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## **Public Emergency Threatening the Life of the Nation<sup>1</sup>**

### **Normative Dimension**

The existence of a public emergency threatening the life of the nation is a condition stipulated by most human rights treaties which allows a State to avail itself of the power to derogate from some international obligations.

The European Convention on Human Rights allows States to derogate from some of the obligations under the Convention “in time of war or other public emergency threatening the life of the nation” (Article 15(1)). This clause was taken into consideration in the discussion of the International Covenant on Civil and Political Rights, with the United Kingdom being its strongest proponent. At the initial stages of its drafting, the clause drew criticism. On the one hand, suggestions could be heard which advocated dispensing with the derogation clause in favour of a general provision on allowable limitations on human rights, modelled on Article 29(2) of the Universal Declaration of Human Rights:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of oth-

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<sup>1</sup> Translated from: A. Michalska, *Niebezpieczeństwo publiczne, które zagraża życiu narodu*, in: *Prawa człowieka w sytuacjach nadzwyczajnych, ze szczególnym uwzględnieniem prawa i praktyki polskiej*, red. T. Jasudowicz, Toruń 1997 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

ers and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

On the other hand, suggestions were made that the derogation clause should be formulated as precisely as possible, so that States would be left with little discretion. In the Drafting Committee and Human Rights Commission, there were also opponents of any derogation clause, who argued that a treaty on human rights should not allow for a possibility to derogate from its obligations. Furthermore, animated discussions focused on the proposal to include in the derogation clause “war” or “natural disaster.”<sup>2</sup> One of the arguments used in this case was that any mention of war in a human rights treaty could suggest that the UN accepted military conflicts. The Third Committee of the UN General Assembly was almost unanimous in its opinion that an international military conflict was a model case of “public emergency threatening the life of the nation.” In the course of a discussion, an agreement was reached that the derogation clause also covered natural disasters.<sup>3</sup> Finally, Article 4(1) of the Covenant was drafted to read as follows: “In time of public emergency which threatens the life of the nation...”

In turn, the American Convention on Human Rights in its Article 27(1) says, “In time of war, public danger, or other emergency that threatens the independence or security of a State Party...”. This wording clearly differs from that of the European Convention and the Covenant, so it is surprising that the authoritative juristic literature has shown little interest in the American solution. The international documents that shall be discussed below rarely refer to the American Convention, either, while defining “public emergency.”

In Article 30, the European Social Charter allows for derogation from the obligations stipulated in it “in time of war of other public emer-

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2 U.N. Doc.E/CN.4/SR.127.

3 For a broader discussion, see M. Bossuyt, *Guide to the “travaux préparatoires” of the International Covenant on Civil and Political Rights*, Dordrecht 1987.

gency threatening the life of the nation.” The wording has been taken over *in extenso* from the European Convention, thus it can be reasonably expected that its interpretation made by the Commission and the Court of Human Rights will also be binding for the State Parties to the Charter. It is worth mentioning here that States have not availed themselves of this power so far, even when declaring a state of emergency and derogating from some obligations under the European Convention.

Derogation provisions referring to the clause “public emergency threatening the life of the nation” can be also found in OSCE documents. For instance, the Document of the Copenhagen Meeting (1990) contains the following clause “[...] any derogations from obligations relating to human rights and fundamental freedoms during a state of public emergency must remain strictly within the limits provided for by international law...” (Item 25). The Document of the Moscow Meeting (1991) says that:

The participating States confirm that any derogation from obligations relating to human rights and fundamental freedoms during a state of public emergency must remain strictly within the limits provided for by international law [...]. The participating States will endeavour to refrain from making derogations from those obligations from which, according to international conventions to which they are parties, derogation is possible under a state of public emergency (Items 28.6 & 28.7).

In the Document of the Moscow Meeting, we can also find an attempt to lay down the conditions for declaring a state of emergency which is “[...] justified only by the most exceptional and grave circumstances, consistent with the State’s international obligations [...].”

The “public emergency” clause not only excuses the derogation of some international obligations as in the international instruments quoted above. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment says, “No exceptional circum-

stances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture” (Article 2(2)).

On the regional level, this principle is laid down in the Document of the Copenhagen Meeting, in which the participating States stress that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture” (Item 16.3). Moreover, the Covenant and both regional Conventions list the ban on torture among the provisions that cannot be derogated from under any circumstances.

