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DEROGATIONS OF HUMAN RIGHTS WITHIN THE FRAMEWORK OF THE ECHR (IN THE LIGHT OF THE DEROGATIONS BY UKRAINE, FRANCE AND TURKEY)

SUMMARY: 1. Introduction. – 2. Conventional Regulation of Derogation of Rights in the ECHR. – 3. Limits and Content of the Derogable Rights. – 4. Procedural Obligations regarding Derogation of ECHR guarantees. – 5. Conclusions.

1. *Introduction*

One of the most interesting areas of legal principle arises where two equally applicable legal rules are superimposed. The law itself provides mechanisms to cover such circumstances. In the case of the protection of human rights and the safeguarding of the common good, two frameworks are relevant. One is the margin of appreciation states have to take measures that contravene the protection of human rights in specific situations in which the very authority of the state is at stake; clearly, human rights must necessarily be restricted if they are not to prove abusive. The second framework is the possibility of the temporary suspension of these rights (derogation) in order to prioritise national security. In other words, the purpose is to adapt the principles of law to exceptional situations.

As stated in Article 30 of the American Convention on Human Rights, such restrictions are permitted for reasons of general interest[1] or of the temporary derogation – or suspension – of guarantees, depending on the international legal text.

As Salerno mentions «Derogation provisions are of crucial importance at least for three reasons. Firstly, it is better to decide in advance what measures have to be adopted in time of emergency or crisis; secondly, these clauses establish specific limitations to restrain states' action;

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[1] This concept of general interest has been further developed by the Inter-American Commission of Human Rights in its Advisory Opinion *The Word "Laws" in Article 30 of the American Convention on Human Rights* (1986), § 28-30. This may be of interest in regard to the ECHR.

finally, for a derogation to be adopted, states are required to provide a valid justification, that is related to the safety of the nation, not to the pursuit of their own interests»[2].

In this paper I shall limit myself to analysing derogation (the term used in Article 15 of the text of the European Convention on Human Rights) in time of war or other public emergency threatening the life of the nation.

I mention Article 15 of the European Convention on Human Rights (ECHR) since I shall be focusing exclusively here on the European framework of the Council of Europe. However this must be compatible with the international framework, given that European states also have legal obligations pursuant to other international agreements such as the International Covenant on Civil and Political Rights of 1966[3].

In my analysis, I will examine the European regional framework (i.e. the framework of the Council of Europe). I will analyse two essential elements, case law and the circumstances that have arisen to date, to determine how they might also operate in the cases of Ukraine, France and Turkey, the three states which have recently derogated from their human rights obligations in accordance with the procedures established in the ECHR. I shall examine the rules contained in the ECHR on derogation of rights, the limits and content of derogable rights and the procedural obligations on suspension of ECHR guarantees[4].

Why is the case law of the European Court of Human Rights (hereafter ECtHR) important? Because the court itself recognises that its judgements serve to raise the standards of protection and the extension of rights throughout the community of member states[5]. This analysis will therefore serve to ascertain whether those standards are being – or have been – taken into account in the present circumstances in the three states in question.

2. *Conventional Regulation of Derogation of Rights in the ECHR*

Article 15 of the ECHR allows for the possibility of suspending certain obligations set out in the Convention, under the heading "Derogation in time of emergency", (the French text refers to cases "d'état d'urgence").

When it refers to a time (or state) of emergency, does the ECHR require a formal public proclamation of such a circumstance?

Under the rules of interpretation set out in Article 33 of the Vienna Convention on the law of treaties[6], «when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that,

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[2] M.E. SALERNO, *In the fight against terrorism, does Article 15 of the ECHR constitute an effective limitation to states' power to derogate from their human rights obligations?*, in *Giurisprudenza Penale*, 2016, pp. 1-2.

[3] See, D.L. RICHARDS, C. CLAY, *An Umbrella With Holes: Respect for Non-Derogable Human Rights During Declared States of Emergency, 1996-2004*, in *Human Rights Review*, 2012, p. 443 ss. See also S. JOSEPH, M. CASTAN, *The International Covenant On Civil And Political Rights, Cases, Materials And Commentary*, Third Edition, Oxford, 2013, p. 911 s.

[4] I do not analyse other experiences in different countries. However, I have taken into account the possibility to apply Art. 15 of the ECHR in my own country. See J. ROCA, MARÍA, *La suspension del Convenio Europeo de Derechos Humanos desde el Derecho Español. Procedimiento y Control*, in *Revista Española de Derecho Europeo*, 2019, p. 43 ss.

[5] *Konstantin Markin v. Russia*, No. 30078/06, § 89 ECHR, (judgement of 22 Mar. 2012).

[6] Vienna Convention on the Law of Treaties, of 23 May 1960 (*U.N.T.S.*, Vol 1155, p. 331.).

in case of divergence a particular text shall prevail». In this case, therefore, the English and French texts are equally authoritative.

However, Article 33 of the Convention on the Law of Treaties also states that «when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 39 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.»

Article 31 of the Vienna Convention, which establishes the general rule on interpretation of treaties, makes no mention of the institutionalised practice of interpretation developed by treaty supervisory bodies – in this case, the ECtHR. However, Article 31 § 3b refers to «any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.» This appears to target not only the explicit approval of the treaty but also tacit approval of a practice, such as ECtHR case law[7].

In any case, in the sense to which I am referring, the English text is much more expansive for the object and purpose of this specific article of the ECHR. Therefore, as we shall see, no public proclamation of a particular "state" – of war, emergency, siege, public disaster, etc. – should be necessary. It should suffice that the situation does indeed involve an armed conflict or a situation that threatens the life of the nation.

The title of the article is merely a general expression of its contents. Nonetheless, the drafters of the text could have taken greater care in formulating the contents, not only with regard to the type of situation in which rights may be suspended, but also with regard to the expression "derogation".

The ECtHR has never required that a given duration be established for the situation – given that the circumstances may persist for a long time[8]. However, in all cases, it does require that states indicate when the derogation will cease to apply. This means that in practice, states applying Article 15 indicate the time period during which they have decided to make certain obligations under the ECHR ineffective. As we shall see, this is what the three states analysed here did.

With regard to whether or not an official proclamation of a State of Emergency (the official expression in Spanish used by the Council of Europe in Article 15 is "Estado de excepción")[9] is required, it is the competence of the domestic legal systems to regulate formal declaration of states of war, emergency, disaster, etc. in accordance with international law[10]. The internal legal systems of the three states analysed here have precise constitutional and legislative rules on which to base the constraints provided in Article 15 of the ECHR.

In the case of Ukraine, on 12 August 2014 the Verkhovna Rada, or State parliament, adopted the Law *On Amendments to the Law of Ukraine "On Combatting Terrorism" with regard to the preventative detention of persons related to terrorists activities in the area of anti-terrorist operations for period of over 72 hours*; the Law *On Amendments to the Criminal Procedure Code of Ukraine regarding the special regime of pre-trial investigation under martial law, in state of emergency or in the anti-terrorist*

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[7] M. SCHEININ, *Human Rights Treaties and the Vienna Convention on the Law of the Treaties – Conflicts or Harmony*, UNIDEM Seminar *The Status of International Treaties on Human Rights*, Coimbra, 7-8 October European Commission for Democracy Through Law (Venice Commission), Doc. CDL-UNT (2005) 014rep., 8.

