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The Threat to the Life of the Nation as an Introductory Premise of the Derogation of Obligations in the Domain of Human Rights

Key words: Human rights, European Commission of Human Rights, International Covenant on Civil and Political Rights

Abstract

The subject of the study is the issue defined in international documents by the term “threat to the life of the nation” as a preliminary condition for departing from obligations in the field of human rights. This premise was adopted both in the International Covenant on Civil and Political Rights, as well as in similar regulations for individual continents, including the European Convention on Human Rights.

However, on a practical basis, this issue has raised and continues to raise multiple interpretation doubts. In the presented considerations, various aspects of this problem are presented in the light of the jurisprudence of the European Court of Human Rights.

On the basis of these, it can be assumed that one cannot identify the category of the nation with the categories of the state and/or the population, since each of these categories has its due autonomy; while on the other hand, they accompany, coexist and remain in mutual relations and interaction. Hence, in international norms, both the treaty provisions and the treaty bodies in their rulings consistently confirm “the life of the nation” as the fundamental protected value, which does not prevent them from associating this value with values important for the state as such and for the population/society.

The classic model of this approach has already been established by the ECtHR in the *Lawless* case, where the Court described a derogation situation as “an exceptional crisis or emergency situation that affects the entire population and poses a threat to the organized life of the community that comprises the state

Introduction

I am very grateful to the Conference Organizers that once again¹ the issues of their important conference

relate to my life and activity, namely to the Scientific Conference “*Human Rights in Emergency Situations*” held in Toruń on February 19–20, 1997². Participated in it include – that I will mention only those who have

¹ In 2014, the Olsztyn Conference on Human Rights was – to my great satisfaction – associated with celebrating my 70th anniversary (1944–2014). Unfortunately, a separate commemorative book was not published, and the papers at the conference were presented in the next issues of the “Polish

Yearbook of Human Rights and Humanitarian Law” 2014 and 2015.

² See “*Prawa człowieka w sytuacjach nadzwyczajnych ze szczególnym uwzględnieniem prawa i praktyki polskiej*”, ed. T. Jasudowicz, Toruń 1997, Dom Organizatora TNOiK.

gone from us for eternal times – irregrieved Professor Anna Michalska, unforgettable Senator Zbigniew Romaszewski, as well as Professors: Leszek Wiśniewski (then director of the Poznań Center for Human Rights of the Polish Academy of Sciences) and Roman Jasica (University of Silesia, member of the International Commission Research ICRC). Let me go one year deeper and remind you that together with Professor Cezary Mik we led in 1996 to the preparation, publication and ceremonial handing over in Poznań in tribute of Professor Anna Michalska Memorial Book³. In this study, I included my study on the problem of the limits on the use of human rights, precisely against the background of teaching Professor Anna Michalska⁴.

It was my personal scientific tribute to Her. There, I briefly referred to the derogatory criterion of “life of the nation”⁵. I again included this criterion – only in the form of a kind of *obiter dictum* – not conducting in-depth own research, but sending in *this regard to Professor Michalska’s paper*⁶.

At the same time, I drew attention to the fact that – according to the European Commission of Human Rights – “*this criterion is (...) <main condition> with a prior, objective and completely fundamental substantive charge*”⁸. I added, bearing in mind regard – among others and especially – the title context of “*Polish law and practice*” that “*the protected value is here expressis verbis and not just accidentally <nation>, and in a state of extreme danger, when its life, <existence> or “survival” is being questioned, not the threat to the security of the state as such, not some geopolitical weave, and even less any extension of monopoly rule*”⁹.

If I am allowed to follow the beaten track again in 1996 and think again “against the background of Professor Anna Michalska’s teaching”, I propose, as

the subject of these considerations, “*public danger that threatens the life of the nation*”, with a focus on the last three words “*threatens the life of the nation*”.

Comparative study of derogation clauses

The wording of this “*main condition*” in the derogation clauses of human rights treaties is not uniform. The earliest formula of Article 15 (1) of the European Convention on Human Rights (ECHR) provides for the admissibility of a derogation of obligations in the field of human rights: “*In time of war or other public emergency threatening the life of the nation*” (franc. “*En cas de guerre ou en cas d’autre danger public menaçant la vie de la nation*”)¹⁰ it is significant that in the International Covenant on Civil and Political Rights, the “war” was consciously abandoned. In art. 4 (1) formula applies “*In time public emergency which threatens the life of the nation*”¹¹.

Preparatory works on *International Covenant on Civil and Political Rights* (ICCPR), including its Article 4, and on the ECHR, including its Article 15, previously started at the universal level, for some time went on in parallel and interacted with each other, especially since in both systems the designer of the article Great Britain was a derogation¹², in both systems its project

¹⁰ The formula from the ECHR is identically adopted in Article 30 by the European Social Charter (ESC) as well as in Article F by the Revised European Social Charter (RESC). Polish texts of the ECHR, ESC and RESC. [in:] *International protection of human rights. Source selection*, compiled M. Balcerzak, Toruń 2007, II–A/1, II–AS/9 and II–A/12. It is difficult for me to agree with the Polish translation of M. Balcerzak; duplication of “threat” is defective.

¹¹ Polish Version [in:] *Międzynarodowa ochrona...*, I–A/2. Here, too, translation by M. Balcerzak raises my doubts.

¹² As part of the work on Article 4 of the Pact at the first session of the Drafting Committee in 1947, Britain proposed a derogation of obligations “*in time of war or other national emergency*” – doc. E/CN.4/21, annex B. art. 4/GB/. See: *Guide to the “travaux préparatoires” of the International Covenant on Civil and Political Rights*, by M.J. Bossuyt, Dordrecht–Boston–Lancaster 1987, p. 87. See also: J.F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies – a Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, Harvard International Law Journal, vol. 22, 1981, No 1, p. 8. In view of the rejection of this proposal (by 3: 2 votes), Great Britain at the meeting of the Working Group of the UN Human Rights Commission proposed a changed formula “*in time of war or other public emergency*”, initially approved by 4: 3 votes with 8 abstentions – see. *Guide...*, p. 81. Then in 1949 at the fifth session of the Commission

³ *O prawach człowieka w podwójną rocznicę Paktów. Księga Pamiątkowa w hołdzie Profesor Annie Michalskiej*, ed. T. Jasudowicz i C. Mik, Toruń 1996 Dom Organizatora TNOiK.

⁴ T. Jasudowicz, *Determinanty międzynarodowo chronionej substancji praw człowieka w systemie uniwersalnym i europejskim (na tle nauczania Profesor Anny Michalskiej)*, [in:] *O prawach człowieka...*, p. 87–114.

⁵ *Ibidem*, p. 94, 96 and 108.

⁶ A. Michalska, *Niebezpieczeństwo publiczne, które zagraża życiu narodu*, [in:] *Prawa człowieka w sytuacjach...*, p. 11–26.

⁷ See. *Greek Case. Opinion*, 5 November 1969, [in:] Yearbook of the European Convention on Human Rights, vol. II, p. 103–104.

⁸ T. Jasudowicz, *Studium substancjalnych przesłanek dopuszczalności środków derogacyjnych*, [in:] *Prawa człowieka w sytuacjach...*, p. 45.

⁹ *Ibidem*.

collided with the proposal to introduce a general limitation clause and to abandon the derogation clause¹³. In the course of work on the Covenant in 1950, the US and France proposed slightly different formulas of the general limitation clause, and only at the VIII session of the Human Rights Commission of the United Nations (HRC) in 1952, Great Britain first proposed the formula "*In time of war or other public emergency threatening the life of the nation*" to withdraw it and present it in the short version "*In time of public emergency threatening the life of the nation*"¹⁴.

In the framework of the Council of Europe, similar work gained more momentum, as Great Britain – after the Committee of Experts adopted its formula of 9.03.1950, previously proposed by it "*In time of war or other public emergency threatening the interests of the people*"¹⁵ – she clarified her proposal so that the Committee of Experts could in its Explanatory Report for the Committee of Ministers use the new formula "*in case of war or threat to the life of the nation*"; the latter, in turn, passing the documentation of the Committee of Experts to the Conference of Senior Officials in June 1950, drew attention to the replacement of the phrase "*the interests of the people*" with the phrase "*the life of the*

on the basis of the proposal of Great Britain, supplemented by the request of the USSR, opted for the formula "*In time of war or other public emergency threatening the interests of the people*" (adopted by 5: 3 votes with 8 abstentions) – *ibidem*, p. 85. In the course of work on the European Convention on Human Rights (ECHR), Great Britain first noted that "*in times of emergency the safety of the community is of first concern*", to propose the said formula to the Committee of Experts on 15.02.1950 United Nations Human Rights Council (UNHRC) in 1949 – see. *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights (Travaux...)*, The Hague 1976, vol. III, p. 190. See. J. de Deus Pinheiro Farinha, *L'article 15 de la Convention*, p. 522.