The phrase “public emergency threatening the life of the nation”, as any general clause, is subject to various interpretations. To attempt to determine some universal meaning of this clause, it is necessary to take into account the practice of States, the position of international bodies overseeing the implementation of human rights treaties, and the authoritative juristic literature.

### **The Practice of States**

Between 1985 and 1991, 80 States declared a state of emergency for a shorter or a longer period, which entailed the derogation from some international obligations in the sphere of human rights.<sup>4</sup> The States being parties to the Covenant explained the reasons for their decisions in notifications to the Secretary-General under Article 4(3). Thus, they interpreted the phrase “public emergency threatening the life of the nation.” Here are some examples:

- In connection with public riots threatening the stability of institutions, safety of the population and their property, and the nor-

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<sup>4</sup> *Fifth revised annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency*, presented by Mr Leonardo Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37.E/CN.4/Sub.2/1992/Rev.1 (hereinafter: Despouy).

mal functioning of public services (notification by Algeria of 19.06.1991).

- In connection with mass assaults and devastation of shops, vandalism and the use of firearms, with such acts seriously threatening the effective exercise of human rights and fundamental freedoms by the whole population (notification by Argentina of 12.06.1989).
- For the purpose of maintaining the rule of law, constitutional system, democracy and public order as well as continuing economic reforms and safeguarding against the hyperinflation that begins to threaten seriously the life of the country (notification by Bolivia of 29.10.1985).
- In connection with serious political and social unrest, including hyperinflation that affects the entire country; the need to modernise the structure of the State; illegal and terrorist activities of the extreme left; the activities of mafias smuggling narcotics (notification by Bolivia of 28.10.1986).
- For the purpose of protecting the public order in connection with the activities of the extremist groups that attempt to destabilise the government by force (notification by Chile of 7.09.1976).
- In connection with the escalation of terrorism that has caused the death of many people, trespassed on both public and private property, and seriously disturbed the economy (notification by Chile of 14.10.1984).
- Because of the activities of armed groups that attempt to destabilise the constitutional system by causing public disturbances (notification by Columbia of 11.04.1984).
- Due to terrorist activities headed by former high-ranking servicemen supported by extremist groups (notification by Ecuador of 17.03.1986).
- In consequence of illegal calls for a national strike which may lead to acts of vandalism, assaults on people and their property, and may disturb peace in the State and the exercise of civil rights (notification by Ecuador of 28.10.1987).

- In connection with the danger of war, imminent danger of armed attacks, acts of terrorism as a result of which people perish (notification by Israel of 3.10.1991).
- In connection with the unjust, unlawful and immoral aggression by the United States against the Nicaraguan people and their revolutionary government. The Nicaraguan government points to the following circumstances: the presence of US forces in the border area, which poses the constant threat of a military intervention, the activity of illegal sabotage groups sponsored by the US government, a trade blockade and an economic crisis in the country, which causes a major deterioration of the living conditions of the whole population (notification by Nicaragua of 11.10.1985).
- In connection with violent clashes between demonstrators and police forces, and calls—by individuals and political groups—for acts of violence, causing human casualties and major damage to property. The emergency measures undertaken are aimed at restoring the rule of law and order, and the protection of the life, dignity and property of citizens and foreigners (notification by Panama of 11.06.1987).
- Because of the danger of a civil war, economic anarchy and the destabilisation of the State and social structures, for the purpose of protecting the supreme national interest (notification by Poland of 29.01.1982).
- Due to nationalistic demonstrations often accompanied by the use of firearms, which causes damage to State and private property and puts State institutions in danger (notification by the Russian Federation of 18.10.1988).
- Because of the activities of extremist groups which disturb the social order, increase hostility between nations, do not hesitate to mine roads, use firearms in populated areas and take hostages (notification by the Russian Federation of 17.01.1990).

The above examples of arguments used by States to justify their decisions to proclaim a state of emergency and derogate from human rights obligations are too weak a foundation to determine the meaning and scope of the phrase “public emergency threatening the life of the nation.” This is due to the fact that the reasons for taking emergency measures vary greatly. Moreover, States rarely try to prove that events they invoke actually “threaten the life of the nation.” This phrase sometimes merely serves the purpose of embellishing the notification document.