[8] *A. & Others v. United Kingdom,* No. 3455/05, § 178, ECHR, (judgement of 19 Feb. 2009).

[9] http://www.echr.coe.int/Documents/Convention_SPA.pdf. Last consulted on 15 Oct. 2017 (all documents cited in this work were consulted on this same date).

[10] For an analysis of the occasions on which Article 15 of the ECHR has been used until 2014, see J. ZAND, *Article 15 of the European Convention on Human Rights and the Notion of State of Emergency*, in *İnönü Üniversitesi Hukuk Fakültesi Dergisi Cilt:* 5 Sayı: 1 Yıl 2014, p. 159 ss.

operation area; the Law *On Administering Justice and Conducting Criminal Proceedings in Connection with the Anti-Terrorist Operation"; and on 3 February 2015, the Law "On Military and Civil Administrations*[11].

These internal laws relating to anti-terrorist activities have a bearing on numerous articles of the ECHR. For this reason, the Ukrainian state informed the Council of Europe of its derogation, based on an internal rule of the Ukrainian parliament establishing said suspension[12].

As we can see, the internal legal basis used by Ukraine consists of the resolution of the parliament decreeing suspension and a set of internal laws involving derogation from certain ECHR rights and liberties, and not the declaration of a state of war, siege, emergency, disaster, etc.

The expression of the events used by Ukraine is compatible with the term "war", although this expression is not explicitly mentioned. It speaks of "armed aggression", of "vital interests of the society and the State", of "illegal occupation" and it recognises the applicability of the international humanitarian law and international human rights law. Yet it makes no mention whatsoever to the situation of a decreed "state".

France, on the other hand, did refer to the proclamation of a state of emergency (*état d'urgence*), in accordance with its Law 55-385 of 3 April 1955, by means of Decree No. 2015-1475 of 14 November 2015, which has been extended to the time of writing, on the grounds of the severity of the attacks, their simultaneous nature and the continuance of the threat at unknown levels[13].

Turkey, in accordance with its constitutional rules (Article 120) and legislative rules (Article 3 § 1 of the Law on the State of Emergency (urgence in the French text) - No. 2935), decreed a state of emergency on 20 July 2016, as ratified by the Turkish Parliament on 21 July 2016[14].

Ukraine is therefore the only one of the three countries not to base its arguments on domestic law.

Nonetheless, international law can impose certain safeguards or demands when it comes to derogating from human rights obligations. No derogation may be made that is not permitted under international law and all derogations must be made in accordance with the rules established by convention. So, for example, Article 4 of the ICCPR requires that the existence of the situation be "officially proclaimed" (it is not within the remit of this study to analyse the issues related to this covenant).

The same is not true of the ECHR; Article 15 makes no such requirement, and under the principle that *ubi lex non distinguit nec nos distinguere debemus* (where the law does not

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[11] Note Verbale of 5 June 2015 (http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=iVJsw8dK&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=U&_coeconventions_WAR_coeconventionsportlet_codeNature=10).

[12] Resolution of the Verkhovna Rada of Ukraine on Declaration *On Derogation from Certain Obligation under the International Covenant on Civil and Political Rights and the Convention for the Protection on Human Rights and Fundamental Freedoms* (https://rm.coe.int/1680304c47).

[13] Annex to Note Verbale JJ8085C of 26 Feb. 2016 (https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2894806&SecMode=1&DocId=2362260&Usage=2).

[14] Annex to Notification JJ8190C Tr./005-192, of 25 July 2016. (https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2930086&SecMode=1&DocId=2380804&Usage=2).

distinguish, neither should we distinguish) no public proclamation can therefore be required. The ECtHR has already been clear on this subject, as we shall see below.

International law not only impedes the suspension of an international treaty but under Article 57 of the Vienna Convention on the law of treaties, of 23 May 1969: «The operation of a treaty in regard to all the parties or to a particular party may be suspended: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States. Therefore, Article 15 of the ECHR is the provision regulating this possibility.»

The precept that specifically authorises derogation is «in time of war or other public emergency threatening the life of the nation». It seems evident that derogation of certain fundamental human rights and freedoms is provided for in time of war. Nonetheless, this might not have been necessary, because, from the moment an armed conflict exists, with or without a formal declaration of war, international humanitarian law comes into play. This, at minimum, entails application of Article 3, common to the four 1949 Geneva Conventions, which essentially shares the same content as Article 15 for non-derogable rights. It might not, therefore, be necessary to indicate a state of war. However, it is no bad thing to mark the precise moment from which international humanitarian law would also apply.

In any case this expression is outdated. Although it sits well in the language of the time, "wars" had already been proscribed by the United Nations Charter, with its explicit prohibition of resort to the use of force.

In the case of Chechnya, the ECtHR felt that even applying the provisions of Article 15 of the ECHR, the existing military operations were more compatible with the rules governing armed conflicts (international humanitarian law)[15], although some consideration might be applied under Article 15 of the ECHR[16]. For this reason, in the case of *Hassan v. the United Kingdom*, the ECtHR clearly states that if the circumstances exist for application of international humanitarian law (IHL), application of Article 15 of the ECHR need not be required.

In this regard, when an Iraqi national is captured within the framework of its military operations in Iraq, the United Kingdom has no need to establish exceptional measures or give any notification under Article 15 of the ECHR, given that in an armed conflict, powers of detention correspond to the Geneva Conventions of 1949 and its Additional Protocols of 1977[17].

The ECtHR determined that it was not the practise of states to derogate from their obligations under Article 5 (right to liberty and security) for the detention of persons in an armed conflict, regulated by IHL.

This did not signify that the ECHR was not applicable, but rather that its provisions had to be interpreted within the context of IHL. The reasons given for deprivation of liberty must as far as possible be adapted to the ECHR.

Thus, the taking of a prisoner of war or the detention of civilians in an armed conflict may involve an action compatible with military security, within the framework of

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[15] On the interaction between IHL and Human Rights, see P.A. FERNÁNDEZ-SÁNCHEZ, *The Interplay Between International Humanitarian Law and Refugee Law*, in *International Humanitarian Legal Studies*, 2011, p. 329 ss.

[16] *Isayeva, Yusupova & Bazayeva v. Russia*, No. 57947/00, 57948/00 & 57949/00), § 198-199, ECHR (judgement of 24 Feb. 2005).

[17] On the extra-territorial derogation from human rights treaties in armed conflicts, see M. MILANOVIC, *Extraterritorial Derogations from Human Rights Treaties in Armed Conflict*, in N. BHUTA, (Ed.). *The Frontier Of Human Rights – Extraterritoriality And Its Challenges*, Oxford, 2016.

international rules governing armed conflicts. Article 5 of the ECHR could therefore be interpreted as allowing the exercise of such powers of detention.

Thus, the capture and detention of the Iraqi was compatible with the Geneva Conventions and was not arbitrary, for which reason the ECHR had not been violated[18].

Of the three states analysed, the only case in which this interpretation might be considered would be that of Ukraine – either for actions taken against Ukraine or any that might be taken against Russia as the occupying power. The circumstances in the cases of France and Turkey do not meet the requirements for application of IHL, and I therefore do not consider that this jurisprudential interpretation applies to them.