¹³ In their work on the Covenant in the Drafting Committee, the US indicated that they prefer – instead of a derogation article – a "general limiting clause". – see *Guide...*, p. 82. They returned to this idea in 1950 at the forum of the sixth session of the UNHRC, supported by a similar French proposal – *ibidem*, p. 86. In the work on the ECHR, since the initial draft of the Consultative Assembly of the CE provided for a general limitation clause, modeled on Article 29 (2) of the ECHR Additional Protocol, the Committee of Ministers suggested to the Committee of Experts that, therefore, a derogation clause is superfluous – see *Travaux...*, vol. II, p. 274; vol. III, p. 28, respectively.

¹⁴ See. E/CN.4/170 and 187; E/CN.4/L.139 and L.1139, Rev.1 – See. *Guide...*, p. 86. At that time, the term "*threatening the interests of the people*" was not finally accepted (8: 8 votes, 2 abstentions), and the phrase "*threatening the life of the nation*" (14: 4 votes) – See. *ibidem*, p. 87.

¹⁵ See. J. de Deus Pinheiro Farinha, *op.cit.*, p. 522.

nation"¹⁶. This conference, and then in August 1950 the Consultative Assembly, and finally in the first days of November 1950 the Committee of Ministers no longer questioned the formula that finally entered the text of Article 15 § 1 of the Convention.

It is worth paying attention to the richness and diversity of formulas that were taken into account during discussions at the UN Human Rights Commission: "*public emergency threatening the security, safety and general welfare of the people*"; "*Exceptional danger*"; "*War or other public emergency*"; "*War or other public emergency threatening the interests of the people*". Attention was drawn to the fact that: "*such a danger can only come into play when the life of a nation is at risk*"; "*Public danger should be such that it threatens the life of the nation as a whole*"; "*<Public danger> is a too narrow term, it could not, for example, cover natural disasters that almost always justify a derogation of the state from at least some of the rights recognized in the Covenant*"; "*Although it was recognized that one of the most important public dangers is the outbreak of war, it was felt that the Covenant should not consider, even by implication, the possibility of war, because the United Nations was created to prevent war*"¹⁷.

It is important that in the end – both in universal and European mainstream work – the classification of public danger as the "*threat to the life of the nation*" has won, and not any other, in particular stressing the "*threat to the interests of the people*". In this regard, the more striking is the formula adopted in Article 27 (1) of the American Convention on Human Rights (ACHR), "*During war, public danger or any other situation that threatens the independence or security of a state party*"¹⁸. As you can see, the category of the nation does not appear here, and normalization serves to protect the value of the state, its "*independence or security*". Personally, I am not in favor of such a statist approach; perhaps this can be partly explained by the fragility of political structures in Latin America.

Reflections on the background of the law and practice of states

In the study of Prof. Anna Michalska from 20 years ago, one can notice the dedication of broad considerations to the practice of the (ICCPR) party states, with

¹⁶ See. J.F. Hartman, *op.cit.*, p. 7.

¹⁷ See: *Guide...*, p. 85, 86.

¹⁸ Polish version [in:] *Międzynarodowa ochrona...*, IV/1.

an emphasis on their derogation notifications required pursuant to Article 4 (3) of the Covenant. Based on the annual report V prepared by L. Desouy¹⁹, she considers 15 such cases. One notification came from Africa (Algeria in 1991), one from the Middle East (Israel in 1991), three from Europe (Poland in 1982, and Russia in 1988 and 1990), the most, as many as ten from Latin America (Argentina in 1989, Bolivia in 1985 and 1986, Chile in 1976 and 1984, Colombia in 1984, Ecuador in 1986 and 1987, Nicaragua in 1985, Panama in 1987)²⁰.

This review of the practice of states, indicating the diversity of arguments of states introducing emergency states and the lack of adjustment to the formula of Article 4 (1) of the Covenant, did not give rise to optimism. That is why A. Michalska states that “exemplification of the arguments used by states to justify the decision to impose a state of emergency and derogation from human rights obligations is too fragile the basis for determining the meaning and scope of the phrase <public danger that threatens the life of the nation>”²¹.

Gheballi notes with pain that Organization for Security and Co-operation in Europe (OSCE) participant countries – including Tajikistan (1992–1993), Azerbaijan (1993/1994), the Russian Federation (1992–1994), Georgia (1993), Armenia (1993), and Croatia, Bosnia-Herzegovina and Serbia, as well as Great Britain and Turkey – do not fulfill the notification obligations regarding derogations, and if they do so – such as Moldova in 1992 – they do not refer to the obligations arising from the Moscow Document of the OSCE²². He also cites data from the report of the Special Rapporteur of the UN Commission on Human Rights, which confirms that the practice of the OSCE participant countries was “far from satisfactory: notifications to the Office for Democratic Institutions and Human Rights (ODIHR) were rarely accurate and timely”, so compliance with the Moscow regime proved to be erroneous, partial and in any case insufficient”²³.

From the perspective of this study, it can be summarized that such practice did not contribute and could not contribute to specifying the criterion of “public

danger threatening the life of the nation”. The treaty body of the Covenant, i.e. the UN Human Rights Committee, hoped to control the obligations of states under Article 4 as a result of the examination of their reports. However, he could not be satisfied with the results of this activity. Therefore, on the occasion of his first commentary on Article 4, he regretfully noted the cases of “countries which – as you can assume – derogated from the rights of the Covenant, it was not clear whether the state of emergency was officially declared, but also whether there were no actual derogations from the rights from which the Covenant does not allow any derogation (...)”²⁴.

It is worth pointing out that when, in 1973, Chile declared a state of emergency based on Article 4 of the Covenant, a special ad hoc Working Group of the UN Human Rights Commission stated that “it did not find any serious elements confirming the existence of internal unrest of a degree that would justify extensive suspension of the constitutional guarantees that occurred in Chile” so that “it could not be concluded that the situation existing at that time in Chile would endanger the life of the nation (...)”²⁵.

It is not without reason that Hartman points out that “the most direct inspiration” for derogation clauses was “legislation on states of emergency such as the United Kingdom”²⁶. He gives the example of a clause in the United States Constitution authorizing Congress to suspend habeas corpus guarantees, “when in cases of rebellion or invasion, public security may require it”²⁷.

Interesting in this regard is the study of K. Wojtowicz regarding the extraordinary powers of the executive, and pointing to cases based on a legal basis (in Germany and France), as well as cases without such a basis, and referring to the doctrine of necessity or “necessary defense of the state”²⁸.

¹⁹ L. Despouy, *Fifth revised annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency*,

²⁰ A. Michalska, *op.cit.*, p. 13–15.

²¹ *Ibidem*, p. 15.

²² V.-Y. Gheballi, *The Human Dimension Regime on States of Public Emergency*, OSCE ODIHR Bulletin, vol. 3, No. 1, p. 37–38.

²³ *Ibidem*, p. 38.

²⁴ *General Comment No. 05: Derogation of Rights (Article 4)*, CCPR General Comment of 31 July 1981, point 2. See. B.G. Ramcharan, *The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-international Armed Conflicts*, American University Law Review 1983–1984 vol. 33, p. 108.

²⁵ *Report of the Ad Hoc Working Group on the Situation of Human Rights in Chile*, 30 UN GAOR Annex, UN Doc. A/1-285 (1975), p. 47 and UN Doc. A/31/253 (1976), p. 27. See also: B.G. Ramcharan, *op.cit.*, p. 107–108.

²⁶ J.F. Hartman, *op.cit.*, p. 11.

²⁷ *Ibidem*, p. 13–14. As for United Kingdom legislation, see: *ibidem*, p. 14–15.

²⁸ K. Wójtowicz, *Koncepcje nadzwyczajnych uprawnień władzy wykonawczej*, [in:] *Polskie zmiany ustrojowe w literaturze prawniczej. Wybór tekstów*, ed. R. Balicki, B. Banaszak, M. Jabłoński, Wrocław 1997, p. 240–245.

It is worth quoting the position taken by the International Labour Organization (ILO) Investigative Commission regarding the state of emergency and the derogation of freedom of trade union activity announced by Greece. The Commission confirmed that – from the perspective of the national order and in view of compliance with the Constitution – the Greek Government may feel “*the sole judge as to the need to declare a state of emergency*”; this is not so from the perspective of the international order, if only because of the special nature of ILO Conventions 87 and 98²⁹. It says, “*It can be said that the position of pleas of emergency or necessity in international custom may be said to correspond essentially, within the peculiar framework of the international community, to the place given to pleas of force majeure or legitimate self-defence in national systems of law*” at the same time. “*Both the general principles of law derived from national practice and international custom are based on the assumption that the non-performance of a legal duty can be justified only where there is impossibility of proceedings by any other method than the one contrary to law*”³⁰.

