in Northern Ireland has been dealt with through application of a series of statutes granting wide powers of arrest, internment without trial, trial in special courts, investigatory detention, and restrictions on media coverage of proscribed organizations.[21] Parliamentary enactment (perhaps long

the intifada, this anomalous situation was highlighted when the police in Jerusalem were secretly authorized to exercise special emergency powers similar to those enforced on the West Bank, including the imposition of a curfew in one Arab neighborhood and actions to break a strike by shopowners. The new police powers were reported to have been announced only over the Arab-language radio station in Jerusalem, and the government appeared to be reluctant to admit the new arrangement or to make any kind of formal proclamation. *Israelis Impose Curfew on East Jerusalem Area,* N.Y. TIMES, Jan. 23, 1988, at 6, col. 5.

The status of emergency powers in Israel and the Occupied Territories is made even more ambiguous by the fact that a state of emergency was declared in Israel on 21 May 1948, and the 1945 EDR were absorbed into Israeli law. *See* Leon v. Gubernik, H.C. 5/48, 1 Piskei Din 58 (1948) and Ziv v. Tel Aviv District Commissioner, H.C. 10/48, 1 Piskei Din 85 (1948), *cited in* H. Rudolph, *The Judicial Review of Administrative Detention Orders in Israel,* 14 ISR. Y.B. ON HUM. RTS. 148, 149 (1984). Apparently, the application of the EDR does not depend upon the proclamation of a state of emergency. S. Shetreet, *A Contemporary Model of Emergency Detention Laws: An Assessment of the Israeli Law,* 14 ISR. Y.B. ON HUM. RTS. 182, 184 (1984). However, the 1979 amendments to the provisions for administrative detention (Regulations 108 and 111, Emergency Powers [Detention] Law, 5739/1979) do apparently depend on the existence of a state of emergency. *See* E. PLAYFAIR, ADMINISTRATIVE DETENTION IN THE OCCUPIED WEST BANK (1986); M. Saltman, *The Use of the Mandatory Emergency Laws by the Israeli Government,* 10 INT'L. J. SOC. L. 385 (1982).

19. EUR. COMM'N OF HUM. RTS., STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, SUPPLEMENT 1988, at app. I (1989).

20. *Report of the Human Rights Committee,* 45 U.N. GAOR Supp. (No. 40), U.N. Doc. A/45/40 Annex I (1990).

21. *E.g.,* the Civil Authorities (Special Powers) Act (Northern Ireland), 1922, 12 & 13 GEO. 5, N. Ir. Pub. Gen. Acts of 1922, ch. 5; the Northern Ireland (Emergency Provisions) Act 1987, PUBLIC GENERAL ACTS & MEASURES OF 1987 (pt. II), ch. 30; the Prevention of Terrorism (Temporary Provisions) Act 1974, PUBLIC GENERAL ACTS & MEASURES OF 1974 (pt. II), ch. 56; the Prevention of Terrorism (Temporary Provisions) Act 1976, PUBLIC GENERAL ACTS & MEASURES OF 1976 (pt. I), ch. 8; the Prevention of Terrorism (Temporary Provisions) Act 1984, PUBLIC GENERAL ACTS & MEASURES OF 1984 (pt. I), ch. 8; Prevention of Terrorism (Temporary Provisions) Act 1989, PUBLIC GENERAL ACTS OF

before a specific crisis occurs) or issuance of regulations or directives by administrative officials to whom relevant power has been delegated is all that is formally necessary in the British system as a prelude to application of these emergency powers. However, authorities in the United Kingdom have found it necessary because of their treaty obligations to proceed in a more formal manner by issuing or renewing notices of derogation when these emergency laws are actually being applied in a specific crisis, at least if the measures involve suspension of treaty obligations.[22] Scholars of the Northern Ireland situation have noted that recent legislation "has the effect of blurring a distinction . . . between emergency powers and anti-terrorism provisions. . . . [T]hen a permanent emergency state becomes the 'solution' to the emergency."[23] Despite the differences in formalities, therefore, the distinction between states such as the United Kingdom and Brunei also blurs in defining the "normal" versus the "emergency" legal regimes.[24]

But if one moves away from a formal definition of states of emergency, the major line-drawing problem becomes distinguishing between *de facto* emergencies and situations that should not be classified as emergencies at all. Some coherent definition of states of emergency, including both formal and *de facto* emergencies, is a prerequisite to any emergency-specific system of monitoring human rights abuses.