The reference to any «other public emergency threatening the life of the nation» is more generic. In this case, the declaring state has sufficient margin of appreciation to consider that the life of the nation is under threat, albeit with the guarantees I list below. The public danger may therefore consist of terrorism, looting, internal disorder, etc., etc. The state has a very large margin of appreciation. This is logical; as Quesada Polo says: «The mechanism of control established by the Convention is subsidiary to national law. Specifically… states are free to adopt the most suitable measures in the interests of meeting the obligations to which they have signed up.»[19] Nonetheless, they must respect the obligations of Article 15. This theory of the margin of appreciation (or of state discretion) has been widely and generously adduced by the ECtHR, precisely in order to modulate its own control[20], although «not mentioned anywhere in the European Convention itself or in the Convention's *Travaux Préparatoires*, the doctrine has developed in the case law emanating from the Court»[21].

However, Protocol 15 inserts into the preamble of the ECHR the States enjoy a margin of appreciation. This Protocol has entered into force 1 August 2021. Protocol No. 15 amending the Convention introduces the principle of subsidiarity and the doctrine of the margin of appreciation. It also reduces from six to four months the time-limit within which an application may be made to the Court following the date of a final domestic decision[22].

Gross and Ní Aoláin consider that National Authorities are not in a "Better Position" than the Court to appreciate the circumstances[23].

International law[24] requires only the existence of four principles: the principle of existence of an exceptional threat[25]; the principle of proportionality; the principle of non-discrimination; and the principle of non-derogability[26].

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18 *Hassan v. United Kingdom*, No. 29750/09, ECHR, (judgement of 16 Sept. 2014).

19 S.Q. POLO, *La presentación de la demanda ante el Tribunal Europeo de Derechos Humanos*, in C. JIMÉNEZ PIERNAS, (Ed.), *Iniciación A La Práctica En Derecho Internacional Y Derecho Comunitario Europeo*, Madrid, 2003.

20 J. GARCÍA ROCA, *El Margen de Apreciación Nacional en la Interpretación del Convenio Europeo de Derechos Humanos: Soberanía e Integración*, in *Cuadernos Civitas/Instituto de Derecho Parlamentario*, Cizur Menor, 2010.

21 O. GROSS, F. NÍ AOLÁIN, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, in *Human Rights Quarterly*, 2001, p. 625.

22 https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf

23 *Ibidem*, p. 638.

24 For a general view of the doctrine of the margin of appreciation in International Law, see E. BJORGE, *Been There, Done That: The Margin of Appreciation and International Law*, in *Cambridge Journal of International and Comparative Law*, 2015, p 181 ss. In the context of Art. 15 of the ECHR, see O. GROSS, F. NI AOLAIN, *From discretion to scrutiny: Revisiting the application of the margin of appreciation doctrine in the context of Article 15 of the European Convention on Human Rights*, in *Human Rights Quarterly*, 2001, p. 625 ss.

25 The ECtHR specifically referred to this principle in *Lawless v. Ireland*, No. 332/57, § 28, ECHR, (judgement of 1 July 1961).

26 J. ORAÁ, *Human Rights In States Of Emergency In International Law*, Oxford, 1992, p. 260 ss.

In the *Lawless* case, the ECtHR maintains that the emergency, danger or crisis must meet three essential requirements: it must be an exceptional situation of crisis or emergency; it must affect the whole population and it must constitute a threat to the organised life of the community of which the State is composed. However, there is a discrepancy between the English and French versions of the text, which may be important when it comes to determining the authentic interpretation of the ECtHR's meaning. The French text reads «qu'ils désignent, en effet, 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»[27]. In other words, the term "imminent" has been omitted in the English text. This has since allowed the ECtHR to infer that a state has the right to take the necessary measures even before an event takes place. In this regard, it considers that «The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it» and therefore rules that Article 15 «permit(s) States to take derogating measures to protect their populations from future risks»[28].

Indeed, the attacks in the United States on 11 September 2001 could have constituted a "public emergency" for the United Kingdom, in the sense of Article 15 of the ECHR[29], even though they occurred thousands of miles away and in a different jurisdiction.

In short, the judgement rules that a public emergency is «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»[30].

Both the European Commission of Human Rights and the Council of Europe's Committee of Ministers have ruled on the nature of the circumstances adduced. In this regard, when the Greek junta derogated from the ECHR, the Commission considered (21 April 1967) that there was insufficient justification since no public emergency had occurred that threatened the life of the nation[31]. Resolution DH (70) 1 of the Committee of Ministers (15 April 1970) ruled likewise, making it unnecessary to enter into the question of form[32].

The ECtHR has ruled similarly, for example in the Case of *Aksoy v. Turkey*, of 18 December 1996[33]. Likewise, in *Şen v. Turkey*, 17 June 2003, it considered that the Government had not demonstrated that the detention without prior authorisation was necessitated by the exigencies of the situation, in accordance with Article 15 § 1[34]. The margin of appreciation of States is not unlimited. It must be accompanied by European supervision[35].

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27 *Lawless v. Ireland*, No. 332/57, § 28, ECHR, (judgement of 1 July 1961).
28 *A. & Others v. United Kingdom*, No. 3455/05, § 177, ECHR, (judgement of 19 Feb. 2009).
29 *A. & Others v. United Kingdom*, No. 3455/05, § 180, ECHR, (judgement of 19 Feb. 2009).
30 *Lawless v. Ireland*, No. 332/57, § 28, ECHR, (judgement of 1 July 1961).
31 hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-73020...pdf.
32 http://www.cvce.eu/obj/resolution_dh_70_1_of_the_committee_of_ministers_of_the_council_of_europe_15_april_1970-en-56b2427e-7703-48b7-8aa3-acfa868af60a.html.
33 *Aksoy v. Turkey,* No. 21987/93, ECHR, (judgement of 18 Dec. 1996).
34 *Şen v. Turkey*, No. 41478/98, ECHR, (judgement of 17 June 2003); *Elçi & Others v. Turkey*, No. 23145/93 and 25091/94, ECHR, (judgement of 13 Nov. 2003).
35 *Mehmet Hasan Altan v. Turkey*, nº 13237/17, (judgment 20 March 2018, § 91); *Şahin Alpay v. Turkey*, nº 16538/17, 20 March 2018, § 75).

One issue that requires a brief analysis is whether the threat must be temporary to be considered proportional by the ECHR[36]. In this case, the interpretation given in case law has been generous – possibly too generous – allowing a state to derogate from certain obligations merely by notifying the existence of a threat[37].

As we have seen, the faculties – set out in ECHR Article 15 – have been used by several European states (Greece, Turkey, the UK and Ireland) and in the last decade by others, such as Armenia (4 March 2008[38] or 21 September 2021[39]) and Georgia (2006)[40].

In the context of the COVID-19 health crisis only «Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia and San Marino notified the Secretary General of the Council of Europe of their decision to use Article 15 of the Convention»[41].

However, there are three special situations extant in which states have derogated from their human rights obligations under ECHR Article 15[42] before the health crisis. These situations can now be analysed in the context of their implementation. For that reason, I am going to focus on them.

Taken in order of date of notification, the first was Ukraine. The grounds for the derogation was the Russian occupation of part of Ukrainian territory, namely the Autonomous Republic of Crimea and the city of Sebastopol, as well as certain areas of the Ukranian oblasts of Donetsk and Luhansk[43].