In addition to the above reference to United Kingdom legislation and the US Constitution, it is worth supplementing the remarks against the background of the constitutional practice of states. The United Kingdom introduced, prolonged and renewed a state of emergency in Northern Ireland related to IRA terrorism³¹. It once again took advantage of the possibility of derogating obligations under Article 15 of the ECHR immediately after the attack on the World Trade Center on September 11, 2001³².

There are countries such as Belgium whose constitutions do not provide for the introduction of states of emergency; on the contrary, Article 130 provides that ‘*la Constitution ne peut être suspendue en tout ni en partie*’; on the other hand, “*there is no doubt that Article 15 is directly applicable in the Belgian legal order*”³³.

Traditional state constitutions have normalized the issue of the possibility of introducing states of emergency “*in their own way*”, often without saying anything at all³⁴. It is even more difficult for them to require adjustments to normalize the derogation of obligations in international human rights treaties. From this point of view, it is worth looking at the new constitutions of former socialist states adopted in the 1990s. Well, in the Constitutions of the Czech Republic (December 16, 1992) and the Slovak Republic (from September 1, 1992) there will be no provision on emergency states³⁵. Paragraph 8 (4) of the Hungarian Constitution provides for the suspension or limitation of fundamental rights (not all) “*During a state of emergency, critical state or emergency*”³⁶. The Constitution of Croatia in Article 17 provides for the possibility of limiting the rights “*For a state of war or a state of imminent threat to the independence and unity of the Republic, and in the event of major natural disasters*”³⁷.

Relatively best suited to international standards is the provision of Article 16 (Temporary suspension and limitation of rights) of the Slovenian Constitution, providing for such suspension and limitation “*exceptionally in a situation of war or emergency*” only for “*duration*” and “*to the extent necessary*” and “*in such a way that the measures introduced do not cause inequality*”³⁸.

²⁹ Quotation for: B.G. Ramcharan, *op.cit.*, p. 106–107. This special nature is also recognized and confirmed by both International Human Rights Covenants: ICCPR in Article 22 (3), and International Covenant on Economic, Social and Cultural Rights (ICESCR) in Article 8 (3). See T. Jasudowicz, *Studium...*, p. 72–74.

³⁰ She added: *the action sought to be justified under this plea is limited, both in extent and in time, to what is immediately necessary* – *ibidem*.

³¹ See more about it: Sh. Kilcommins, B. Vaughan, *A Perpetual State of Emergency: Subverting the Rule of Law in Ireland*, Cambridge Law Review 2004, vol. 35, p. 55. I will return to the problem below in the context of the Strasbourg case-law study.

³² See. *United Kingdom derogation under Art. 15 ECHR/ /Public emergency after 11 September 2001*, [in:] Human Rights Law Journal 2001, vol. 22, no. 9–12, p. 465. A verbal note from the UK Permanent Representative of 18 December 2001 stated that “*There is a terrorist threat to the United Kingdom from persons suspected of being involved in international terrorism, which is a “threat to United Kingdom national security”*”.

³³ J. Velu, R. Ergec, *La Convention Européenne des Droits de l’Homme*, Bruxelles 1990, p. 143.

³⁴ See for example: *Konstytucja Królestwa Norwegii* (from May 17, 1814), Warszawa 1996.

³⁵ *Konstytucja Republiki Czeskiej*, Warszawa 1994 Wyd. Sejmowe; *Konstytucja Republiki Słowackiej*, Warszawa 1993 Wyd. Sejmowe. In the Romanian Constitution, its Article 49 contains a formula corresponding rather to a general limiting clause, only expressly mentioning “counteracting the effects of natural disasters or exceptionally serious disasters” – *Konstytucja Rumunii* (from November 21, 1991), Warszawa 1996 Wyd. Sejmowe.

³⁶ *Konstytucja Republiki Węgierskiej* (August 24, 1990), Warszawa 1996 Wyd. Sejmowe.

³⁷ *Konstytucja Republiki Chorwacji* (December 22, 1990), Warszawa 1995 Wyd. Sejmowe.

³⁸ *Konstytucja Republiki Słowenii* (December 23, 1991), Warszawa 1994 Wyd. Sejmowe. This is similar to the provision of Article 4 (1) of the ICCPR, but the non-discrimination formula is here – and rightly so! – wider than in the Covenant; while, however, there is no “threat to the nation’s life”.

Practice shows that the degree of consideration of national emergency standards is rather negligible. model for normalizing the derogation of commitments in international human rights treaties, including the complete omission of the highest value based on them – the “*life of the nation*”. Therefore, it does not serve well to clarify the meaning of this criterion or to specify the nature and degree of its “*threat*”, required for the admissibility of a derogation of commitments in the field of human rights.

Finally, let’s look at Polish constitutional regulations. On the basis of the March Constitution of 17.03.1921, the possibility of temporary suspension of civil rights during the war or in the event of a threat of war, as well as in the event of internal unrest or widespread plot treason threatening the Constitution of the State or the security of citizens was provided. The details were regulated by the ordinance of the President of the Republic of Poland of January 16, 1928 on martial law and the ordinance of the President of the Republic of Poland of March 16, 1928 on the state of emergency³⁹. The April Constitution of April 23, 1935 also provided for the possibility of introducing a state of emergency in the situation of the threat of the state and the determination of the situation justifying the imposition of a state of emergency was almost identical to that of the March Constitution, and the details were regulated by the Act of 22 February 1937 on Emergency and the Act of 23 June 1939 on Martial Law⁴⁰. “*Threat to the life of the nation*” as a criterion ordering the admissibility of introducing extraordinary states did not appear.

The Constitution of the Polish People’s Republic of July 22, 1952 in art. 33 paragraph 2 envisaged the possibility of the imposition of martial law by the Council of State on all or part of the territory of Poland, if it was required by “*defense or state security*”⁴¹. It is very enigmatic for “*consideration*”, and it was introduced into the entry act, the provisions of which – in the absence of relevant statutory regulations – no direct legal effects could be derived.

³⁹ More precise see: A. Cieszyński, *Stany nadzwyczajne w prawie konstytucyjnym doby II Rzeczypospolitej*, [in:] *Prawa człowieka w sytuacjach...*, p. 120–125.

⁴⁰ *Ibidem*, p. 125–133.

⁴¹ See more about it: M. Róg, *Stan wojenny w prawie i praktyce PRL* [in:] *Prawa człowieka w sytuacjach...*, p. 137–147. I have considerable doubts about the author’s arguments regarding the situation that would justify the imposition of martial law in 1981, as well as its final conclusion – *ibidem*, p. 138–140, 147.

Twenty years ago, in the course of discussion at the said Conference, Senator Romaszewski refuted the thesis about the allegedly threatening “*Soviet intervention*” and stated: “*The main reason for the decision to impose martial law was not at all <threat to the life of the nation>, but on the contrary – threat to the interests of the nomenclature*”⁴². Personally, in the summary of the discussion, I assessed that “*the situation existing in Poland on the eve of the imposition of martial law did not constitute <an exceptional public danger that threatens the life of the nation>, as required by the Civic Covenant standard binding for Poland*” and “*the law of the Poland itself, including the Constitution, it did not comply with this standard, since it adopted the criterion of “state security” (and in practice the immutability of the political system or party monopoly) rather than <the life (or existence or survival) of the nation as a premise of martial law>*”⁴³.

L. Wiśniewski, referring to the regulation in the draft of the new Constitution of the Republic of Poland, which in its wording fully identified with the text of later Articles 229–230 of the Constitution of April 2, 1997, discussed – in principle, uncritically – this regulation⁴⁴. My assessment is definitely critical. Having the opportunity to actively participate in the Senate of the Republic of Poland in the conference to celebrate the 15th anniversary of the Constitution, after pointing out a number of its shortcomings, I emphasized as “*my greatest <personal constitutional ill> an absolute mismatch with international requirements of Chapter XI of the Constitution “Emergency States” (especially art. 229 and 230)*”⁴⁵.

⁴² See Dyskusja panelowa “*Stan wojenny w PRL 1981*”, [in:] *Prawa człowieka w sytuacjach...*, p. 161. See also: L. Wiśniewski, *ibidem*, p. 164; R. Jasica, *ibidem*, p. 166–167.

⁴³ *Ibidem*, p. 168. Consequently, in the resolution of the Conference we emphasized “the failure to meet the condition <exceptional public danger that threatens the life of the nation>, and the obvious falsification of reality were and are arguments based on saving the Polish Nation from: the alleged danger of the USSR or the Warsaw Pact intervention; alleged risk of fratricidal fighting and civil war; alleged economic and supply collapse – Resolution of the Scientific Conference” Human rights in emergency situations “on the qualification and legal assessment of martial law in the People’s Republic of Poland 1981, point. II. 1. – [in:] *ibidem*, p. 173–174.