While recognizing that each emergency is factually unique, as well as complex and variable over time, the ILA Committee attempted to

1989 (pt. I), ch. 4. *See* Directives issued 19 October 1989 by the Secretary of State under section 29(3) of the Broadcasting Act 1981, *reprinted in* Brind v. Secretary of State for the Home Department, [1991] 1 All E.R. 720, 727 (H.L.).

22. The most recent notice of derogation by the United Kingdom under the European Convention was issued on 23 December 1988, in response to the judgment by the European Court of Human Rights in the case of *Brogan v. United Kingdom.* Brogan v. United Kingdom, 11 Eur. H.R. Rep. 117 (1988) (ser. A, No. 145-B) (judgment of Eur. Ct. H.R.). *Brogan* found that investigative detentions under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 of up to six and a half days, without appearance before judicial authority, violated article 5(3) of the Convention. A similar notice of derogation was filed under the Covenant on 23 December 1988. The U.K.'s previous notices of derogation had been terminated on 22 August 1984. *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CRIMINAL JUSTICE AND HUMAN RIGHTS IN NORTHERN IRELAND 24–30 (1988).

23. J.D. Jackson, *The Northern Ireland (Emergency Provisions) Act 1987,* 39 N. IR. L.Q. 235, 257 (1988).

24. Another puzzling example of the difficulties in assessing whether a formal emergency exists is provided by Angola. Angola formally established military courts to try civilians in political cases in areas affected by the conflict with UNITA in 1983, but it did not formally proclaim an emergency or suspend its constitution, nor was it required to notify any human rights treaty body. AMNESTY INTERNATIONAL, ANNUAL REPORT 1985 19 (1985). The Angolan example is replicated in numerous other situations.

divide emergencies into a six-part typology. The two central factors for classification were (1) the distinction between formal (or *de jure*) emergencies and *de facto* emergencies, and (2) whether actual conditions in the country constituted a serious public emergency, threatening the life of the nation, from whatever cause.[25] Several further distinctions are necessary within the category of unjustified *de facto* emergencies. The typology can be illustrated graphically in Table 1. The importance of categorization along these lines can best be explained by use of concrete examples.

Type 1: The "Good" *De Jure* Emergency

This type of emergency is the one sanguinely envisioned by the drafters of the derogation clauses in the major human rights treaties: actual conditions of public emergency threatening the life of the nation that regrettably, but unavoidably, make extraordinary measures and thus suspension of certain treaty rights necessary. The imposition of emergency measures is accompanied by formal declaration, if required by national law, plus notification to the other states parties under any relevant treaty. Emergencies meeting the criteria of Type 1 would be included under any mechanism of emergency-specific monitoring.[26] However, the criteria for classifying emergencies into Type 1 contain an element of subjectivity, and their application would be open to dispute in specific situations. While determining whether the formalities have been completed may be easy, measuring the gravity of the threat to the nation is difficult because of the possible inaccessibility of reliable and complete data and potential political or other bias in assessment.

Under the ILA Committee's analysis, however, the term "good" should not be taken too literally, because it signifies only that the conditions for a formal emergency have been met. This still leaves open the possibility that the emergency may involve serious human rights abuses, such as violation of non-derogable rights or lack of proportionality between crisis conditions and the specific measures imposed. In fact, the ILA Committee suggested that it would be ex-

25. The threshold of severity is drawn from the three major human rights treaties with derogation clauses: European Convention Article 15(1), ICCPR Article 4(1) and American Convention Article 27(1). The potential causes of serious emergencies are infinitely variable, but can be roughly classed under three headings: war, internal tension, and natural disaster. 1986 Seoul Report, *supra* note 4, at 113.

26. Two such examples are the proposal that the Human Rights Committee request immediate supplemental reports from derogating states under the ICCPR (see Chapter IV) and the Sub-Commission's list of states under formal emergencies (see Chapter V).

TABLE 1.

	De Jure	*De Facto*
Actual Emergency	(1) "Good" *de jure* emergency Actual emergency conditions Formal declaration and/or notification	(3) "Classic" *de facto* emergency Actual emergency conditions No formal declaration and/or notification
No Actual Emergency	(2) "Bad" *de jure* emergency No real emergency conditions Formal declaration and/or notification	(4) "Ambiguous or potential" *de facto* emergency No real emergency conditions No formal declaration and/or notification Sudden change in application of security laws (5) "Institutionalized" emergency No real emergency conditions Lifting of prior formal emergency Simultaneous incorporation of emergency laws in ordinary law (6) "Ordinary" repression No real emergency conditions No formal declaration or notification Permanent laws with extreme restrictions on human rights.

tremely difficult to identify a single concrete instance of a *de jure* emergency that fully complied with all international standards.[27] And even if such a case could be identified, serious human suffering probably still would have occurred during the crisis, since a threat to the life of the nation implies that the population is menaced by some grave danger.