## **The Decisions of International Bodies**

### **The Position of the Human Rights Committee**

#### **A. The General Comments**

The General Comments adopted on 2 July 1991 are an attempt to interpret Article 4 of the Covenant and specify the obligations of States under it. The Committee stresses that only few States give reasons for derogating from human rights in their reports. Measures taken under Article 4 are exceptional and may be applied as long as a threat to the life of the nation prevails. The short and laconic General Comments are essentially a repetition, using a slightly different style, of the Covenant, Article 4. Our aim to specify the meaning of the phrase “public emergency threatening the life of the nation” is not furthered in any way by the Comments. They do not contribute any new elements to its normative construction.

#### **B. Reports by States**

The Committee’s competence to examine the measures taken in the period of a state of emergency derives from Article 40(2) of the Covenant, which makes States report “difficulties affecting the implementation of the present Covenant.” Adopted by the Committee, the “Guidelines” on the content and form of such reports do not specify any requirements

as to what information ought to be submitted in relation to Article 4. In practice, States do not submit detailed information on the application of Article 4. What they as a rule do instead is merely quote the notification submitted to the Secretary-General.

In the course of discussions of reports, Committee members asked the representatives of States about the political, social and economic circumstances or the natural disasters justifying the proclamation of a state of emergency. They also inquired about the meaning, in relation to the internal law of particular States, of such phrases as “public order”, “public safety”, “public security”, “national security”, “international terrorism”, “subversion”, etc. The Committee, however, did not make any attempt to define the criteria of “public emergency threatening the life of the nation.” The few attempts at a more thorough discussion that did take place took on a political hue and ended in a fiasco. For instance, in relation to the report of the United Kingdom mentioned earlier, the Soviet member of the Committee had doubts if terrorist attacks confined to a relatively small territory constituted a “public emergency threatening the life of the nation.” In reply, the British representative argued that the existence of such an emergency was obvious and invoked the ruling of the European Court of Human Rights (see below).

The general wording of the supervisory powers of the Committee confined the discussion on the application of Article 4 to questions asked by particular members and prevented any conclusion being reached. The most popular view was that the State was obliged “to ascertain whether there was justification for each and every derogation under that article.”<sup>5</sup> However, Committee members did not study the reasons for a state of emergency given by particular States.

Indeed, it was the case that a state of emergency proclaimed pursuant to Article 4 of the Covenant was not studied by the Committee at all. The martial law declared in Poland in 1981 completely escaped the attention of the Committee, owing to the time limits for submitting

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5 E.g. in relation to the report by the United Kingdom; A/34/40, p. 55.



periodic reports, which were fortunate for the government of People's Poland.

Beginning with April 1991 (41st Session), the Committee made it a practice to ask State Parties to submit urgently relevant information when human rights are threatened due to a state of emergency. Usually, States were given a three-month time limit for sending in explanations. Radical steps were taken by the Committee only in 1993, when during the 47th Session, Article 66 of its rules of procedure was amended by the addition of para. 2, reading as follows:

Requests for submission of a report under article 40, paragraph 1 (b), of the Covenant may be made in accordance with the periodicity decided by the Committee or at any other time the Committee may deem appropriate. In the case of an exceptional situation when the Committee is not in session, a request may be made through the Chairperson, acting in consultation with the members of the Committee.

In the same year (during the 49th Session), the Committee decided that if the analysis of a report submitted by a State under Article 40 of the Covenant led to the conclusion that there was a “grave human rights situation”, it could ask the Secretary-General to inform of the situation competent UN bodies, including the Security Council.<sup>6</sup>

### C. Individual Complaints

Considering individual complaints, the Committee studied *ex officio*, if circumstances called for it, if a State complied with the requirements of Article 4 of the Covenant. The Committee many times expressed the view that:

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<sup>6</sup> *Report of the Human Rights Committee*, vol. I, G.A. Official Records, Forty-ninth Session, Supplement No. 40/A/49/40.