⁴⁴ See L. Wiśniewski, *Stany nadzwyczajne w projekcie nowej Konstytucji RP* [in:] *ibidem*, p. 149–158. On p. 151–152 he emphasized, however, the need for a “*special risk situation*” – *ibidem*, p. 152.

⁴⁵ T. Jasudowicz, *Garść refleksji i wspomnienie na tle Piętnastolecia Konstytucji Rzeczypospolitej Polskiej*, p. 3 (not published).

The constitutional description of the situations authorizing the imposition of martial law (Article 229) and the state of emergency (Article 230) confirms the disregard for international standards and has little to do with the criterion of the “*exceptional public danger that threatens the life of the nation*” specified in the Covenant and the European Convention. Article 229 permits the imposition of martial law “*in the event of an external threat to the state, an armed attack on the territory of the Republic of Poland, or when an obligation to joint defense against aggression results from an international agreement*”. There is no “letter” or “spirit” of threat to the nation’s life! Similarly, the possibility of introducing a state of emergency does not suit the international model of derogation in accordance with Article 230 of the Polish Constitution – “*in the event of a threat to the constitutional system of the state, the security of citizens or public order*”.

Unfortunately, the defects of the Constitution did not remove, or even attempt to remove, the Act on Emergency⁴⁶ and Martial Law⁴⁷ of 2002. In the opinion prepared for the needs of the Senate regarding the adopted Act on Emergency, I stated that “*Situational criteria adopted in the Polish legal order as the basis for admissibility the introduction of a state of emergency, i.e. <threat to the constitutional system of the state, security of citizens or public order>, in connection with the criterion of insufficiency of ordinary constitutional measures, do not correspond to the initial substantive premise required by international, universal and European standards binding for the Republic of Poland*”⁴⁸. I cannot accept

R. Wieruszewski’s assessment: “*the solution adopted in the Polish legal system seems almost model!*”⁴⁹. I do not know what “model” he is referring to, because he does not fit into the international model of the derogation of obligations in the field of human rights!

To sum up, it can be stated that the practice of states – manifested in their constitutional and statutory regulations, in their notifications of emergency states and in their reports on the implementation of obligations arising from ICCPR – is rich and diverse, but has little to do with international standards of derogation of obligations, in particular, for her – as a basic protected value – the category of “life of the nation”.

Conclusions on the background of the practice of treaty bodies

As Poland participates in the universal and European human rights protection system, I will deal with the practice of treaty bodies operating in the ICCPR system as well as in the ECHR and European Social Charter (ECS) systems. As for the latter, it is sufficient to state that the European Committee of Social Rights – neither in the examination of reports of state parties on the implementation of obligations (the so-called Conclusions), nor in the settlement of collective complaints (the so-called Decisions) – did not deal with the derogation clause of Art. 30 ESC/art. F RESC. Therefore, he did not take a position on the criterion of “*public danger threatening the life of the nation*”⁵⁰.

The UN Human Rights Committee devoted its concise General Comment for the first time to the problem of the derogation of commitments in 1981, repeating the formula in Article 4 (1) of the Covenant as to “*an exceptional public danger that threatens the life of the nation*, and adding that derogatory measures are being taken “*they are unique and temporary, and can only last as long as the life of the nation is threatened, and that, in an emergency, the protection of human rights becomes even more important, especially those rights which do not allow any derogation*”⁵¹.

⁴⁶ The Act of June 21, 2002 on the state of emergency, in Article 2 (1), repeats the definition in Article 230 of the Polish Constitution, adding “*including that caused by acts of a terrorist nature or activities in cyberspace*”. Paragraph 1a explains the concept of “cyberspace”.

⁴⁷ The Act of 29 August 2002 on martial law and the competences of the Supreme Commander of the Armed Forces and the principles of its constitutional subordination to the authorities of the Republic of Poland also repeats the determination of Article 229 of the Constitution, except that after the phrase “*In the event of an external threat to the state: and before the return*” armed assault” inserts the formula “*including that caused by acts of terrorism or cyberspace*”.

⁴⁸ T. Jasudowicz, *Legal opinion (of May 13, 2002) regarding the Act on Emergency*, adopted by the Sejm of the Republic of Poland on April 26, 2002, item 8 (2) (not public). I added: “*Our law (...) would be considered not to correspond to the term <law> within the meaning of treaties protecting human rights, and the responsibility of the Republic of Poland would already be recognized on this basis, without the need to go even into the matter of meeting further criteria*” – *ibidem*, act 3.

⁴⁹ See: R. Wieruszewski, *Artykuł 4: Nadzwyczajne niebezpieczeństwo publiczne*, [in:] *Międzynarodowy Pakt Praw Obywatelskich (Osobistych) i Politycznych. Komentarz*, ed. R. Wieruszewski, Warszawa 2012, p. 77.

⁵⁰ See: T. Jasudowicz, *The limits of enjoyment of human rights in the system of the European Social Charter*, point 2.2. (in edition).

⁵¹ See *General Comment No. 05: Derogation of Rights (Ar-*

Despite its brevity, the Committee's position is significant⁵². First of all, there is no derogation from the category of "*threat to the life of the nation*", it remains fully relevant and reaffirms. Secondly, this very basic criterion itself indicates the essential features of the emergency situation related to it: its uniqueness and temporality; as can be seen, the *ratio temporis* of derogation measures is determined by the continued threat to the life of the nation. Thirdly, the uniqueness and extraordinary situation of the situation is not intended to favor the freedom of the state's actions or for its wide margin of appreciation, since in such a situation the protection of human rights does not cease or lose its validity, but – on the contrary – it acquires significance.

After 20 years, the Committee issued another General Comment against the background of Article 4 of the Covenant, this time incomparably larger. Repeating the essence of its position in 1981 in paragraph 2, the Committee pointed out that "*Not all anxieties or disasters qualify as an exceptional public danger that threatens the life of the nation, as required by Article 4 (1)*"⁵³. However, in the course of preparatory work in the context of Article 4 of the Covenant, they were so strongly forbidden to make war, the Committee had in this connection made its basic findings, but using the concept of "*armed conflict*", according to the tendencies developed in international humanitarian law, which even it itself began to be called "*international humanitarian law of armed conflict*".

The Committee pointed out that "*During armed conflict – whether international or non-international – international humanitarian law standards are applicable and help, in addition to the provisions of Articles 4 and 5 (1) of the Covenant, prevent abuse of extraordinary powers of the state*"⁵⁴. Importantly, from the point of view of the problem being examined, the Committee strongly emphasized: "*The Covenant requires that even during an armed conflict, measures of derogation from the Covenant are permissible only if and to the extent that the situation poses a threat to the life of the nation*"⁵⁵.

Article 4), U.N. Doc. CCPR General Comment of 31 July 1981, points 1 i 3.

⁵² A. Michalska's assessment is not very favorable for the Committee's General Comment: "*this document does not bring new elements to the normative structure*" – A. Michalska, *op.cit.*, p. 15.

⁵³ *General Comment 29: States of Emergency (Article 4)*, UN Doc.CCPR/C/21/Rev.1/Add.11 (2001), point 3.

⁵⁴ *Ibidem*.

⁵⁵ *Ibidem* See interesting remarks of R. Wieruszewski regarding the "humanitarian law regime" and the applicabil-

Of course, the Committee did not overlook situations other than armed conflict; he also pointed out: "*If States Parties consider invoking Article 4 in situations other than armed conflict, they should carefully consider justification and why such a measure is necessary and legitimate in the circumstances*"⁵⁶. In the opinion, it also confirms the Committee's caution in granting States Parties too far-reaching powers as to their too arbitrary and broad interpretation, as well as in assigning them too wide a margin of appreciation.

In examining individual complaints addressed to it, the Committee required the respondent State to provide "*sufficiently detailed information about relevant facts to show that a situation like the one described in Article 4 (1) exists in the country concerned*"⁵⁷. The Committee emphasized that "*it needs complete and comprehensive information*", as well as the burden of proof for the defendant State as to the existence of the public danger that threatens the life of the nation⁵⁸.

20 years ago, Professor Michalska also referred to the Strasbourg case-law against the background of Article 15 ECHR. However, she considered only three cases: one based on an individual complaint (*Lawless v. Ireland*) and two based on inter-state complaints (the so-called *Greek case and Ireland v. The United Kingdom*)⁵⁹. Therefore, her research base was rather modest, already in that far incomplete at the time, and above all currently requiring an update. As a supplement, I will add the opinions of the Commission (together with any opinions of minority judges) in *Lawless, De Becker and Greece and Ireland v. The United Kingdom*⁶⁰ as well as the Court's judgments in the cases *Brogan v. The United*

ity of the Covenant *durante bello* – R. Wieruszewski, *op.cit.*, p. 77.

⁵⁶ *Ibidem*.

⁵⁷ *L. Weinberger Weiss v. Uruguay*, sk. 28/1978, Doc.A/36/40.