Type 2: The "Bad" *De Jure* Emergency

This type was also anticipated by the treaty drafters and certainly merits inclusion in any emergency-specific monitoring program. The "bad" *de jure* emergency is invoked by governments that are either acting out of antidemocratic or self-interested motives, or are overreacting to modest stresses in imposing a formal state of emergency in the absence of a genuine threat to the nation. The European Commission of Human Rights found in 1967, for example, that the military regime in Greece had suspended rights under the European Convention without any plausible or substantial reasons.[28] Long-prolonged emergencies, such as that in Chile[29] and many other states, also fit into this category.

The "bad" *de jure* emergency is frequently and somewhat inaccurately perceived as the paradigm for abuse of human rights associated with states of emergency (the popular stereotype of the Latin American dictatorship). Such abuses are also associated with "good" *de jure*

27. 1988 Warsaw Report, *supra* note 4, at 147.

28. The "Greek" Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. 45–76 (Eur. Comm'n of Hum. Rts.). This is the classic example of a treaty implementation body rejecting a derogating government's claim that it faced a genuine emergency. The Commission focused on the actual situation (the level of disturbances to public order, etc.) and not upon the revolutionary character of the Colonels' regime. The question of the relevance of government motive will be discussed further in Chapter II. *See* F. Hassan, *A Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of Coup d'etat in the Common Law*, 20 STAN. J. INT'L L. 191 (1984).

29. Seventeen years of military rule since the coup in September 1973 ended in Chile when an elected civilian government took office on 11 March 1990. IACHR 1989–90 ANNUAL REPORT, *supra* note 14, at 133–135. According to the IACHR, this "fully reinstated a representative and constitutional democratic system of government." *Id.* at 133. Prior to that time, however, a series of states of siege (*e.g.*, from 7 September 1986 to 6 January 1987), states of emergency and other states of exception had prevailed. 1988 Warsaw Report, *supra* note 4, at 193 n.100. Articles 39, 40, 41 and transitory provisions 15 and 24 of the 1980 Constitution set out elaborate degrees of states of exception for situations of internal or external war, internal disturbances or natural calamity. *Id.* One or the other of these states of exception had been almost continually in force during the military regime.

emergencies and with the various subcategories of *de facto* emergencies. But in "bad" *de jure* emergencies, emergency measures are, almost by definition, disproportionate to the "exigencies" of the situation and frequently result in deprivation of non-derogable rights. The imposition or maintenance of a "bad" *de jure* emergency thus seems to be a reasonably good predictor of human rights abuse and presents the strongest argument for emergency-specific monitoring. The existence of a "bad" formal emergency is not, however, a strong predictor of the *severity* of associated human rights abuses. Long-prolonged formal emergencies may blend gradually into the normal legal regime, and human rights abuses may moderate over time. It may become difficult to distinguish these prolonged formal emergencies from Type 5 ("institutionalized" *de facto* emergencies) or Type 6 ("ordinary" repression). Yet, the government's invocation of emergency powers in these instances merits scrutiny simply because it is likely to cast some light upon the underlying issue of whether there is anything unique about the abuse of human rights in emergency contexts.

Type 3: The "Classic" *De Facto* Emergency

As noted in Table 1, which divides *de facto* emergencies into four types, non-formal emergencies require a complex scheme of classification, and all may not be suitable for any targeted program of monitoring. Only one of the four types is "genuine" in the sense that it occurs in the context of actual emergency conditions: that is the "classic" *de facto* emergency.

This "classic" type also merits categorization into four distinct subtypes. The first is where a conflict or other crisis exists but the imperiled government chooses to maintain, both formally and in practice, its ordinary legal regime. The second may be characterized by a conflict or other emergency situation during which the government takes extraordinary measures but without formally declaring or giving notice of an emergency. The third may entail the existence of actual emergency conditions, but the government's "legal" regime may be totally *ad hoc*. And the fourth occurs when a nation is faced with an actual emergency and chooses to respond by incorporating on a permanent basis harsh security laws into its ordinary legislation. Not all of these four subtypes may deserve targeted monitoring.

Looking at the first subtype, in which the government successfully preserves the ordinary legal regime (and enjoyment of human rights) despite extreme stress, little more than admiration or curiosity would seem to justify special monitoring. Genuine examples of this subtype,

however, are not immediately apparent. For example, the 1988 Report of the ILA Committee questioned whether the claims of Cyprus[30] and Iraq[31] to have coped with war situations without resort to emergency powers were truly credible.