[...] the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4(1) of the Covenant in proceedings under the Optional Protocol [...]. In order to assess whether a situation of the kind described in article 4(1) of the Covenant exists in the country concerned, it needs full and comprehensive information.<sup>7</sup>

In connection with complaints against Uruguay, its government referred to the emergency measures it undertook in the submitted explanations. However, the Committee consistently argued that the State was duty-bound “[...] to give sufficiently detailed information on the relevant facts to show that the situation of the kind described in article 4(1) of the Covenant exists in the country concerned.” In addition, it asserted that the State “has not made any submission of fact or law to justify such derogation.”<sup>8</sup>

As far as the procedure of considering individual complaints is concerned, the Committee’s view is that the burden of proof for the existence of “a public emergency threatening the life of the nation” lies with the State. In the strongest criticisms, the Committee expressed the view that “the reasons given in the official notification are insufficient to justify the derogations from rights...” The Committee demanded detailed information on the reasons for proclaiming a state of emergency but it neither studied nor commented on it.

## **The Decisions of the European Commission and the Court of Human Rights**

### **A. State complaints**

State Parties to the European Convention took advantage of their right to derogate from human rights pursuant to Article 15, with some decisions

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<sup>7</sup> Cf. *Silva vs. Uruguay*, complaint no. 34/1978, Doc. A/36/40; *S. de Montejó vs. Columbia*, complaint no. 64/1979, Doc. A/36/40.

<sup>8</sup> *L. Weinberger Weisz vs. Uruguay*, complaint no. 28/1978; *L. Buffo Carballal vs. Uruguay*, complaint no. 44/1979; *D. Sallias de López vs. Uruguay*, complaint no. 52/1979; Doc. A/36/40.

being contested by other States filing complaints. The positions taken by the Commission and Court were rather consistent on the question of the definition of “public emergency.” Therefore, they shall be illustrated with only two examples.

In the case of Denmark, Norway, Sweden and the Netherlands vs. Greece, the government of the last-mentioned country argued that it was necessary to proclaim a state of emergency due to the following circumstances: communist threat, a crisis of constitutional bodies, and a crisis of public order. Specifying these arguments further, the Greek government claimed that communists active in the country and abroad conspired to carry out an armed coup and planned a takeover of power. To make matters worse, some other political parties collaborated with the communists, incessant cabinet reshuffles made it impossible to govern the country, continued strikes had brought the country to the verge of bankruptcy, and violent street demonstrations threatened the onset of anarchy. The Human Rights Commission found that the Greek government did not prove to a sufficient degree that the situation in their country corresponded to the above description. Thus, the Commission took the stance that the application of Article 15 depended on the prior finding if the values that are to be protected by derogation measures are indeed threatened. It is worthy of note that the Commission relied on witness testimonies, press reports and other information besides the explanations submitted by the Greek government.

In the case in question, the Commission opined that an “emergency that threatens the life of the nation” had to answer the following description:

- The emergency is imminent and serious,
- The consequences of the emergency affect the whole population,
- The organised life of the community of which the State is composed is under threat,
- The crisis or emergency must be exceptional, i.e. the ordinary measures or restrictions provided for in the Convention are plainly

inadequate to maintain public safety, order and the health of the population.<sup>9</sup>

The concept of “public emergency” was the subject of decisions by the Commission and Court in the case of Ireland vs. United Kingdom. The British government first and foremost invoked the extensive activity of paramilitary organisations in Northern Ireland. Both the Commission and the Court found that these circumstances constituted a “public emergency” within the meaning of Article 15 of the Convention.<sup>10</sup>

The procedure of hearing complaints filed by States is objective in nature, that is, its purpose is to protect the values proclaimed by the European Convention and not the rights or interests of parties. It follows that even when the complaining State does not question the existence of a public emergency in the State it levels charges against, the Strasbourg bodies conduct appropriate inquiries. The finding that a public emergency occurred is in principle the starting point for the evaluation whether the measures taken by a State complied with the Convention requirements. It must be realised that it is difficult to draw a clear line between these two stages because an international body, while evaluating measures taken by a State, does this keeping in mind the assessment of the gravity of a public emergency.<sup>11</sup>

## B. Individual Complaints

The definition of a “public emergency threatening the life of the nation” was formulated in 1959 in connection with the Lawless Case. It was a precedent then and together with the definition adopted in the Greek case mentioned earlier, it is a benchmark for international overseeing bodies. In relation to the complaint of Lawless vs. Ireland, the Commission found that the country witnessed “an exceptional situation of crisis

9 The Greek Case (1969), *Report of the European Commission of Human Rights of 5 November 1969*, *Yearbook of the European Commission of Human Rights*, vol. XII, p. 72.