⁵⁸ As A. Michalska, *op.cit.*, p. 17 notes, "*The Committee demanded precise information about the reasons for the state of emergency, but did not analyze or comment on it*". Note, however, that he was able to consider them insufficient and reject as a justification for the derogation.

⁵⁹ *Ibidem*, s. 18–20.

⁶⁰ *Lawless Case*, Commission opinion of 19 December 1959 (together with the opinions of 5 judges – Waldock, Berg, Faber, Crosbie i Erima – Eustathiades, Susterhenn and. Dominedo); *De Becker Case*, opinia Komisji z 8 stycznia 1960 r.; *Case of Greece v. the United Kingdom*, Commission opinion of 2 October 1958; *Case of Ireland v. the United Kingdom*, Commission opinion of 25 January 1976 – follow: *Article 15 [in:] Digest of Strasbourg Case-Law relating to the European Convention on Human Rights*, vol. 4, Koln–Berlin–Bonn–München 1986, p. 193

Kingdom of 1988 and *Brannigan and McBride v. The United Kingdom* of 1993⁶¹.

As regards later case-law, which Professor Michalska could not take into account for *understandable time reasons*, I will mention two judgments against Turkey in the cases of *Aksoy and Sakik and others*⁶², as well as two subsequent judgments against Turkey issued in the 21st century⁶³ and above all in Grand Chamber's judgement *A. and others v. The United Kingdom*⁶⁴, which is like a summary of the entire case-law against the background of Article 15 of the Convention.

Of the 13 cases I considered, 4 were based on state complaints (*Greece v. The United Kingdom*, Commission opinion of 1958; *Denmark, Norway, Sweden and the Netherlands v. Greece* (the so-called Greek case), opinion of the Commission from 1969; *Cyprus v. Turkey*, opinion of the Commission from 1976; and *Ireland v. United Kingdom*, opinion of the Commission from 1976), while at the base of 9 others – individual complaints (*De Becker, Lawless, Brogan and Others*; *Brannigan and McBride, Aksoy, Sakik and Others, Nuray Sen, Yurttas, A. and Others*), of which 3 for the United Kingdom and 4 for Turkey. In 13 cases, 16 decisions were made, because in 3 cases – after the Commission – the Court still issued its judgments (*de Becker, Lawless, Ireland v. The Kingdom*).

In one case, the Court – in view of the withdrawal of the derogation notification by the respondent State – decided “not to examine whether the terrorist campaign in Northern Ireland allowed United Kingdom, pursuant to Article 15, on a derogation of obligations arising out of the Convention for it”⁶⁵. In 3 cases, the existence of a “threat to the life of the nation” was questioned⁶⁶,

in 9 and⁶⁷, in 2 cases – by examining the problem with the criterion “required by the situation” – the Court found that the state's steps were well beyond these limits⁶⁸.

In the *De Becker* case, the Belgian Government considered that “wartime measures, originally justified under Article 15, could not automatically cease to be effective when the war was ended” however, according to the Commission, “the measures of derogation which it provides for are only justified in the circumstances defined in para. 1 with the result that if they remain in force after those circumstances have disappeared they represent a breach of the Convention”⁶⁹.

I have given some examples above just to indicate that the Strasbourg authorities – both the Commission and the Court – assessed the situation of exceptional public danger threatening the life of the nation not in isolation and detachment from other requirements accompanying the derogation of obligations, including requirements *ratione loci* and *ratione temporis*, in the context of the requirement of public announcement and international notification of derogations, in a dynamic process of proving law and facts, together with the recognition that the burden of proof lies with the defendant State⁷⁰.

This does not impose any unbearable or excessive burden on the defendant government, as it is accompa-

any factor is outside the control of the public authorities. using normal means, and so that the situation is threatening the life of the Greek people”. On the other hand, in two Turkish cases, the Court found that the *ratione loci* situation did not meet the requirements of a derogation, as the events at issue took place outside the area covered by Turkey's derogation note – see: *Sakik et autres*, point 97; *Yurttas*, point 57–59.

⁶⁷ *Lawless*, point 28; *Ireland v. the United Kingdom*, point 224; *Brannigan and McBride*, point 93; *Aksoy*, point 96; *Nuray Sen*, point 26; *A. and Others*, point 180–181.

⁶⁸ See: *Aksoy*, point 84 (“The Court undoubtedly took into account the serious problem of terrorism in Southeast Turkey and the difficulties faced by the state in taking effective measures against it, but was not convinced. that the situation requirements justify the incommunicado applicant being detained as suspected of involvement in terrorist offenses for 14 days or more, without access to a judge or other judicial officer”). See also: *Nuray Sen*, point 27–28.

⁶⁹ *De Becker*, point 271[in:] *Digest...*, p. 211.

⁷⁰ In *Greek Case* point 154 The Commission pointed out that “in the present case, it is for the defendant government to demonstrate that the conditions justifying derogation measures under Article 15 have been met and are still met, with due regard to the <appreciation margin> from which, according to the constant case law of the Commission, in the assessment of the situation in Greece, the government benefited from the takeover of power on April 21, 1967”.

⁶¹ *Affaire Brogan et autres c. Royaume-Uni*, arrêt 20 novembre 1988; *Affaire Brannigan et McBride c. Royaume-Uni*, Cour (plénier), arrêt 26 mai 1993.

⁶² *Case of Aksoy v. Turkey*, judgment, 18 december 1996; *Case of Sakik and others v. Turkey*, judgment 26 November 1997.

⁶³ *Case of Nuray Sen v. Turkey*, judgment 17 june 2003; *Affaire Yurttas c. Turquie*, arrêt, 27 mai 2004.

⁶⁴ *A. and others v. the United Kingdom*, judgment, 19 February 2009.

⁶⁵ *Brogan et autres*, point 48 ak. 3 and 4. It is worth pointing out that before that the Tribunal – referring to its judgment in the *Klass and Others* case – recalled that: “In view of the spread of terrorism in modern society, the Tribunal has already recognized the necessity, inherent in the Convention system, of maintaining a fair balance between defense in the common interest of democratic institutions and safeguarding the rights of individuals” – *ibidem*, ak. 2.

⁶⁶ See: *Greek Case*, point 207, where the Commission “on the basis of the evidence submitted to it, has not established that

nied by a “margin of appreciation”. Already in the *Lawless* case, five judges indicated that “a certain discretion – a certain margin of appreciation – must be left to the Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention”⁷¹.

The Court’s case-law has even gone in the direction of granting “a wide margin of appreciation”. As the ECHR stated in the case of Ireland against the United Kingdom, “It falls in the first place to each Contracting State, with its responsibility for <the life of the nation>, to determine whether that life is threatened by a <public emergency> and, if so, how far it is necessary to go in attempting to overcome the emergency”⁷². The Strasbourg case-law clearly indicates that the Commission, and especially the Court were very favorable in relation to for the assessment competence of the States Parties to the Convention.

In the *Lawless* case, the Commission simply stated, by a majority of 9: 5, that “there was in Ireland, in July 1957, a public emergency threatening the life of the nation within the meaning of Article 15(1) of the Convention”⁷³. Judges stated that: “The natural and ordinary meaning of <a public emergency threatening the life of the nation> is, we think, a situation of exceptional and imminent danger or crisis affecting the general public, as distinct of particular groups, and constituting a threat to the organised life of the community which composes the State in question”⁷⁴.

Similarly, Eustathiades believed that “The expression <public emergency threatening the life of the nation> appears to me to refer to a situation much more serious than any state of affairs threatening public order or national security. as described in certain other Articles of the Convention; it implies, in fact, an emergency of such magnitude that it affects not one section of the population, but

the nation as a whole”⁷⁵. He explained that “the word <nation> is used to make it clear that what is meant is a threat to the existence of the population as a whole from some particularly serious emergency far outweighing any problems of public order and safety that may arise in other circumstances”⁷⁶.

Susterhenn, in turn, took the premise that “war is a fundamental threat to the very existence of the state”, that the experience of World War II – affecting the authors of the Convention in 1949–1950 – indicates that “war is taking on more and more the character of total war and threatens the life of the nation itself, that is to say, its frontiers and internal order, its economy and culture, as well as the life and liberty of its citizens”⁷⁷. He did not exclude “the existence of a potential threat that could threaten the life of the nation in the future”; however, he believed that “public danger, which is only potential, lasts for years in an unchanging form and does not lead to any serious violation of general public order or foreign relations, cannot be considered to have <exceptional gravity>, but only as <latent emergency of a minor degree>”⁷⁸.

According to Dominedo, Article 15 requires “the threat to be immediate, serious and persistent”; “the expression <public emergency threatening the life of the nation> means any unspecified emergency; it means a particular kind of emergency; and an extremely grave one; it must threaten the very life of the nation, i.e. the existence, as is shown beyond any shadow of doubt by the wording of Article 15 of the Convention”⁷⁹.