The second subcategory concerns governments that impose extraordinary measures frequently by decree but without any formal declaration of emergency. Afghanistan[32] at one time fit this category, which

30. The government of the Republic of Cyprus currently controls approximately 60% of the now-divided island, as a result of a 1974 invasion by Turkey. The other 40% under Turkish control unilaterally declared its independence on 15 November 1983 as the Turkish Republic of Northern Cyprus. So far, it has been recognized only by Turkey. COUNTRY REPORTS FOR 1990, *supra* note 10, at 1117. A UN peacekeeping force patrols the volatile "line." It appears that both sides are attempting to bolster their claims to control by not resorting to emergency powers. L. Despouy, *First Annual Report and List of States Which, Since 1 January 1985, Have Proclaimed, Extended or Terminated a State of Emergency,* U.N. Doc. E/CN.4/Sub.2/1987/19, at 23 (1987) [hereinafter 1987 Despouy Report].

31. Leandro Despouy noted that "despite the existence of armed conflicts, in Afghanistan, Iran, and Iraq, *inter alia,* the Special Rapporteur found no indication that a state of emergency had been proclaimed." 1987 Despouy Report, *supra* note 30, at para. 43. He was speaking of course of the situation during the eight-year Iran-Iraq war. At the time of the review of its second periodic report to the Human Rights Committee in 1987, Iraq's representative blithely asserted that "Iraq had not declared a state of emergency nor had it suspended any human rights covered by its obligations under the Covenant. In fact, it had continued to improve the material, economic and social conditions of life and on that basis to develop the human rights of its citizens." *Report of the Human Rights Committee,* 42 U.N. GAOR Supp. (No. 40), U.N. Doc. A/42/40, at para. 347 (1987). Amnesty International reported that during 1987 thousands of political prisoners were arbitrarily detained without trial or after summary trials before the Revolutionary Court, that torture was routinely practiced, and that hundreds of persons had been executed, including children and the relatives of suspected government opponents. AMNESTY INTERNATIONAL, REPORT 1988 236–239 (1989). Indeed, in response to Amnesty's expression of concern, the Iraqi government justified the large number of executions on the grounds that "the society of any country would be bound to defend itself more strongly under certain conditions, such as when it is at war." *Id.* at 238.

32. Special Rapporteur Despouy noted in 1987 that the Afghan government had not declared any emergency. 1987 Despouy Report, *supra* note 30, at para. 43. The Afghan representative who presented his country's report to the Human Rights Committee in 1985 did little to clarify whether Article 4 had been invoked. U.N. Docs. CCPR/C/SR. 603, at para. 58; CCPR/C/Sr. 604, at paras. 6, 27, 43; CCPR/C/SR. 608, at paras. 2–42 (1985). However, after the withdrawal of troops by the USSR, the Afghan government did declare a state of emergency and transfer the authority of the National Assembly under article 81(1) of the Constitution to the Council of Ministers. These powers were reportedly transferred back by presidential decree in October 1989, and the National Assembly continued to function during the emergency. As noted by the Special Rapporteur for the Commission on Human Rights, Prof. Felix Ermacora, in his 1990 report to the Commission, "the state of emergency was still in force but would appear to have had little incidence on the human rights situation in general," which was dismal in areas

also tends to subsume situations under martial law, including foreign military occupation.[33] Martial law situations vary in their relative degree of legal formality. Some, such as that in Jordan, fit the model of a *de jure* emergency[34] which might be "good" or "bad" depending upon the severity of the crisis that triggered the imposition of martial rule. Martial law imposed without any formal declaration of emergency in a situation of genuine national crisis, involving "a suspension of normal civil government in order to restore it . . . [with] civilians for its subjects and civil areas for its loci of operation,"[35] fits the "classic" *de facto* model and should be encompassed in any program of emergency-specific monitoring.

Even more informal is the third subtype, a legal regime which is totally *ad hoc.* Areas occupied by armed opposition groups may fall into this category, such as the portions of Lebanon controlled by militia groups,[36] areas occupied by the Afghan guerrilla factions,[37] and the

controlled both by the government and by the opposition forces. 46 U.N. ESCOR Comm'n on Hum. Rts., at paras. 31–77, U.N. Doc. E/CN.4/1990/25 (1990) [hereinafter Ermacora Report].