10 *Report of the European Commission of Human Rights of 25 January 1976*; *Judgment of the European Court of Human Rights of 18 January 1978*, Publications of E.C.H.R., A.25(1978), p. 78.

11 Cf. P. van Dijk, G.J.H van Hoof, *Theory and Practice of the European Convention on Human Rights*, Sec. Ed., Kluwer, Deventer–Boston 1990.

or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”<sup>12</sup> This finding was affirmed by the Court, who in its opinion found that the Irish government had had the following grounds to conclude that a public emergency threatening the life of the nation existed. Firstly, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities immediately prior to the proclamation of the state of emergency.<sup>13</sup>

From the decisions of the Strasbourg bodies, the clear principle can be deduced that State Parties are empowered to, and responsible for, judging if a specific situation “threatens the life of the nation.” Article 15 of the Convention gives some discretion, which, however, may not be identified with full power. The Court and Commission are, under Article 19 of the Convention, responsible for ensuring that States observe the engagements they have undertaken. These bodies investigate if States “[...] have gone beyond the extent strictly required by the exigencies of the crisis.” In other words, the margin of discretion is subject to international oversight, including the establishment of the existence of a public emergency.<sup>14</sup>

### **The Position of the American Human Rights Commission**

In a resolution adopted in 1968, the Commission expressed the view that the suspension of constitutional guarantees or the proclamation of

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<sup>12</sup> *Report of the European Commission of Human Rights of 19 December 1959, Yearbook...*, vol. VII, pp. 472–474.

<sup>13</sup> European Court of Human Rights, Judgment of 1 July 1961, Publications E.C.H.R. A.3 (1961), pp. 57–59.

<sup>14</sup> Cf. Handyside Case, Judgment of 18 January 1978, *Publications...* A.25(1978), p. 78; and the case of Ireland vs. United Kingdom.

a state of emergency was admissible in a democratic system of government “when adopted in the case of war or other serious public emergency threatening the life of the nation or the security of the State.”<sup>15</sup> Adopted a year later, the Convention uses in its Article 27 a slightly different wording (see Item I above) from which the phrase “threatening the life of the nation” disappeared. The reasons for the discrepancy are difficult to indicate, but it should be stressed that in the procedure of international oversight, the Commission invoked both instruments.

The quoted resolution authorises the Commission to investigate whether exceptional measures were taken in accordance with the constitution (letter a), and whether they are proportional to the exigencies of the situation (letter b). However, no mention is made of the powers of the Commission to assess whether a state of war or another serious public emergency exists in a State (letter c). Nevertheless, the Commission has made pronouncements on this matter several times. Here are the examples.

In the Report on the Situation of Human Rights in Chile, the Commission acknowledged that “[...] although the situation in the country is not completely normal, it is far from a state of war. Consequently, there are no reasons for a further suspension of constitutional guarantees.” In the Report on the situation in Paraguay, the Commission did not question the necessity or advisability of the proclamation of a state of emergency but accused its government of not indicating the period for which human rights were derogated from. In the Report on Nicaragua, the Commission ascertained that successive decisions to extend the state of emergency made it “[...] permanent in fact, although the situation in the country does not justify such measures.”<sup>16</sup>

In the Report on Colombia, the Commission took the view that “proclamation of a state of siege was justified by the circumstances, but it contravened Article 27 of the American Convention nonetheless.”

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15 *Resolution on the Protection of Human Rights in Connection with the Suspension of Constitutional Guarantees or the State of Siege*, OEA/Ser.L/V/II. 19 Doc. 32.

16 Cf. T. Buergenthal, R. Norris, D. Shelton, *Protecting Human Rights in the Americas. Selected Problems*, N.P. Engel, Kehl-Strasbourg 1982, p. 212.

The American Commission was unable to define more closely the concept of “public emergency threatening the life of the nation”, because it is not found in the Convention. Instead, the Commission judged if the situation in a country threatened the values listed in Article 27 of the American Convention. In the Report for the OAS General Assembly drawn up in 1980–1981, the Commission recommended that Member States resort to derogation from human rights in truly exceptional situations.<sup>17</sup> Analogous resolutions were adopted later as well.