In order to ensure the vital interests of the society and the State, the Verkhovna Rada of Ukraine, the Cabinet of Minister of Ukraine and other authorities have to adopt legal acts, which constitute the derogation from certain obligations of Ukraine under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms [inter alia] the Law of Ukraine, of 12 August 2014 *On Amendments to the Law of Ukraine "On Combating Terrorism" regarding the preventive detention of persons, involved in terrorist activities in the anti-terrorist operation area for a period exceeding 72 hours*, the Law of Ukraine of 12 August 2014 *On Amendments to the Criminal Procedure Code of Ukraine regarding the special regime of pre-trial investigation under martial law, in state of emergency or in the anti-terrorist operation area*, the Law of Ukraine of 12 August 2014 *On Administering Justice and Conducting Criminal Proceedings in Connection with the Anti-terrorist Operation" and the Law of Ukraine of 3 February 2015 "On Military and Civil Administrations*[44].

In these terms, Ukraine notified the Secretary General of the Council of Europe on 15 June 2015 of its derogation from certain ECHR obligations due to the situation of emergency in the country[45]. It subsequently renewed this notification on 4 November 2015, 1 July 2016

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[36] On proportionality, see C. MICHAELSEN, *The Proportionality Principle in the Context of Anti-Terrorism Laws: An Inquiry into de Boundaries between Human Rights Law and Public Policy*, in M. GANI, P. MATHEW, (Eds.). *Fresh Perspectives On The "War On Terror"*, The Australian National University, Canberra, 2008, p. 111 ss.

[37] See the commentaries by J. BONET PÉREZ, *Las situaciones de crisis en el Derecho internacional de los derechos humanos*, Doc. de Trabajo nº 1, 18-19 (2009). (avalaible at: http://www.ub.edu/didh-crisi/uploads/1-Conceptodecrisis-JBonet.pdf).

[38] https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=240814&SecMode=1&DocId=1223754&Usage=2.

[39] https://hudoc.echr.coe.int/eng#{"itemid":["002-13401"]}

[40] https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=331963&SecMode=1&DocId=954742&Usage=2.

[41] https://www.echr.coe.int/documents/fs_derogation_eng.pdf

[42] See *Guide on Article 15 of the European Convention on Human Rights*, ECHR, updated 31 December 2019 (https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf).

[43] Statement by Ukraine to the Council of Europe of 2 Feb. 2017 (BOE No. 109, of 8 May 2017, p. 36977).

[44] *Ibid.*, p. 36978.

[45] http://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EYlBJNjXtA5U/content/ukraine-derogation-from-european-convention-on-

and 3 February 2017[46]. The Statement to renew the derogations has been made in 9 July 2018 and 29 November 2019[47]. This last Statement contains a partial withdrawal of the derogation regarding the territory, to which the derogation applies, regarding temporarily occupied territories of Ukraine in Donetsk and Luhansk regions and regarding the security situation in the area of the Joint Forces Operation (as of 16.09.2019)[48].

Ukraine limited its Article 15 derogation to the geographical region of Donetsk and Luhansk. It even drew up a list of names of cities and places over which it exercised full control, making Russia, as the occupying power, liable for any breaches of human rights or of the IHL that might occur[49]. The ECHR has had the opportunity to analyse a case on that, considering that there has been no violation of Art. 6, par. 1[50].

For its part, France, following the terrorist attacks in Paris on 13 November 2015 decided, by way of Decree No. 2015-1475, to apply Law No. 55/385 of 3 April 1955, regarding the state of emergency[51]. It justified the terrorist threat as «an imminent danger resulting from serious breaches of public order» which «requires the availability of strengthened administrative measures in the fight against terrorism on the national territory»[52]. For this reason, on 24 November 2015 it too notified the Secretary General of the Council of Europe that due to these circumstances, it was suspending the rights established in the ECHR[53]. France renewed this notification on 26 February 2016, 30 May 2016, 25 July 2016, 22 December 2016, 12 July 2017, 2 November 2017[54]. The last Statement announced the end of the state of emergency.

It bases its derogation on the declaration of a state of emergency, compatible with the expression established in Article 15 of the ECHR, «public emergency threatening the life of the nation».

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human-rights/16695?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Ffr%2Fweb%2Fsecretary-general%2Fnews%3Fp_p_id%3D101_INSTANCE_EYlBJNjXtA5U%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1.

[46] https//wcd.coe.int/ViewDoc.jsp?p=&id=2452899&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true.

[47] See B. HARZSL, O. PLOTNIKOV, *Ukraine's Derogations From the European Convention on Human Rights*, in *Austrian Review of International and European Law Online*, 2019, p. 29 ss., https://doi.org/10.1163/15736512-. See, too, T. MARINIELLO, *Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system*, in *German Law Journal,* 2019, p. 46 ss. doi:10.1017/glj.2019.3

[48] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=4ZONlTZB

[49] Annex to Note Verbale JJ8034C of 5 Feb. 2015. (https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2834815&SecMode=1&DocId=2325234&Usage=2).

[50] Case of *Khlebik v. Ukraine*, Judgment 25 July 2017.

[51] To see a national applicability of this French laws, M. TOULLINER, *The European Court of Human Rights' Control Over States' Derogations in Time of Emergency: Example of Effectiveness of the Lessons Learned From WW2*, in *Interational Comparative Jurisrudence*, 2017, p. 8 ss., especially p. 19 ss.

[52] BOE nº. 109, of 8 May 2017, p. 36975.

[53] http://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EYlBJNjXtA5U/content/france-informs-secretary-general-of-article-15-derogation-of-the-european-convention-on-human-rights?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Ffr%2Fweb%2Fsecretary-general%2Fnews%3Fp_p_id%3D101_INSTANCE_EYlBJNjXtA5U%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1.

[54] http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=N5hF4XrW

On 30 October 2017, France adopted a new Bill on *reinforcing domestic security and the fight against terrorism*[55]. This Bill includes measures in order to permit the withdrawal of the derogation. On 1st November 2017 France has notified to the Council of Europe the end of the derogations of rights under Article 15 of the ECHR[56].

This French Bill has been criticized by part of the doctrine, considering that national authorities have the possibility to create a permanent state of emergence[57].

Lastly, on 21 July 2016, the Secretary General of the Council of Europe received formal notification from the Turkish Government of its derogation from the ECHR under Article 15[58] (renewed several times until 19 April 2018 when the state of emergency terminated)[59]. An English and French translation of the legislation drawn up by the Turkish Government within the framework of this threat was appended, which was not sufficiently accredited.

In the case of Turkey, this move was taken as the result of a failed coup d'état on 15 July 2016, with consequences (severe damage, to use the expression of the Turkish Government) for public safety and order which made it necessary to declare a state of emergency in accordance with the provisions of the Turkish constitution[60].

In 2018, in the case *Şahin Alpay v. Turkey* (two journalist has been arrested and detained by Turkish Authorities), the ECtHR states Turkey has the right to make a derogation from art. 15 of the Convention. However, the European Court observed that the Turkish Constitutional Court has considered that, in this case, «the guarantees of the right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence». The final judgment of the ECtHR decided Turkey has violated Article 5-1 of the ECHR[61].

According to this judgment, Turkey has right for derogation but the measures of pre-trial detention was not affected «in accordance with the procedure prescribed by law».

As the Council of Europe itself notes, the European Court of Human Rights may rule on whether application of Article 15 falls within the criteria allowed for in the Convention, especially the criterion of proportionality[62].