33. Clinton Rossiter notes of martial law in England prior to 1914, the "almost complete lack of institutional status . . . the absence of statutory foresight for its initiation and use." ROSSITER, *supra* note 3, at 141. As Rossiter explains: "Given a condition of emergency in England that would call for a declaration of the state of siege in France, the government (or a local magistrate or military commander) has the power to do just about the same things that French officials can do under the state of siege. The authority to adopt whatever arbitrary measures are necessary to restore public order proceeds directly from the common law right and duty of the Crown and its subjects to 'repel force by force in the case of invasion or insurrection, and to act against rebels as it might against invaders' " [citations omitted]. *Id.* at 142.

34. Martial law was declared by Royal Decree on 5 June 1967, in response to the war with Israel. AMNESTY INTERNATIONAL, JORDAN: HUMAN RIGHTS PROTECTION AFTER THE STATE OF EMERGENCY 6 (1990). Martial Law Directives under this declaration provide, *inter alia,* for the appointment of the General Military Governor (currently the Prime Minister) (Art. 2); unappealability of orders by the Martial Law General (Art. 5); and the establishment of a Martial Law Court (Art. 6). Martial law is declared by Royal Decree under Article 125 of the Constitution of the Hashemite Kingdom of Jordan of 1952. *Id.* at 6–9. In 1967, when martial law was declared, Jordan was already under a state of emergency that had been imposed in 1939, "thus effectively introducing a dual state of emergency." *Id.* at 4. Martial law was "frozen" in December 1989, with the announced intention of gradually eliminating it. *Id.* at 1. But by the end of 1990, the parliament had not finished drafting the necessary legislation. COUNTRY REPORTS FOR 1990, *supra* note 10, at 1497. Martial law was formally terminated on 7 July 1991. *Jordanian Cancels Most Martial Law Rules,* N.Y. TIMES, July 8, 1991, at A3 col. 5.

35. ROSSITER, *supra* note 3, at 140.

36. These groups include the Lebanese Forces, Amal, al-Waad, Syrian Social Nationalist Party–Emergency Command, Hizballah, and several Palestinian groups. Portions of Lebanese territory are also under control by foreign armies, including those of Syria and

chaotic war conditions in contested areas in Uganda.[38] Similarly, chaotic conditions may also pertain in situations short of armed conflict. For example, security forces in Haiti at the time of the aborted 1987 elections appear to have engaged in a perhaps calculated loss of control and discipline.[39] In 1989 General Prosper Avril himself referred to his government as "*de facto*," according to an expert appointed by the United Nations,[40] who found the Avril regime "without legitimate title or a solid legal basis."

These *ad hoc* regimes often entail widespread and grave human rights abuses and a sharp departure from a prior, orderly legal regime. As such, they may present true states of emergency which, in some cases, might even be largely legitimate if the legal chaos is due to factors beyond the control of the government. Thus, it would be important to include them in any targeted program of monitoring. However, it may not always be a simple matter to determine when lawlessness by security forces reaches a level that pushes it beyond an "emergency" threshold.

The fourth subtype of "classic" *de facto* emergency is where a nation confronted with armed conflict or other actual emergency conditions responds to the crisis by adopting harsh national security laws not as a temporary emergency measure but as a permanent one. A somewhat debatable example of this situation occurred in El Salvador, which permitted a state of emergency to lapse while making permanent certain

Israel (the latter largely working through the South Lebanon Army). COUNTRY REPORTS FOR 1990, *supra* note 10, at 1522.

37. Special Rapporteur Ermacora noted reports by Asia Watch of serious human rights abuses committed by Afghan guerrillas, and suggested critically that the practice of placing areas under field commanders rather than the Afghan Interim Government "does not guarantee the full respect of basic law and order because full representivity and an effective authority are lacking." Ermacora Report, *supra* note 32, at paras. 46, 48–57 (1990).

38. 1988 Warsaw Report, *supra* note 4, at 195 n.111; COUNTRY REPORTS FOR 1990, *supra* note 10, at 433–42.

39. 1988 Warsaw Report, *supra* note 4, at 195–96 n.112; INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN HAITI, 20–21, OEA/Ser.L./V/II.74, doc. 9, rev. 1, at 20–21 (1988).