### **The Position of the UN Human Rights Commission**

In 1977, the Sub-commission on Prevention of Discrimination and Protection of Minorities decided to monitor continuously the impact of states of emergency on human rights. Nicole Questiaux submitted the first report on this question in 1982.<sup>18</sup> A year later, the Sub-Committee decided to include in its annual agenda the item “Realisation of the right to derogation established in Article 4 of the Covenant on Civil and Political Rights, and human rights violations.”

Questiaux distinguished three types of situations, which she classified as a “public emergency threatening the life of the nation.”

First, a political crisis involving an international military conflict, a war for national independence, a military conflict of a non-international character, riots or internal tensions. The humanitarian law applies to the first two situations.

Second, *force majeure* such as an earthquake, flood, cyclone, volcano eruption, etc. Such events may justify derogation from human rights,

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<sup>17</sup> The Report was drawn up in connection with the complaint filed by Pedro P. Camargo and explanations submitted by the State concerned. Camargo also filed a complaint with the Human Rights Committee, making very similar allegations. The view of the Committee was similar (not identical, though) to the position of the American Commission.

<sup>18</sup> *Question of the Human Rights of Persons Subjected to any Form of Detention or Imprisonment: Study of the implication 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, hereinafter quoted as “Questiaux”.

but only when the events are rare and unusual in a given area. It is worth mentioning in this context that Erica-Irene Daes (also a Rapporteur of the Human Rights Commission) believed that *force majeure* could justify a restriction of certain human rights but not their derogation.<sup>19</sup>

Third, an economic crisis, including chronic economic underdevelopment. In the course of discussion on the draft Covenant, views were expressed that such circumstances could not justify the application of Article 4.

A “state of emergency”, which in national law is sometimes referred to as “state of siege, of alert, of prevention, of internal war, or as martial law and special powers, is treated by Questiaux as a “state of law being a consequence of exceptional circumstances.” She defines the latter as “a crisis situation affecting the population as a whole and constituting a threat to the organised existence of the community which forms the basis of the State.”

The Ad Hoc Working Group of the Human Rights Commission that investigated human rights violations in Chile in the light of Article 4 of the Covenant “has not found, so far, any serious elements attesting to the existence of danger of a degree of internal disturbance which could have motivated the extensive suspension of constitutional guarantees that has occurred in Chile” (170).<sup>20</sup> It was this report among others that was a starting point for the discussion of severity, which shall be discussed in section IV.

### **Authoritative Juristic Literature**

In 1984, a group of 31 outstanding experts on international law adopted a document entitled “The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political

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<sup>19</sup> *Study of the individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights*, E/CN.4/Sub.2/432/Rev.1.

<sup>20</sup> *Report of the Ad Hoc Working Group on the Situation of Human Rights in Chile*, U.N. Doc. A/10285/1975.



Rights”, popularly known as the “Siracusa Principles”, in reference to the conference venue. Item II, letters A & B, of the document analyses the meaning and scope of application of the clause “public emergency threatening the life of the nation.” It reads as follows:

39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called “derogation measures”) only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the state; and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.
40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.
41. Economic difficulties *per se* cannot justify derogation measures.<sup>21</sup>

The Siracusa Principles strongly emphasise two circumstances. First, the ultimate purpose of derogation from obligations is the protection of human rights. Second, only serious disturbances of social and political life may be classified as a threat to the life of the nation. Hence, these proposals go further than the linguistic interpretation of Article 4 of the Covenant and Article 15 of the European Convention allows. They meet halfway, however, the interpretation put on these articles by the Strasbourg bodies. Furthermore, the Principles impose unequivocally, albeit implicitly, a prohibition against derogation from human rights

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<sup>21</sup> *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>.

obligations for preventive purposes. In other words, a threat must be imminent for derogation to take place.

The Siracusa Principles do not provide a typology of the situations that may be recognised in good faith as a threat to the life of the nation. What they underscore, as does the Questiaux report, is the principle that economic difficulties cannot justify derogation from human rights because, as a rule, they do not satisfy the requirement of “exceptionality.”<sup>22</sup>

An attempt to clarify the meaning of the phrase “public emergency threatening the life of the nation” was made by J. F. Hartman, one of the authors of the Siracusa Principles.<sup>23</sup> First, Article 4 of the Covenant should be invoked only in extraordinary and extreme states and not in situations of chronic political or social tension. Second, an emergency must threaten the population as a whole and equally, and also the functioning of democratic institutions. Third, an emergency must be imminent and serious, not only potential or barely noticeable.