The Court was more precise than the Commission, which in *Lawless* ruled that “in the general context of Article 15 of the Convention, the natural and customary meaning of the words <other public emergency threatening the life of the nation> is sufficiently clear” “they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is

⁷¹ See: *Digest...*, p. 194. The judges used two formulas: “certain margin of appreciation” and “some margin of appreciation”.

⁷² *Ibidem*. In case *A. and Others v. the United Kingdom*, point 180 The Court confirmed in 2009: “National authorities have a wide margin to assess whether their nation’s life is at risk of <public danger>. (...) it belongs to each government, as the security guard of its own people, to make its own assessment on the basis of facts known to it”.

⁷³ *Lawless Case*, point 89. See the rich justification of the government – *ibidem*, point 85–86.

⁷⁴ See [in:] *Digest...*, p. 205. The judges also explained: “we are of the opinion that the preparatory work confirms that those who included these words in Article 15 (1) wanted them to have meaning which we consider to be their natural and ordinary meaning”. – *ibidem*, p. 206.

⁷⁵ *Ibidem*.

⁷⁶ *Ibidem*, p. 208. So he allowed a derogation “only in quite exceptional circumstances constituting, in addition to a threat to public order and safety, serious danger to the life of the nation as a whole” – *ibidem*, p. 209.

⁷⁷ *Ibidem*, p. 209. In his opinion: “Such a concept of modern war lies at the heart of Article 15, as evidenced by the fact that the words <during war> are followed by the words <other> public danger threatening <the life of the nation>”

⁷⁸ *Ibidem*, p. 209–210. Therefore, the situation in Ireland does not meet the requirements of derogation, but rather “is more a question of a danger against public order” – *ibidem*, p. 210.

⁷⁹ *Ibidem*, p. 210.

composed”⁸⁰. This formula was later constantly recalled in subsequent Strasbourg rulings⁸¹. In my personal opinion, an important enrichment of the criterion being understood is these “*a threat to the organised life of the community of which the State is composed*”.

The Commission in the Greek matter referred to this definition by adding two important elements. First, it pointed out that “*the notion of <imminent> danger, which is represented in French but not directly in the English text of the judgment, must be given weight because it is the French text which is authentic*”⁸².

Secondly, according to the Commission, “*a public emergency may then be seen to have, in particular, the following characteristics: (1) It must be actual or imminent; (2) Its effects must involve the whole nation; (3) The continuance of the organised life of the community must be threatened; (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate*”⁸³.

In another case of Ireland against the Kingdom, both the Commission⁸⁴ and the Court⁸⁵ did not focus on defining the threat, but on practical issues for determining it. Importantly, the Tribunal pointed out that: “*When a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements for the proper functioning of the authorities and for restoring peace within the community*”⁸⁶.

⁸⁰ *Lawless Case*, point 28.

⁸¹ See in: Commission in *Greek Case*, point 152; and Tribunal in: *Aksoy*, point 70; *A. and Others*, point 176 ak. 1.

⁸² *Greek Case*, point 153.

⁸³ *Ibidem*. I deliberately depart from translating Professor Michalska – See: A. Michalska, *op.cit.*, p. 18. It recalled the Commission’s position in the case – *A. and Others*, point 176 ak. 2.

⁸⁴ *Case of Ireland v. the United Kingdom*, Commission opinion of 25 January 1976. [in:] *Digest...*, p. 214. According to the Commission: “*The degree of violence, with bombing, shooting and rioting was on a scale far beyond what could be called minor civil disorder*”, so we can tell “*public emergency threatening the life of the nation within the meaning of Article 15*”, whose existence “*is not in dispute between the parties*”.

⁸⁵ The Tribunal considered that the United Kingdom did not exceed the limits of the margin of appreciation available to the Contracting States – *Case of Ireland v. the United Kingdom*, wyrok Trybunału z 18 January 1978, point 221.

⁸⁶ *Ibidem*, point 220. As the Court emphasized: “*The interpretation of Article 15 must leave room for gradual adaptations*”.

Similarly pragmatic in their approach to the problem under examination, the subsequent Court judgments in the cases of *Brogan and Others* and *Brannigan and McBride*, as well as in the cases of *Aksoy*, *Sakik and Others*, *Nuray Sen and Yurttas*⁸⁷. From the point of view of pragmatism, the latest model also fits this pattern judgment of *A. and Others*. Also in it – as in the above-mentioned cases – it is about the problem of terrorism as a phenomenon threatening the life of the nation, but this time it is international terrorism par excellence after the attack on the World Trade Center. The Tribunal – after reviewing the national aspects of the problem⁸⁸ and pointing to the negative position of the Council of Europe bodies⁸⁹ for the derogation – has broadly opened up to the universal system, recalling not only the General Comment of the UN Human Rights Committee⁹⁰, but also – and to a certain extent – the Syracuse Principles⁹¹.

This does not mean that he shared the requirements set in the context of the universal system. Let us recall that – while the Human Rights Committee emphasized the current and temporal nature of the derogation – the Court pointed out that “*the ECHR case law has never clearly incorporated the requirement that danger be “temporary”, although the question of proportionality of liability may involve the existence of danger*”⁹². Similarly, the Court relaxed the requirement of “*imminence*”, re-

⁸⁷ *Case of Aksoy*, point 68–70; *Affaire Sakik et autres*, point 38–39; *Case of Nuray Sen*, point 25–26; *Affaire Yurttas*, point 52–59.

⁸⁸ *Case of A. and Others v. the United Kingdom*, point 10–11, 16–18, 85, 102 and point 156–171.

⁸⁹ This is the opinion of the Council of Europe Commissioner for Human Rights of August 2002 and the Council of Europe Parliamentary Assembly Resolution 1271 (2002) of 24 January 2002 – cf. *Ibidem*, Paragraphs 103 and 106. However, the Court recognized without a doubt that ‘there was a danger public life-threatening nation’ – *ibidem*, paragraph 181.

⁹⁰ The Court referred to General Comment No. 29 of 2001, emphasizing – pursuant to paragraph 2 – that derogation measures must be ‘exceptional and temporary’ – see *ibidem*, paragraph 110.

⁹¹ *Syracuse Principles on the Limitation and Derogation Provisions in the International Covenant of Civil and Political Rights*, Anex UN Doc.E/CN.4/1984/4. The Court specifically referred to paragraphs 39–40 and 54 of the Syracuse Principles. – see *ibidem*, paragraph 109.

⁹² *A. and Others*, point 178 act 1. The Court recalled that public danger in Northern Ireland “*lasted for many years*” and pointed out that “*it does not think that derogatory measures introduced following Al-Qaida attacks on the US and examined annually by Parliament could raise charges that they were not <temporary>*” – *ibidem*, Point 178 act 2.

calling that “*it has never been interpreted so narrowly as to require the state to wait for a tragedy before taking measures to remedy it*”⁹³.

Regardless of whether in the given case it was a “war” or “other public danger”, the decisive criterion was “the threat to the life of the nation”. It can be added that in Strasbourg case-law cases related to terrorism in Northern Ireland and south-eastern Turkey clearly dominated, and that in cases of accidents, catastrophes or natural disasters the states did not introduce emergency states, Russia did not even do so in connection with subsequent wars in Chechnya⁹⁴.

In search of the essence and content of the “threat to the life of the nation” criterion

Research indicates a huge variety of factual situations that may pose a threat to the life of the nation, according to the ECHR formula “*war or other public emergency threatening the life of the nation*” or the ICCPR formula “*exceptional public emergency that threatens the life of the nation*”. Examples of this ‘public emergency’ include: wars (international or non-international armed conflicts), internal tensions and unrest, relations and external threat, terrorism (domestic and international), natural (natural) disasters⁹⁵ and major industrial disas-

ters⁹⁶, economic crises⁹⁷ and epidemics⁹⁸.

As we have seen above, the Strasbourg jurisprudence adopted from the outset the “*natural and ordinary meaning of words <other public emergency threatening the life of the nation> as “sufficiently clear”*”⁹⁹. All the uncountable wealth of events and situational convolutions can cause this public danger; however, irrespective of their type, the decisive factor is that they are “*threatening the life of the nation*”. Of these three words-components, the term ‘threat’ has been developed relatively best, with a number of adjectives characterizing them, namely: unique, real, current (subjected, territorial and temporal).

The feature of uniqueness (extraordinary, extraordinary nature), always indicated by everyone, and concluded implicitly in the very term, “*emergency*” emphasizes both the extraordinary nature of the situation or condition, as well as the measures necessary to remedy it¹⁰⁰. In particular in the Greek Case, the Commission emphasized.in. that “*the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate*”¹⁰¹.