40. *Report on Haiti by the Expert, Mr. Philippe Texier, prepared in conformity with the Commission on Human Rights Resolution 1989/73*, 46 U.N. ESCOR, Comm'n on Hum. Rts., U.N. Doc. E/CN.4/1990/44 at 12, at para. 53 (1990). Prof. Philippe Texier noted that as of January 1990, General Avril's government had revived some portions of the 1987 Constitution, but continued to suspend "essential provisions about the organization of the State." *Id.* Free elections were held in December 1990. COUNTRY REPORTS FOR 1990, *supra* note 10, at 660. But on 30 September 1991, elected President Jean-Bertrand Aristide was ousted by a military coup. *Haiti's Military Assumes Power After Troops Arrest the President*, N.Y. TIMES, Oct. 1, 1991, at A1, col. 1.

measures on administrative detention.[41] Where emergency conditions exist and the government chooses to make a transition from emergency measures to harsh ordinary legislation, it becomes more difficult to classify the situation as an emergency. In fact, governments may make such transitions, in part, to escape international attention, which is often attracted by declarations of emergency and reassured when emergencies are terminated.[42] Continued monitoring would be essential, however, to determine if the lifting of an emergency actually resulted in improvements in the human rights climate. The ILA Committee recommended that such situations be included in special monitoring if actual emergency conditions still prevailed, or if the revised ordinary laws incorporated a substantial portion of the earlier emergency measures and the new provisions were being applied to a significant extent.[43]

Type 4: The "Ambiguous or Potential" *De Facto* Emergency

Although in these situations there are no actual emergency conditions and no formal declaration of emergency, they typically entail a sudden increase in the application of harsh, permanent internal security laws. A good example is the sudden crackdown in Singapore in 1987, during which the government placed a number of opposition figures of varying persuasions in administrative detention for periods of up to two years under the Internal Security Act (ISA). Without any change in the formal legal regime, a dramatically new political and human rights situation was created in Singapore by unilateral government action, triggering concern and attracting increased international attention.[44]

41. 1988 Warsaw Report, *supra* note 4, at 150 n.113. The Inter-American Commission on Human Rights reported in 1990 that El Salvador was under a state of siege involving increasing numbers of detentions. IACHR 1989–90 ANNUAL REPORT, *supra* note 14, at 145. *See Final Report to the Commission on Human Rights on the Situation of Human Rights in El Salvador*, 46 U.N. ESCOR Comm'n on Hum. Rts., U.N. Doc. E/CN.4/1990/26 at 6, at para. 20 (1990) (citing Amnesty International data on increased arrests under the state of siege at the time of the late 1989 offensive).

42. *E.g.*, 1990 Queensland Report, *supra* note 4, at 4 n.9 (noting the lifting of "marital law" in Beijing in January 1990); *Taiwan's Leader Ends 43-Year Emergency Rule*, N.Y. TIMES, May 1, 1991, at A6, col. 2.

43. Warsaw Report, *supra* note 4, at 150–51.

44. In May and June 1987, twenty-two people were arrested under the Internal Security Act (ISA) of 1960. AMNESTY INTERNATIONAL, RECENT DETENTIONS UNDER THE INTERNAL SECURITY ACT: REPORT OF AN AMNESTY MISSION IN SINGAPORE, AI Index: ASA 36/11/87 (1987) [hereinafter SINGAPORE MISSION REPORT]. Those arrested were professionals in the media, law, market research, or employed by the Catholic church. *Id.* at 4. Persons may be detained under the ISA (which derives from the British Colonial Preser-

That increased scrutiny of Singapore's human rights situation was justified in 1987 cannot be doubted; what is unclear is whether the situation should be labeled an "emergency."

The 1987 Singapore scenario is replicated in many other countries, particularly those with a British colonial heritage. The common law system places, at best, a modest emphasis upon the formalities of emergency rule, in comparison to the often Byzantine complexity of distinctions in civil law between various states of exception. One legacy of the British Empire was a complex of internal security laws, designed to cope with external threats and internal subversion, including struggles for decolonization. It is a familiar story repeated throughout the world that when those liberation struggles succeeded, the new leaders embraced the same tools of repression that had been used by the colonial masters.[45]

But unlike the United Kingdom, the newly independent states commonly adopted written constitutions. These constitutions typically provide for emergency powers, often with a fair degree of formality.[46]

vation of Public Security Ordinance of 1955) for renewable two-year periods. *Id.* at 2–3. The absence of emergency conditions prior to these arrests is underlined by a statement by Foreign Minister Suppiah Dhanabalan: "We are not saying the group was on the verge . . . of starting a revolution. . . . Why should we wait until they are on the verge before we act?" J. Katigbak, *Singapore Insists Communist Threat Is Real,* Reuters, June 2, 1987, *available in* LEXIS, Nexis Library, Reuters File. *See* AMNESTY INTERNATIONAL, CONTINUING DETENTIONS UNDER THE INTERNAL SECURITY ACT: FURTHER EVIDENCE OF THE TORTURE AND ILL-TREATMENT OF DETAINEES, AI Index: ASA 36/09/88 (1988). At the end of 1990, no persons were detained under the ISA; one detainee was released in 1989 after twenty-three years of preventive detention under the ISA. COUNTRY REPORTS FOR 1990, *supra* note 10, at 1021. Singapore itself implicitly acknowledged the significance of these events by describing them to the Sub-Commission's Special Rapporteur on states of emergency. U.N. Doc. E/CN.4/Sub.2/1989/30/Rev.1, at 5 (1990).