In accordance with Resolution 56(16) of 26 September 1956 of the Committee of Ministers, any information received by the Secretary General of the Council of Europe must be communicated as soon as possible to the other Contracting Parties of the ECHR.

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55 LOI n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme (https://www.legifrance.gouv.fr/eli/loi/2017/10/30/INTX1716370L/jo/texte)

56 France – Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), Notification of Declaration, JJ8525C Tr./005-213 (Nov. 7, 2017).

57 See, T. MARINIELLO, *Prolonged Emergency and Derogation of Human Rights. Why the European Court Shuld Raise its Immunity System*, in *German Law Journal*, 2019, note 60. (https://www.academia.edu/36782629/Prolonged_Emergency_and_Derogation_of_Human_Rights_Why_the_European_Court_Should_Raise_its_Immunity_System). See also E. ASGEIRSSON, *French Anti-Terror Bill Theatens to extend State of Emergency Abuses*, in *Just Security*, Aug. 2, 2017 (https://www.justsecurity.org/43771/french-anti-terror-bill-theatens-normalize-state-emergency/)

58 https://wcd.coe.int/ViewDoc.jsp?p=&Ref=DCPR132(2016)&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&direct=true.

59 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=N5hF4XrW.

60 https://wcd.coe.int/comintranet/InstraServlet?command=comintranet.CmdBlobGet&InstranetImage=2029966&SecMode=1&DocId=2380676&Usage=2 .

61 *Şahin Alpay v. Turkey* n° 16538/17, 20 March 2018 (confirmed by the final judgment of 20 June 2018).

62 Press release-DC132(2016)(https://wcd.coe.int/ViewDoc.jsp?p=&id=2436775&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&direct=true).

3. *Limits and Content of the Derogable Rights*

Article 15, although authorising the possibility of derogating from certain ECHR obligations, also establishes the possible limits to any such derogation. No derogation from Article 2 is authorised except in respect of deaths resulting from lawful acts of war[63], or from Articles 3[64], 4 (§ 1)[65] and 7[66]. These limitations should be taken within the context of Article 3 of Protocol 6 on the abolition of the death penalty, of 28 April 1983[67] and Article 2 of Protocol 13 on the abolition of the death penalty in all circumstances[68].

Note too that Article 4 § 3 of Protocol 7 of the ECHR states that «No derogation from this Article shall be made under Article 15 of the Convention», with regard to the prohibition on anyone's being liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

The reference to the "same State" is important, since France, one of the states analysed here, which is a party to Protocol 7, has made a reservation whereby it is interpreted as applying only to offences falling within the jurisdiction of the French criminal courts[69].

The three states analysed here, Ukraine, France and Turkey are signatories to Protocol 7 and, there are no reservations other than the French one. It so happens that the date of entry into force of this Protocol for Turkey is 1 August 2016, i.e., twelve days after the declaration of a state of emergency in which the derogations under Article 15 of the ECHR began to be applied.

The states cannot therefore suspend the guarantees of the Convention with regard to the right not to be arbitrarily deprived of life, or to be subjected to torture or to inhuman or degrading treatment or punishment, slavery or servitude or to be deprived of the safeguards of criminal procedure or to the abolition of the death penalty.

The exception made in Article 2 (in respect of deaths resulting from lawful acts of war) must be viewed within the context of Article 2 «(a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person unlawfully

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[63] «1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person unlawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection».

[64] «No one shall be subjected to torture or to inhuman or degrading treatment or punishment».

[65] «No one shall be held in slavery or servitude».

[66] «1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations».

[67] «No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention».

[68] «No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention».

[69] See this reservation in https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/117/declarations?p_auth=ksa0tId0&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=FRA&_coeconventions_WAR_coeconventionsportlet_codeNature=2.

detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection», given that in a situation of armed conflict the rules of international humanitarian law already apply (the protection of victims contained in the four Geneva Conventions of 1949 and its Additional Protocols of 1977).

In 1988, élite British forces killed three members of the Provisional IRA, whom they suspected of having remote control devices for the purpose of detonating a bomb, in a street in Gibraltar. The families of the deceased brought a case against the United Kingdom alleging excessive use of force in contravention of Article 2 of the ECHR.

The ECtHR found that a breach had occurred, on the grounds that Article 2 not only safeguards the right to life but also establishes the circumstances in which the deprivation of life might be justified. Article 15 of the ECHR, in the opinion of the ECtHR, allows for no exception[70].

In any case, as Rey Martínez notes, the legal protection of life provided in Article 2 of the ECHR and in Protocols 6 and 13 is being expanded and transformed, and all dimensions of the article must be taken into account[71].

With regard to Article 3 ECHR, banning the use of torture, inhuman or degrading treatment or punishment, the prohibition is absolute, to a far greater extent than the prohibition on violation of the right to life. There is no circumstance under which torture may be permitted or justified. This prohibition has been enshrined as an imperative norm of international law and is identical in content to other international treaties of a similar or universal ambit[72].

The ECtHR has made it very clear that this article is non-derogable[73]. On occasions it has heard cases taken within the framework of Article 15, and considered certain actions not to be in breach of the convention by reason of derogation, yet where it has been proven that torture has taken place, it has ruled this to be in breach of Article 3, even when Article 15 has been applied[74].

With regard to article 4 § 1 (prohibition of slavery and servitude) and Article 7 (principle of legality in criminal law), the prohibition on any suspension also applies to rights that are non-derogable in international law. These articles have been widely adduced before the ECtHR and its jurisprudential analyses have been used as leading legal analyses. This is

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[70] *McCann & Others v. United Kingdom*, No. 18984/91, ECHR, especially § 147 (judgement of 27 September 1995). Likewise, *Makaratzis v. Greece*, No. 50385/99, ECHR, (judgement of 20 December 2004), *Isaveva v. Russia* and *Isaveva & Others v. Russia*, No. 57950/00, ECHR, (judgements of 24 February 2005) and *Giuliani & Gaggio v. Italy*, No. 23458/02, § ECHR, (judgement of 24 March 2011).

[71] F. REY MARTÍNEZ, *La protección jurídica de la vida: un derecho en transformación y expansión (Art. 2 CDEH y Protocolos 6º y 13rd)*, in J. GARCÍA ROCA, P. SANTOLAYA, (Eds.), *La Europa De Los Derechos – El Convenio Europeo De Derechos Humanos*, 3rd Ed., Centro de Estudios Políticos y Constitucionales, Madrid, 2014, p. 57 ss.

[72] P.A. FERNÁNDEZ-SÁNCHEZ, *La Suspensión de las Garantías establecidas en el Convenio Europeo de Derechos Humanos (Art. 15)*, in J. GARCÍA ROCA, P. SANTOLAYA, (Eds.), *La Europa De Los Derechos – El Convenio Europeo De Derechos Humanos*, 3ª Ed., Centro de Estudios Políticos y Constitucionales, Madrid, 2014, p. 617 ss.

[73] See *Ireland v. United Kingdom,* No. 5310/71, § 163, ECHR, (judgement of 18 Jan. 1978); *Soering v. United Kingdom*, No. 15038/88), § 88, ECHR, (judgement of 7 July 1989); *Chahal v. United Kingdom*, No. 22414/93), § 79, ECHR, (judgement of 15 November 1996); *Saadi v. Italy*, No. 37201/06, § 127, ECHR, (judgement of 28 February 2008); *El-Masri v. Former Yugoslav Republic of Macedonia*, No. (39630/09), §195, ECHR, (judgement of 13 Dec. 2012); *Al Nashiri v. Poland*, No. 28761/11, § 507, ECHR, (judgement of 24 July 2014).