As examples of this understanding of a public emergency, Hartman gives military conflicts, internal riots, natural and nuclear disasters, if their effects seriously destabilise social life. Further, a large-scale economic crisis or chronic famine and underdevelopment, causing social or political unrest, may justify derogation from obligations in exceptional cases.

When interpreting Article 4 of the Covenant, faced with rather general and laconic decisions of the Human Rights Committee, the juristic literature turns to the accumulated decisions of the Strasbourg bodies. M. Nowak proposes the following criteria for a “public emergency”: it must be real, direct, affect the population as a whole, prevent organised social life from continuing, while limitations provided for in specific regulations are inadequate.<sup>24</sup>

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22 Cf. D. O’Donnell, *Commentary by the Rapporteur on Derogation, Human Rights...*, “Human Rights Quarterly” 1985, vol. 7, no. 1, pp. 23–27.

23 *Working Paper for the Committee of Experts on the Article 4 Derogation Provision, Human Rights...*, pp. 89–91.

24 *UN Covenant on Civil and Political Rights, CCPR Commentary*, N.P. Engel, Kehl-Strasbourg 1993, p. 78 ff.

Moreover, the juristic literature discusses the geographic scope, degree of severity and time in which an emergency occurs. Hartman believes that an emergency having a limited geographic scope (raids by terrorist groups across the border) justifies derogation from obligations, provided that it affects the operation of State institutions. He clearly alludes to the position of the European Human Rights Commission which in the Lawless Case found that “armed raids by the IRA across the border jeopardise the external relations of Ireland and, consequently, the life of the nation.” However, industrial unrest of a local character does not justify the declaration of a state of emergency in the whole country.<sup>25</sup>

The severity of an emergency must be “exceptional” indeed in order to avoid the situation Questiaux calls a “permanent and institutionalised” state of emergency. Different political views shared by a part of society and political unrest must be—at least to some degree—tolerated in a democratic State. Competent bodies may limit particular rights on account of State security or public order, but derogation serves only “to protect the life of the nation.”

The clause “public emergency threatening the life of the nation” is functionally tied to other conditions for derogating from human rights, which are stipulated in relevant regulations. The juristic literature and international bodies are chiefly interested in the scope of derogation and the principle of the proportionality of measures.<sup>26</sup>

## Conclusion

The study of international instruments, decisions and the authoritative juristic literature leads to the conclusion that a public emergency threat-

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<sup>25</sup> The Chilean government declared a state of emergency in response to the “lunch-box campaign” conducted by workers in the El Loa province. This decision was strongly criticised in: *Report of the Ad Hoc Working Group...*, U.N. Doc. E/CN.4/1210 (1979).

<sup>26</sup> Cf. International Commission of Jurists, *States of Emergency. Their Impact on Human Rights* (1983); *Rule of Law in a State of Emergency* (1988); D. McGoldrick, *The Human Rights Committee*, Oxford 1991.

ening the life of the nation may have a military, social, political, economic or finally ecological character. Moreover, an emergency may be external or internal. It seems, however, that the assessment of whether a public emergency exists should be based more on its severity than on its character. In other words, the severity of a threat, not its kind, should be considered a reason for derogation from international obligations. In this respect, however, one can hardly expect international bodies to work out tolerably uniform benchmarks. A factor that in one State is considered a major threat to the life of the nation may be considered a minor occurrence in another State, with the assessment always being made by those who govern, not the governed.

In October 1996, the Polish Sejm debated the motion to bring to trial before the Tribunal of State persons responsible for proclaiming martial law in Poland on 13 December 1981. The report of the Constitutional Accountability Committee argued that “the then authorities had compelling reasons to be afraid of a foreign intervention and moreover, the threat consisted in “activities of the opposition attempting to change the system of government and the possibility of the eruption of street fighting due to demonstrations announced by the Solidarity.” The well-known *Gazeta Wyborcza* columnist Ewa Milewicz in her commentary on the report wrote, “It is not known whether the proclamation of martial law was a prohibited act. This matter could not be decided by ruling coalition deputies, members of the Sejm Constitutional Accountability Committee.” Let these words be the conclusion to the present article.