45. *See supra* note 10 (noting the example of Brunei); *supra* notes 15–18 (noting the case of Israel in the Occupied Territories); *supra* note 44 (citing the example of Singapore) to South Africa and Zimbabwe.

46. For example, the Governor-General of Fiji asserted power under Section 72 of the Constitution of 1970 to dismiss the Prime Minister and dissolve Parliament, in the face of a coup d'etat in May 1987. This effort to cope with the political crisis was ineffective and was followed in September 1987 by a second coup d'etat by Colonel Sitiveni Rabuka, who abrogated the 1970 Constitution on 1 October 1987. 1988 Warsaw Report, *supra* note 4, at 198 n.121. Prof. F.M. Brookfield questions whether the Governor-General actually possessed authority under the Constitution for his actions. *See* Brookfield, *The Fiji Revolutions of 1987,* 1988 N.Z.L.J. 250.

Sometimes the Constitution offers several alternative sets of extraordinary powers. In 1987, for example, the Punjab was placed under direct presidential rule by the Indian government, invoking Article 356 of the Constitution. Articles 352–355 of the Constitution allow for the suspension of fundamental guarantees in times of emergency. 1988

Such states may also come under martial law regimes, as in Bangladesh and Pakistan.[47] In addition, these Commonwealth nations possess harsh internal security laws, similar to Singapore's ISA. In time of stress, therefore, these governments have a choice between imposing formal emergencies under their constitutions and implementing emergency legislation, or simply invoking the provisions of their permanent national security laws. They seem to alternate between these responses in an unpredictable, haphazard way.[48]

Malaysia presents an especially problematic and complex example. Since independence Malaysia has been under a series of states of emergency, including a nationwide state of emergency declared in 1969 in response to post-election communal violence.[49] During that emergency, Malaysia adopted the Emergency (Public Order and Prevention of Crime) Ordinance, 1969,[50] which permits detention for a maximum of two years of persons suspected of acting or being likely to act in a manner prejudicial to public order. The 1969 emergency has never been terminated, despite the abatement of communal violence.

Malaysia also has an overlay of permanent national security legislation, including the Internal Security Act, 1960 (ISA), which permits persons to be arrested without warrant and detained for renewable two-year periods if they have acted or are about to act "in any manner prejudicial to the security of Malaysia."[51] The government of Malaysia typically invokes the provisions of the ISA in order to crack down on its opponents, particularly suspected communists and Islamic extremists.

Warsaw Report, *supra* note 4, at 199 n.124. In April 1990, the Indian Parliament repealed a constitutional amendment that had permitted suspension of the guarantees of life and liberty and direct presidential rule without legislative approval (a provision invoked only in the Punjab). COUNTRY REPORTS FOR 1990, *supra* note 10, at 1432. During 1990 the states of Punjab, Jammu and Kashmir, and Assam were all under direct presidential rule at various times. *Id.* at 1425.

47. 1988 Warsaw Report, *supra* note 4, at 152 and nn.119 & 120.

48. The government of Kenya, for example, orders administrative detention under the Preservation of Public Security Act (PPSA) ("a holdover from colonial days" according to the COUNTRY REPORTS FOR 1990, *supra* note 10, at 169) or criminal prosecution on such charges as sedition. *Id.* at 167. *See* 1988 Warsaw Report, *supra* note 4, at 197 n.118. Many persons are simply detained by the authorities without even being held under the PPSA. AMNESTY INTERNATIONAL, 1987 REPORT 61 (two hundred detained, with fifty eventually held under the PPSA).

49. *See* Warsaw Report, *supra* note 4, at 153–55.

50. The Emergency (Public Order and Prevention of Crime) Ordinance, 1969, *published as* Ordinance 5, H.M. Govt. Gazette as P.U.(A) 187. Malaysia adopted a series of other emergency laws in 1969 as well.

51. 1988 Warsaw Report, *supra* note 4, at 154 n.126; INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS 204 (1983).