[74] *Aksoy v. Turkey*, No. 21987/93), ECHR, (judgement of 18 Dec. 1996). See also *Selmouni v. France*, No. 25803/94, ECHR, judgement of 28 July 1999); *Elçi & Others v. Turkey*, No. 23145/93, 25091/94, ECHR, (judgement of 13 Nov. 2003); and *Öcalan v. Turkey*, (No. 2), No. 46221(99), § 97-98, ECHR, (judgement of 18 Mar. 2014).

the case of the analysis by Canosa Usera, who makes reference to the extension of the meaning of the terms slavery and servitude, the concept of forced or compulsory labour and the exceptions to military service and alternative civilian service, which may be very important in situations of armed conflict or of threat to the life of the nation[75], and likewise, the work by Prof. Huerta Tocildo, regarding the configuration of the principle of legality in criminal law, the exceptions to the principle of non-retroactivity of criminal law, the prohibition on analogy, the concept of sentence, etc[76].

Use of the term "International Law" in this article is particularly important, not only because it embraces a broader content, but because it can result in different assessments than national criminal law. It is worth remembering, for example, that the law applicable by the International Criminal Court is not only that established in the Statute of Rome; it also extends to customary law, the legal principles of international law, etc. For any criminal lawyer with an exclusively national perspective, this can pose problems not only of interpretation but of structure and foundation[77].

Aside from the content and its interpretation in case law, with regard to Article 4 § 1, the ECtHR has stated that Article 4 enshrines one of the basic values of the democratic societies making up the Council of Europe since unlike most of the substantive clauses of the ECHR, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation[78].

With regard to Article 7 (principle of legality in criminal law), the ECtHR has also been unwavering with regard to its non-derogability. In the case of *Del Río Prado v. Spain*, it concluded that Article 7 of the Convention had been violated, since the plaintiff had completed a prison sentence for a period that was longer than that which was applicable under Spanish law at the time of her sentencing. In particular, it observes that «The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation»[79]. (§ 77 of the judgement).

With regard to Article 3 of the Protocol No. 6 (non-derogation of the abolition of the death penalty) and Protocol No. 13 (abolition of the death penalty in all circumstances), the ECtHR has ruled that this is a non-derogable right[80].

However, the ECtHR has also taken into account the contents and limits of derogable rights. Following the 9/11 attacks in the US, the United Kingdom derogated from certain

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[75] R. CANOSA USERA, *Prohibición de la esclavitud y del trabajo forzado: un ejemplo de integración entre tratados internacionales (comentarios al art. 4)*, in J. GARCÍA ROCA, P. SANTOLAYA, (Eds.), *La Europa De Los Derechos – El Convenio Europeo De Derechos Humanos*, 3ª Ed., Centro de Estudios Políticos y Constitucionales, Madrid, 2014, p. 113 ss.

[76] S. HUERTA TOCILDO, *El contenido debilitado del principio europeo de legalidad penal*, in J. GARCÍA ROCA, P. SANTOLAYA (Eds.), *La Europa De Los Derechos – El Convenio Europeo De Derechos Humanos*, 3ª Ed., Centro de Estudios Políticos y Constitucionales, Madrid, 2014, p. 399 ss.

[77] In this regard, see P.A. FERNÁNDEZ-SÁNCHEZ, *El derecho aplicable por la Corte Penal Internacional*, in J.A. CARRILLO SALCEDO (Ed.), *La Criminalización de la Barbarie: La Corte Penal Internacional*, Consejo General del Poder Judicial, Madrid, 2000, p. 245 ss.

[78] *Rantsev v. Cyprus & Russia*, No. 25965/04, § 283, ECHR, (judgement of 7 Jan. 2010). See also, *Stummer v. Austria*, No. 37452/02, §116, ECHR, (judgement of 7 July 2011) and *N.N. v. United Kingdom,* No. 4239/08, § 65, ECHR, (judgement of 13 Nov. 2012).

[79] *Del Río Prada v. Spain*, No. 42750/09, § 77, ECHR, (judgement of 21 Oct. 2013).

[80] *Al-Saadoon & Mufdhi v. United Kingdom*, No. 61498/08, § 118, ECHR, (judgement of 2 Mar. 2010).

rights under the ECHR after making notification in November 2001. In that same month, the ECtHR heard a case against the UK on the grounds that application of the *Anti-Terrorism, Crime and Security Act 2001* (in force until March 2005) imposed a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. The ECtHR found that the United Kingdom was in violation of Article 5 § 1 of the ECHR[81].

Years before, in *Brannigan and McBride v. The United Kingdom*, the ECtHR ruled that there had been no violation of Article 5 § 3 (right to liberty and security), and that no official proclamation of public emergency was necessary, even though, for the purposes of compatibility of derogation from ECHR rights, it must be consistent with other obligations under international law (the requirement for an official proclamation under Article 4 of the International Covenant on Civil and Political Rights)[82].

In the case of Ukraine, the notification to the Secretary General of the Council of Europe specifically mentions the derogation from Articles 5, 6, 8 and 13 of the ECHR. In contrast, France makes no explicit mention of any articles, instead stating that its legislation "may" involve a derogation from certain rights guaranteed by the Convention. In addition, it should be remembered that France has a reservation established under Article 15 § 1[83]. France has extended the state of emergency until 15 July 2017, under Law No. 2016-1767 of 19 December 2016[84].

However, in its most recent communication to the Secretary General of the Council of Europe, the Permanent Representative of France to the Council of Europe indicates some of the measures that affect specific rights established in the ECHR. In this regard, it states that: «Among the measures that could be taken under the state of emergency, administrative searches (Article 11 § I of the Law of 3 April 1955 regarding the state of emergency) will be allowed until 15 July 2017. Moreover, the extension law provides that the duration of house arrest will be limited to twelve months. In addition, the Minister of the Interior may ask for judicial authorisation to extend the house arrest for a period of three months if there are serious reasons to believe that the behaviour of the person concerned continues to constitute a threat to public security and public order»[85].

Turkey, on this occasion, has decided to follow France's example and refers exclusively to the derogation of rights without explicitly mentioning any articles or rights. Turkey has at this time suspended ECHR rights covered by Article 15 – without detailing which – until 18 July 2018[86].

It is true that Article 15 of the ECHR does not require any specification of the articles derogated from but of the measures, even where such a course of action would be advisable.

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[81] *A. & Others v. United Kingdom*, No. 3455/05, ECHR, (judgement of 19 Feb. 2009).
[82] *Brannigan & MacBride v. United Kingdom*, No. 14553/89, No. 14554/89, ECHR, (judgement of 26 Mar. 1993).
[83] This reservation reads as follows: «The Government of the Republic, in accordance with Article 64 of the Convention [Article 57 since the entry into force of the Protocol No 11], makes a reservation in respect of paragraph 1 of Article 15, to the effect, firstly, that the circumstances specified in Article 16 of the Constitution regarding the implementation of that Article, in Section 1 of the Act of 3 April 1878 and in the Act of 9 August 1849 regarding proclamation of a state of siege, and in Section 1 of Act No. 55-385 of 3 April 1955 regarding proclamation of a state of emergency, and in which it is permissible to apply the provisions of those texts, must be understood as complying with the purpose of Article 15 of the Convention and that, secondly, for the interpretation and application of Article 16 of the Constitution of the Republic, the terms to the extent strictly required by the exigencies of the situation shall not restrict the power of the President of the Republic to take the measures required by the circumstances».
[84] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cec59.
[85] BOE No. 109, 8 May 2017, p. 36976.
[86] Case of *Alparslan Altan v. Turkey*, Judgment 16 April 2019, par. 15.