### References

- Bossuyt M., *Guide to the “travaux préparatoires” of the International Covenant on Civil and Political Rights*, Nijhoff Pub, Dordrecht 1987.
- Buergenthal T., Norris R., Shelton D., *Protecting Human Rights in the Americas. Selected Problems*, N.P. Engel, Kehl-Strasbourg 1982.
- D. Sallias de López vs. Uruguay, complaint no. 52/1979; Doc. A/36/40.

Dijk P. van, Hoof G.J.H van, *Theory and Practice of the European Convention on Human Rights*, Sec. Ed., Kluwer, Deventer–Boston 1990.  
European Court of Human Rights, Judgment of 1 July 1961, Publications E.C.H.R. A.3 (1961).

*Fifth revised annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency*, presented by Mr Leonardo Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37.E/CN.4/Sub.2/1992/Rev.1 (hereinafter: Despouy).

Handyside Case, Judgment of 18 January 1978, *Publications...* A.25(1978).

International Commission of Jurists, *States of Emergency. Their Impact on Human Rights* (1983).

*Judgment of the European Court of Human Rights* of 18 January 1978, Publications of E.C.H.R., A.25(1978).

L. Buffo Carballal vs. Uruguay, complaint no. 44/1979.

L. Weinberger Weisz vs. Uruguay, complaint no. 28/1978.

McGoldrick D., *The Human Rights Committee*, Clarendon Press, Oxford 1991.

O'Donell D., *Commentary by the Rapporteur on Derogation*, Human Rights, "Human Rights Quarterly" 1985, vol. 7, no. 1.

*Question of the Human Rights of Persons Subjected to any Form of Detention or Imprisonment: Study of the implication 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, hereinafter quoted as "Questiaux".  
Report by the United Kingdom; A/34/40.

*Report of the Ad Hoc Working Group on the Situation of Human Rights in Chile*, U.N. Doc. A/10285/1975.

*Report of the Ad Hoc Working Group on the Situation of Human Rights in Chile*, U.N. Doc. E/CN.4/1210 (1979).

*Report of the European Commission of Human Rights* of 19 December 1959.

*Report of the European Commission of Human Rights* of 25 January 1976.  
*Report of the Human Rights Committee*, vol. I, G.A. Official Records,  
Forty-ninth Session, Supplement No. 40/A/49/40.

*Resolution on the Protection of Human Rights in Connection with the  
Suspension of Constitutional Guarantees or the State of Siege*, OEA/  
Ser.L/V/II. 19 Doc. 32.

*Rule of Law in a State of Emergency* (1988).

S. de Montejo vs. Columbia, complaint no. 64/1979, Doc. A/36/40.

Silva vs. Uruguay, complaint no. 34/1978, Doc. A/36/40.

*Study of the individual's duties to the community and the limitations on  
human rights and freedoms under article 29 of the Universal Declara-  
tion of Human Rights*, E/CN.4/Sub.2/432/Rev.1.

The Greek Case (1969), *Report of the European Commission of Human  
Rights of 5 November 1969*, *Yearbook of the European Commission of  
Human Rights*, vol. XII.

*The Siracusa Principles on the Limitation and Derogation Provisions  
in the International Covenant on Civil and Political Rights*, [https://  
www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-IC-  
CPR-legal-submission-1985-eng.pdf](https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-IC-CPR-legal-submission-1985-eng.pdf).

U.N. Doc.E/CN.4/SR.127.

*UN Covenant on Civil and Political Rights, CCPR Commentary*,  
N.P. Engel, Kehl-Strasbourg 1993.

*Working Paper for the Committee of Experts on the Article 4 Derogation  
Provision*, *Yearbook of the European Commission of Human Rights*,  
vol. VII.

## SUMMARY

### **Public Emergency Threatening the Life of the Nation**

The paper is an English translation of *Niebezpieczeństwo publiczne, które zagraża życiu narodu* by Anna Michalska, published originally in Polish in *Prawa człowieka w sytuacjach nadzwyczajnych, ze szczególnym uwzględnieniem prawa i praktyki polskiej* in 1997. The text is published as a part of a jubilee edition of the “Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law” devoted to the achievements of the representatives of the Poznań studies on international law.

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