In late 1987, for example, more than 100 persons were detained under the ISA in "Operation Lallang." [52] The ISA was made even harsher in 1989 when detention orders by the Home Minister were completely exempted from judicial review.[53]

And yet the emergency ordinances in Malaysia are far from moribund. They are broadly applied to detain suspected drug dealers and members of secret criminal societies.[54] This is done even though the never-terminated 1969 emergency was premised upon racial and political conflict, and not the drug problem. Singapore also imposes preventive detention on suspected drug offenders, but not in the context of an extended formal emergency.[55]

The Malaysian and Singapore examples thus present a challenge in applying definitional criteria for a "state of emergency." Because Malaysia has retained the formal 1969 emergency, although its original factual premise no longer exists, a plausible argument could be made for including Malaysia in a program of emergency-specific monitoring.[56] In contrast, the sudden increases in the number of detentions under the ISAs in 1987 in both Singapore and Malaysia, though signaling an important change in the human rights climate, do not fit easily under an "emergency" rubric.

If such situations are excluded from monitoring, however, an incentive is created for governments to apply harsh permanent laws to suppress dissent, rather than resorting to theoretically temporary emergency measures. Perhaps such a concern exaggerates the significance of human rights monitoring as a factor in shaping government strategy. But in devising a program for monitoring human rights abuse during states of emergency, the legal formalities are naturally of less interest than the potential for abuse. Thus, the ILA Committee decided that some "ambiguous or potential" *de facto* situations should be

52. 1988 Warsaw Report, *supra* note 4, at 154 and nn.128–29.

53. Country Reports for 1990, *supra* note 10, at 954.

54. 1988 Warsaw Report, *supra* note 4, at 154. Although approximately 400 persons were detained under the Emergency Ordinance in October 1986, that number was reduced to 189 as of December 1990. *Id.* The reduction appears to be largely due to the passage of the Dangerous Drugs (Special Preventive Measures) Act of 1985, under which drug suspects can be detained without trial for renewable two-year periods. Country Reports for 1990, *supra* note 10, at 954–55. Approximately 1,200 suspects were detained under this law as of December 1990.

55. Singapore detains drug suspects under the Criminal Law (Temporary Provisions) Act. Detentions under this act and Singapore's ISA are not subject to judicial review. Country Reports for 1990, *supra* note 10, at 1021–22.

56. As the 1988 Warsaw Report noted, *supra* note 4, at 155, the Special Rapporteur for the Sub-Commission included Malaysia on his 1987 list. *See* U.N. Doc. E/CN.4/Sub.2/1987/19 Annex I, at 18.

counted as emergencies with the key criterion being a "quantum of repression" that would have to be calculated on a case-by-case basis.[57]

Type 5: The "Institutionalized" Emergency

This applies to a narrowly defined set of circumstances in which a government terminates a formal emergency after having incorporated many control measures into its ordinary law. In many such cases, the government is responding to international criticism for having long maintained a formal emergency in the absence of any genuine crisis.[58] Where real sources of stress remain, however, a government may find such a strategy unworkable. For example, South Africa in 1986 began incorporating portions of its emergency provisions into ordinary legislation in order to deflect virulent international criticism of its emergency, but later decided to extend the emergency.[59] As Nicholas Haysom notes, the attraction of the emergency regulations over ordinary law lay in how they eliminated forms of supervision either by the courts or by the media over the security forces,[60] advantages that could not be gained in ordinary law within the South African legal system.[61]

But in other cases where the government has effective control over the populace, the termination of a formal emergency and its replacement by permanent repressive legislation may be an attractive option that potentially decreases the visibility of the human rights problem. Such a transition presents a painful dilemma for human rights monitors. While no one could logically criticize the lifting of a formal emergency that had no proper basis (because no actual threat to the life of the nation existed), celebration would not be in order where there had been no actual improvement in the human rights situation. Such situations would not be included under any program for emergency-specific monitoring because there would exist neither a "bad" formal emergency nor *de facto* emergency conditions. The only category that might encompass such cases would be the "actual or potential" emergency (Type 4 in the ILA typology), in which ordinary security laws were being widely applied in a manner that created an unusual human

57. 1988 Warsaw Report, *supra* note 4, at 155–56.

58. For example, in 1987 long-prolonged formal emergencies were terminated in Paraguay and Taiwan. 1988 Warsaw Report, *supra* note 4, at 156.

59. *Id.* at 157.

60. N. Haysom, *States of Emergency in a Post-Apartheid South Africa*, 21 Col. Hum. Rts. L. Rev. 139, 147 (1989).

61. Haysom adds, "The State of Emergency regulations can be understood only as an attempt to confer upon the police the capacity to operate in a grey area between an 'extended' legality and wanton illegality, to impose order without law." *Id.* at 148.