As O'Boyle shows, France, at the same time, has opted for a text that seeks to protect its measures from a frontal attack in Strasbourg, without immediately accepting that it necessarily requires an exception to be compatible with the Convention. This is a good example of how optical considerations, and a dose of domestic policy, can influence the way in which the state chooses to derogate. Nonetheless, it is a perfectly legitimate option under Article 15 – there being no orthodox form for drafting notice of exception[87].

In the case of Turkey[88], on 21 July 2016 it formally notified the Secretary General of the Council of Europe that on the day before it had formally declared a state of emergency for a duration of three months, in accordance with Article 120 of its Constitution and Law 2935 on State of Emergency (Article 3/1b). Like France, it stated only that this situation might involve derogation from its obligations under the ECHR, permissible in Article 15[89]. It did not specify the measures to be taken nor the rights to be derogated. Although not strictly in breach of the ECHR, this is an example of worst practise.

As for the content, it should be noted that Turkey has ratified Protocol 6 of the ECHR (12/11/2003) and Protocol 13 (20/02/2006), which, in practice, requires it not to apply the exception contained in ECHR Article 2 § 2. In any case, Turkey (like France and Ukraine) is obliged to investigate possible war crimes[90].

Failure to specify the rights being derogated from and the reference to the measures in such general terms, as in the case of France and Turkey, creates a problem in that application of the rules of exception might harm the rights of victims. This might have to be ruled on in the future by the ECtHR. For example, Decree-Law No. 679, of 6 January 2017[91] of the Turkish Government provides for measures regarding public sector employees. Given its generalised nature and lack of precision and lack of guarantees (it entails summary dismissal from public service with no proceedings whatsoever), it might result in violations of human rights.

In any case, the ECtHR continues to be the jurisdictional body of the ECHR responsible for overseeing compliance with application of Article 15 in its entirety. And it is the ECtHR that must establish the correct interpretation in application of the rules that have been derogated from under Article 15[92].

4. *Procedural Obligations Regarding Derogation of ECHR Guarantees*

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87 M. O'BOYLE, *Emergency Government and derogation under the ECHR*, in *Eur. Hum. Rights Law Rev.*, 2016, p. 331 ss.

88 An interesting analysis on the situation in Turkey from the perspective of human rights can be found in: A. ALLUÉ BUIZA, *Los Derechos Fundamentales en Turquía, un Claro Retroceso*, in *Teoría y Realidad Constitucional*, 2016, p. 471 ss.

89 See this notification in https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2929966&SecMode=1&DocId=2380676&Usage=2. The document also contains a translation of the Turkish Constitution and the relevant law.

90 *Aslakhanova & Others v. Russia*, No. 2944/06, 8300/07, 50184/07, 332/08 & 42509/10, ECHR, (judgement of 18 Dec. 2012).

91 https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ee831.

92 In this regard, see P.A. FERNÁNDEZ-SÁNCHEZ, *Suspending Guarantees of the European Convention on Human Rights (Art. 15)*, in J. GARCÍA ROCA P. SANTAOLAYA MACHETTI (Eds.). *Europe Of Rights: A Compendium On The European Convention Of Human Rights*, Leiden and Boston, 2012, p. 485 ss.

The scope of Article 15 goes far beyond the simple suspension of the guarantees established in the ECHR. As already mentioned, Article 15 sets out a list of non-derogable rights. However, it also contains a procedure for enforcing this suspension.

Article 52 of the ECHR establishes that «On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention». Therefore, in principle, the Secretary General has the power to request «an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention».

However, without requiring an initiative from the Secretary General of the Council of Europe, Article 15 § 3 requires that «Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed».

A procedure is therefore required for informing the Secretary General of the Council of Europe of the measures taken, the reasons for taking them and the date on which the measures will cease to be operative, without necessitating a request from the Secretary General.

In practice, this information also includes the geographic ambit of the measures, which sometimes apply only to a given region. As we have seen, this is the case of Ukraine (only some provinces), France (metropolitan territory and overseas territory) and Turkey (the entire national territory).

As Santiago Quesada Polo writes, «The faculty of derogation is subject to the control of the monitoring bodies established by the Convention which are competent to determine whether the derogation was justified by the internal situation and does not contravene other obligations under International Law»[93].

The procedural measures of Article 15 of the ECHR are constitutive in nature. Therefore, when no notification is made to the Secretary General, the suspension of rights provided for in Article 15 cannot take legal effect because it would not exclude, from the perspective of obligations, the responsibility of the state. In the case of *Cyprus v. Turkey*, the then European Commission of Human Rights confirmed that it had received no official and public notification on derogation from rights by Turkey, and that Article 15 did not therefore apply. Turkey was thus in breach of Articles 5 (right to liberty and security) and 8 (right to respect for private and family life) and Article 1 of Protocol 1 of the ECHR (right to property)[94].

As already discussed, under the European Convention, an official proclamation of threat to the life of the nation is not a mandatory requirement. Domestic provisions that might require such a proclamation – but which do not have international effect – are a different matter. For example, in 1957 Ireland decided to implement the exceptional powers provided for under the Offences against the State (Amendment) Act of 1940 «to prevent the commission of offences against public peace and order»[95]. On 20 July 1957, the Irish government informed the Secretary General of an explicit derogation from the articles of the ECHR, as well as the measures approved, the reasons and the dates.

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[93] S. QUESADA POLO, *cit.,* p. 109.
[94] *Report of the European Commission on Human Rights*, 4 Oct. 1983.
[95] *Annuaire de la CEDH*, vol. XII bis p. 72

From a procedural perspective, international law is not as rigid as domestic (especially procedural) law tends to be. For this reason, the notification to the Secretary General entails no formal gravity. A simple letter addressed to the Secretary General by any person with powers to give an undertaking on the state's behalf, may be deemed to be a notification under the requirements of Article 15.

When Lawless brought an action against Ireland before the then European Commission of Human Rights (no longer the ECHR's monitoring body), on the grounds that it had failed in its obligations under the Convention, he argued that the letter sent to the Secretary General did not constitute sufficient notification in that it neither adduced the existence of a time of war or other public emergency threatening the life of the nation nor properly defined the nature of the measures taken by the Government, and that, in any case, it could not be enforced against persons within the jurisdiction of the Republic of Ireland in respect of the period before 23rd October 1957, when it was first made public in Ireland.

Both the European Commission of Human Rights and the ECtHR ruled that the letter constituted a formal notice and that the States had no obligation to publicly notify the communication. It is therefore sufficient to notify the Secretary General of the measures taken, the reasons therefore and the dates on which they must again be enforced, without requiring internal or external notification[96].

What is required, therefore, is notification to the Secretary General of the Council of Europe. That requirement is legal in nature but it is not in itself sufficient. The measures taken must also correspond to a situation threatening the life of the nation.