⁹⁶ See *General Comment* 29, point 3. See: C. Mik, *Obowiązanie i stosowanie traktatów chroniących prawa człowieka w czasie wojny*, [in:] *Fides et bellum. Księga poświęcona Pamięci Księdza Biskupa, Profesora, Generała śp. Tadeusza Płoskiego*, ed. B. Sitek, T. Jasudowicz, M. Seroka, vol. I, Olsztyn 2012, p. 350; L. Garlicki, *Artykuł 15*, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, t. I: *Komentarz do artykułów 1–18*, ed., L. Garlicki, Warsaw 2010, p. 800 – speaks of “a large-scale industrial disaster”.

⁹⁷ N. Questiaux, *op.cit.*, Pointed to the economic crisis, including chronic underdevelopment; L. Garlicki, *op.cit.*, p. 800, takes into account the case of “*perhaps – also the collapse of the foundations of the economic system*”. In paragraph 41 of the *Syracuse Principles*, however, it was explicitly stated that “*Economic difficulties cannot, per se, justify derogatory measures*”; this inclusion “*per se*” is important, because in connection with the influence of other factors such justification could be provided. In the *Lawless case*, the Court found that Ireland reasonably derived the existence of a public threat to the nation from a “*bunch of factors*” – *Lawless Case*, paragraph 56.

⁹⁸ See: L. Garlicki, *op.cit.*, s. 800.

⁹⁹ The Court in its judgment – *Lawless*, para. 28. This was previously emphasized by five judges in their opinion – see above, p. 17; and the Court... in a judgment – *A. and Others*, paragraph 176.

¹⁰⁰ Meron – for Questiaux – speaks of the “*principle of exceptional danger*” – see Th. Meron, *Human Rights in Internal Strife: their International Protection*, Cambridge 1987, p. 53.

¹⁰¹ See above, pp. 18–19. The Constitution of the Republic of Poland provides for the introduction of an “appropriate emergency state” in situations of particular threat, if ordinary constitutional measures are insufficient.

⁹³ *Ibidem*, pkt 177 ak. 2. The Court added: “*Since the purpose of Article 15 is to enable the state to take derogatory measures to protect its population from future threats, the existence of <a threat to the life of the nation> must be assessed first and foremost with reference to those facts that were known at the time of managing the derogation*” – *ibidem*, pkt 177 ak. 3.

⁹⁴ Thus, for example, the Court stated: “*No martial law or martial law was declared in Chechnya. No federal law was issued regarding restrictions on the rights of the population of this area. No derogation has been made under Article 15 of the Convention*”. – *Case of Isayeva v. Russia*, judgment of 24 February 2005, paragraph 133.

⁹⁵ In the course of the discussion on the draft Article 4 of the ICCPR, France and India opposed the use of the term “*public emergency*”, treating it as “*too restrictive*”, because it does not include, for example, “*natural disasters that almost always justify the derogation of the state from at least some of the rights recognized in Pact*” – see *Guide...*, p. 86.

This is associated – as the Syracuse Principles say – with the “*intrinsic necessity*” principle, and this, objectively applied, requires an appropriate response so that each measure is “*focused on the current, clear, present or unavoidable danger, and not imposed “only in anticipation of a potential danger”*”¹⁰².

The requirement of temporal timeliness of danger means that a derogation must not be justified by past danger, e.g. war ended, as de Becker has clearly pointed out¹⁰³. In principle, it is therefore a current, “*here and now*” state of emergency, although it cannot be ruled out future, potential threats, provided that it is unavoidable (“*imminence*”, “*imminent danger*”). As the Court emphasized in *A. and Others*, “*The <imminence> requirement has never been interpreted so narrowly as to require the state to await the tragedy to come true before it takes measures to remedy it*”¹⁰⁴.

In the system of the Covenant, the Human Rights Committee strongly emphasizes the importance of the criterion of temporality of derogations¹⁰⁵. The system of OSCE *expressis verbis* formulates the principle of lifting the state of emergency as soon as possible; “*It will not last longer than the circumstances require*”¹⁰⁶. The situation is slightly different in the context of the ECHR system. In *Brannigan and McBride*, the Court acknowledged that “*Article 15 does not mention the hypothesis of a temporary suspension of the Convention’s guarantees*”¹⁰⁷.

¹⁰² *Siracusa Principles...*, point 54.

¹⁰³ *Ibidem*, p. 15. See also: J. Velu, *op.cit.*, p. 143.

¹⁰⁴ *A. and Others*, point 177 act 2. See, among others: L. Garlicki, *op.cit.*, P. 801; A. Michalska, *op.cit.*, P. 23; J. DeDeus Pinheiro Farinha, *op.cit.*, P. 523; J.F. Hartman, *op.cit.*, P. 16; B.G. Ramcharan, *op.cit.*, p. 110. In his opinion to the Commission’s report in the *Lawless case*, Susaterhenn argued that “*only the potential public danger, for years lasting almost unchanged and not leading to a serious disturbance of general public order or external relations, cannot be considered as extremely serious, but rather for <latent emergency> of a lesser degree “; (...) “cannot be considered as a public danger threatening the life of a nation (...)”* – see: Digest..., pp. 209–210.

¹⁰⁵ See General Comment, No 05, point 3; *General Comment*, No 29, point 2; R. Wieruszewski, *op.cit.*, p. 76.

¹⁰⁶ Point 28.3. *Document of the Meeting of the Moscow Conference on the human dimension of the CSCE* of October 3, 1991. See also: point 28.7. [in:] *International protection of human rights. Selection of documents*, compiled A. Bieńczyk-Missala, Warsaw 2008, p. 433 et seq. V.-Y. Ghebali, *op.cit.*, p. 34, disregarding the position of the Committee, strongly emphasizes this as “*a further innovation in relation to the Covenant*”.

¹⁰⁷ *Affaire Brannigan et McBride*, para 54 ak. 2. According to the Court: “*One should not deny the validity of the derogation for the sole reason that the government has decided to seek the possibility of finding a better means of implementing the*

Therefore, despite the prolongation of the emergency, it stated that: “*Given the nature of the terrorist threat in Northern Ireland, the scope of the derogation is limited and the recitals invoked to support it, as well as the existence of fundamental guarantees against abuse, the Court emphasizes that the government did not exceed its margin of appreciation, considering that the derogation corresponds to the strict requirements of the situation*”¹⁰⁸. In addition, in *A. and Others* the Court clearly cut off from the position of the Human Rights Committee, pointing out that the Strasbourg case-law “*has never explicitly incorporated the requirement that danger be temporary, but the question of proportionality of liability may involve the existence of danger*”¹⁰⁹.

Personally, I consider the question of what fundamental value the human rights derogation is to uphold as a fundamental issue? Who is to function? Who is to exist and survive? Who is to truly live? The wording in the Civil Covenant and in the European Convention clearly shows that it is a nation, no one else but a nation. At the same time, we know that it is not about any special or specific meaning of the concept, but about its natural and ordinary meaning. I will now try to look for this natural and ordinary meaning.

The history of travaux préparatoires in a universal and European system shows that they fought for better two formulas: “*the interests of the people*” and “*the life of the nation*”¹¹⁰. It was the latter formula that won. At the same time, on the basis of English political and legal terminology, there are turbulences that could raise doubts. When we read “*We, the People*” in the first words of the US Constitution and when we read “*We, the Peoples of the United Nations*” in the first words of the UN Charter, and when we read “*all peoples have the*

Convention’s obligations in the future. Such a process of continuous reflection not only agrees with Article 15 (3), which expects a constant examination of the need for exceptional measures, but also implicitly corresponds to the concept of proportionality”. – *ibidem*, point 54 act 3.

¹⁰⁸ *Ibidem*, Item 66. He questioned this in a separate opinion of Sr. Pettiti – see *ibidem*, p. 22. See the opinion of Martens – *ibidem*, p. 31. Judge Makarczyk demanded that “*the judgment clearly and unequivocally indicate. That the Court accepts the derogation li only as <une mesure struement temporaire>*”. – *ibidem*, p. 33.

¹⁰⁹ *Ibidem*, point 178 act 1. In Act 2, the ECHR added that “*Due to the situation in Northern Ireland, it is possible that “public emergency”(…) lasted for many years;” he did not think that “derogatory measures introduced after the attacks of Al-Qaeda on the USA and examined annually by Parliament could lead to accusations that they are not <temporary>*”.

¹¹⁰ *Ibidem*, p. 3–4.

right to self-determination”, then “people” we perceive as a nation, while “nation” we perceive as a state. However, this is a specific meaning, used in a special legal-state context, and it does not dominate in the Charter¹¹¹.

In a natural and ordinary sense, the state is a creation and the nation is its creator. It is true that the state as a subject of international law realizes sovereignty, but it is the nation that is the sovereign, it is the original bearer of sovereignty. It is he – in the mode of struggle for independence, and then in the peaceful mode of periodic implementation of citizens’ electoral political rights – that shapes his country, gives it the desired face, including by formulating the appropriate constitutional framework. No one can surpass Him in this respect, no parliament, because it is only the creation of a self-determining nation, no Constitutional Tribunal, and finally only the legislative establishment of the parliament.

Can the “*nation*” from the derogation clause of Article 4 of the Covenant and Article 15 of the European Convention be identified with the state as such, with the state party? Undoubtedly not. Perhaps, this is conceivable, and even directly follows from the formulation used in Article 27 (1) of the American Convention on Human Rights, which takes into account “*war*”, “*public emergency*” and “*another exceptional situation that threatens the independence or security of the state-parties*”¹¹². The use of the term ‘*state-party*’ in conjunction with its ‘*independence or security*’ determines a statist approach in which the state itself is a protected value.

This is not the case in the universal system or the European system. It is true that there are some misunderstandings in this regard. Yes. e.g. – otherwise very precise Hartman – mentions as one of the “*two central standards*” of the derogation the requirement that “*there is public danger that threatens the life of the state*”¹¹³. This confirms in its definition of “*life nation*”. In his opinion: “that a public emergency exists which threatens the life of the state” – “*The <life of the nation> clause signifies that the entire state, rather than a discrete segment of the population, must be menaced, and that some fundamental elements of statehood, such as the functioning of the judi-*

ciary or legislature or the flow of crucial supplies, must be seriously endangered”¹¹⁴.

Similarly, Judge Maridakis, in an individual opinion to the Court’s judgment in *Lawless*, stated: “*When a state fights to death, no one can require it to renounce extraordinary emergency measures: salus rei publicae suprema lex est. This is the principle of Article 15*”¹¹⁵. Long ago, also in the context of the Strasbourg authorities’ adoption of the concept of a wide margin of appreciation, I drew attention to the risk of “*<nationalization> of the situation itself <exceptional public emergency> which deviates from the fundamental value of protection, which is <the existence of the nation>, and tends to take into account the security of the state as such or even its system or regime*”¹¹⁶.

Of course, the category of “*life of the nation*” cannot be torn away from the state-important values, because in democratic conditions there is – or rather should be – a harmonious symbiosis between the nation and the state. It is hardly surprising, then, that in terms of the Syracuse Principles, the threat to a life of the nation is a threat that, among others “*Threatens (...) the political independence or territorial integrity of the state or the existence or basic functioning of the institutions necessary to ensure and protect the rights recognized in the Covenant*”¹¹⁷.

On the other hand, the category of a nation cannot be separated from the category of people, population or society, although it cannot be equated with it. Let us remind you that in the course of the preparatory work on Article 4 of the Covenant and Article 15 of the European Convention, two proposals accentuated “*the interests of the people*” and “*the life of the nation*”. In both systems the latter concept won. In his individual opinion to the *Lawless* judgment, Eustathiades stated: “*it is obvious that the expression <the life of the nation> can*

¹¹¹ Most often, the provisions of the Charter use the term “*members*” – see, among others: Article 2 points 1–5; 5–6, 17–19) or “*states*” – see Article 2, points 6–7; 3–4).

¹¹² Polish version [in:] *Międzynarodowa ochrona praw człowieka. Wybór źródeł...*, IV.1. The difference in this formula strongly emphasizes – A. Michalska, *op.cit.*, p. 12.

¹¹³ J.F. Hartman, *op.cit.*, p. 3, 11.

¹¹⁴ *Ibidem*, p. 16. However, Hartman was free from statist criticism when discussing Strasbourg rulings in the *Lawless* case and the *Greek case*. – see *ibidem*, p. 24–29. Van Dijk and van Hoof point to “*the supreme rights of the state to protect its democratic institutions*” – P. van Dijk, G.J.H. van Hoof, *op.cit.*, p. 548–549.

¹¹⁵ See: *Lawless Case*, ser., A, No. 1, p. 34. J. De Deus Pinheiro Farinha, *op.cit.*, p. 523, by public danger threatening the life of the nation means “*a completely unique situation which threatens or possibly threatens the normal functioning of public order, established in accordance with the legally expressed will of the citizens, as far as for the situation within borders, as well as relations with foreign countries*”.

¹¹⁶ T. Jasudowicz, *Determinanty...*, p. 96.

¹¹⁷ *Syracuse Principles...*, point 39b.

only apply to a situation at least as serious as any in which <the interests of the people> are threatened. A threat to the former is in fact more grave than a threat to the latter”¹¹⁸.

Summary

To sum up, it should be stated that, on the one hand, one cannot identify the category of the nation with the categories of the state and/or the population, because each of these categories has its due autonomy; while, on the other hand, they accompany, coexist and remain in mutual relationship and interaction. Therefore, it is not difficult to understand that in international standards, both the treaty provisions themselves and the treaty bodies in their rulings, consistently confirm the “life of the nation” as a fundamental protected value, which does not prevent them from associating this value with the values important for the state as such and for population/society.

The classic model of this approach has already been set by the ECHR in the *Lawless* case, where the Court characterized the derogation situation as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed” (fr. “une situation de crise ou de danger exceptionnel et imminent qui affecte l’ensemble de la population et constitue une menace pour la vie organisée de la communauté composant l’Etat”).

Indeed, in the Greek case, the Commission recalled that finding; but when it came to specifying the characteristics of the required public danger, it emphasized that its effects must “involve the whole nation” (and not “the whole population”, as was the judgment in *Lawless*)¹¹⁹.

In the latter respect, this “population” appears not simply as a population or society, but as a “community” which organizes its existence and functioning in the form of the state (“the community of which the State is composed”; fr. “la vie organisée de la communauté composant l’Etat”). Once I was more inclined to understand “life of the nation” as the existence or survival of the nation, which is more associated with the population

aspect, with being, in some ongoing state¹²⁰. For 123 years of partitions, the Polish Nation existed biologically and remained; perhaps it would have been forgotten, were it not for the eternally vivid spark of independence thought, were it not for the power of patriotism combined with faith and hope, if not for the repetitive uprisings of uprising. He not only persisted; He did not quench the spirit!

There is a great difference between the population and the community, between the people and the nation. That is why I cannot get overwhelmed when I observe translations into Polish which avoid the word “community”¹²¹. Even in the Polish encyclopedia of the People’s Republic of Poland, “the nation” was defined as “historically created, lasting community of people shaped on the basis of common historical fate, culture, language, territory and economic life, manifested in the consciousness of its national members”¹²². The national awareness of people/citizens, constituent entities of the nation is extremely important: it can revive their feelings, can unleash their activity, if necessary, prevent the death of the nation. In this sense, “life of the nation” is associated with national identity as a significant, internationally protected value, respect for which is declared – at least in terms of a slogan – by the basic treaties of the European Union.

“Life of the nation” is very concrete and very important quality. As long as the nation is truly alive and even enslaved by force, it will survive and flourish again. When a nation – even without physical enslavement – is completely discouraged, it loses all hope, gets lost in

¹²⁰ See “existence of a nation” [in:] T. Jasudowicz, *Determinanty...*, p. 96; “Existence” or “survival”: [in:] T. Jasudowicz, *Studium...*, p. 45.

¹²¹ See e.g. M. Lubiszewski, *Derogation of commitments in the field of human rights* [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, *Human rights and their protection*, 2nd edition, Toruń 2010, p. 248. A. Michalska, *op.cit.*, p. 19, cleverly gives an English quote, avoiding translations of, among others, “community” into Polish. In turn, L. Garlicki, *op.cit.*, p. 802, aptly writes about “threat to the organization of the life of the community forming the state”, but a little earlier – after B. Latos – he writes about “<life> (so existence or organized functioning) state or society” – *ibidem*, p. 800.

¹²² *Wielka encyklopedia powszechna PWN*, t. 7. Warszawa 1966, entry “Nation”, p. 623. To distinguish between ‘People’ and ‘Population’, *ibidem*, vol. 6, pp. 634 and 636, respectively. See also: imperfect, admittedly, nonetheless, a rich description of the entity constituting “we, the Polish nation” in the preamble to the Constitution of the Republic of Poland of April 2, 1997. 1997, No. 78, item 483.

¹¹⁸ See: *Lawless Case*, [in:] *Digest...*, p. 207. According to the Syracuse Principles, the threat to a life of the nation is “a threat which (among others): a) hits the entire population (...); and b) endangers the physical integrity of the population.

¹¹⁹ *Greek Case*, point 152–154, [in:] *Digest...*, s. 211.

itself, loses activity, loses elementary faith in the sense of political choices, and dies in a political sense. The nation, aware of its identity, active and full of hope, is the driving force, the constructor of its state and its system, and the social and political order that prevails in it. At the same time – from the perspective of the basic values of the European Convention – it embodies and reflects this “democratic society” which appears as a test of necessity in the context of limiting human rights, and which also constitutes a protected value in connection with the defense of “*the life of the nation*” on the basis of Article 15 para. 1 ECHR.

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