In the inter-state case of *Greece v. United Kingdom*, Greece brought a complaint against the UK (at that time the colonial power of the island of Cyprus) for breach of the ECHR. Between 1955 and 1957 Cyprus had experienced a period of internal tension and civil disorder with protests demanding independence and a deterioration in the relations between the two communities on the island, the Turkish and Greek Cypriots.

As a result, the United Kingdom formally notified the Secretary General of the Council of Europe of the derogation of its rights obligations under Article 15 of the ECHR. However, that formal notification of October 1955 was made without giving any information on the measures or the reasons for taking them. The European Commission on Human Rights therefore considered that the measures taken should form part of the information furnished by the state in the notification[97].

Later, in 1967, during the rule of the junta (the Dictatorship of the Colonels), the Greek government ordered legislative measures and put into place administrative practices that were in violation of the ECHR. The then European Commission of Human Rights, in an inter-state case taken by Denmark, Norway, Sweden and Netherlands against Greece, found that the measures adopted by the revolutionary government of Greece were not justified under Article 15 of the ECHR, given that the public emergency adduced by Greece did not exist in reality[98].

Therefore, as well as the simple notification to the Secretary General of the Council of Europe, it is important that the measures taken, the reasons therefore and the dates on which they have ceased to operate also be notified. Otherwise, the notification cannot be admitted by the Convention's monitoring bodies. The Greek government notified the Secretary General of the Council of Europe of a series of measures to suspend the guarantees provided

[96] *Lawless v. Ireland,* No. 332/57*,* ECHR, (judgement of 1 July 1961).
[97] *Report of the European Commission on Human Rights*, 26 Sep. 1958.
[98] *Report of the European Commission on Human Rights*, 5 Nov. 1969.

for in Article 15, but without giving reasons or dates[99]. The Commission therefore concluded that this notification was not compliant with the obligations of the Convention[100].

The notification was thus not only invalid for formal reasons, but because the nature of the facts did not allow it to be concluded that the country was in a time of war or other public emergency threatening the life of the nation. As Robertson has remarked, the formal question of the compatibility of the notification with Article 15 § 3 was subordinate, since the suspension was in any case invalid[101].

Article 15 § 3 was also at stake in *Ireland v. United Kingdom*, of 18 January 1978. On 20 August 1971, the United Kingdom notified the Secretary General that as a consequence of terrorist activity, as and from 9 August 1971, the government of Northern Ireland had been obliged to exercise extraordinary powers of detention and internment to protect the life, security and property of people and to prevent public disturbances. These powers would be enforced for a period strictly necessary depending on the exigencies of the situation[102].

The Irish Government, which was the plaintiff in this inter-state case, argued that the extrajudicial deprivations of liberty were not in compliance with Article 15. Both the then European Commission of Human Rights and the ECtHR found that they were in compliance, without questioning the existence of a serious threat to the life of the nation[103], and that the procedural requirements of Article 15 § 3 had been met. On 22 August 1984, the United Kingdom gave notice that it was withdrawing the derogation from the guarantees of the Convention. One can therefore recognise, as Frowein and Peukert say, that «the procedure largely works reliably in practice»[104].

On 23 December 1988, the United Kingdom once again decided to derogate from certain ECHR rights, under the Article 15 procedure. This notification came just days after Brogan and others had brought an action against the United Kingdom on 29 November 1988.

The notification to the Secretary General reported the need to suspend application of the ECHR in certain circumstances, considering that the detention periods complained of by Brogan and others did not breach Article 5 of the Convention, as the UK had already derogated from its obligations in Northern Ireland. However, the ECtHR found that it was in breach of Article 5 § 3[105].

This suspension was confirmed in a notice of 12 December 1989, informing the Secretary General that a satisfactory procedure had not been found enabling harmonisation of security and compatibility of Article 12 of the Prevention of Terrorism Act with the Convention.

In the same situation of derogation, Brannigan and McBride took a case against the United Kingdom for detaining them without charge for six days, fourteen hours and thirty

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99 *Annuaire de la C.E.D.H.*, vol. 12, 1969, pp. 71-73.

100 *Annuaire de la C.E.D.H.*, vol. 12-bis, 1969, pp. 41 and 43.

101 A.H. ROBERTSON, *Human Rights Europe*, Manchester, 1977, p. 116.

102 *Annuaire de la C.E.D.H.*, vol. 14, 1971, p. 33. The incidents and successive extensions were later notified to the Secretary General. See *Annuaire de la C.E.D.H.*, vol. 15, 1972, pp. 256-258; vol. 16, 1973, pp. 27-29; vol. 18 [1975], p. 19, and vol. 21 [1978], p. 23.

103 *Ireland v. United Kingdom*, No. 5310/71, ECHR, (judgement of 18 Jan. 1978).

104 J. FROWEIN, W. PEUKERT, *Europäische Menschen Rechts Konvention*, Kehl, Strasbourg, Arlinton, 1985, p. 335. The original German text is: «das Verfahren funktioniert in der Praxis weitgehend zuverläsig».

105 *Brogan & Others v. United Kingdom*, No. 11209/84, No. 11234/84, No. 11266/84, No. 11386/85, ECHR, (judgement of 29 November 1988). See a more complete commentary in A. TANCA, *Human Rights, Terrorism and Police Custody: The* Brogan *Case*, in *Eur. Jour. Int. Law*, 1990-I, p. 269 ss.

minutes and four days, six hours and twenty-five minutes, respectively. The UK maintained that this situation was legitimate under the powers conferred in its domestic anti-terrorism legislation. The ECtHR found that given that the derogation notified by the United Kingdom was in force, such detention was compatible with Article 15 of the ECHR. Therefore, no breach of Article 5 (right of liberty and security) was deemed to have occurred[106] by virtue of the Article 15 derogation in application at the time.

In the case of Turkey, serious disturbances had been ongoing since around 1985 in the South-East of the country, as a result of the armed struggle by the PKK, considered a terrorist group by the Turkish authorities. The Turkish Government therefore gave notice of its derogation from the guarantees of the Convention under Article 15. On 6 August 1990, it informed the Secretary General of the circumstances, geographical region (11 provinces), measures and the duration of the derogation – defined simply as extending as long as the circumstances persisted. This period was further extended on 3 January 1991 and 5 May 1992[107]. On 12 May 1992, Turkey reported that the derogation was limited to the rights provided for in Article 5 of the Convention.

In its judgement on the *Aksov* case, the ECtHR ruled that the circumstances created by the PKK attacks were sufficient to constitute a public emergency threatening the life of the nation, and that the derogation by the Turkish Government was therefore valid.

However, the 14 days incommunicado detention without formal remand was considered excessive by the ECtHR and did not appear to correspond to an exigency of the situation[108].

The ECtHR has analysed several cases, also in Turkey, in which a citizen was detained in a region than those mentioned within the derogation legislation, finding that the derogation was therefore not applicable.

In the case of *Sakik and Others v. Turkey*, the ECtHR ruled that the detention, which took place in Ankara, contravened the object and purpose of Article 15 of the Convention if, when assessing the territorial scope of the derogation, the Turkish Government were to extend its effects to part of Turkish territory not explicitly named in the notice of derogation. The derogation was therefore inapplicable *ratione loci* to the facts of the case and it was unnecessary to determine whether it met the requirements of Article 15[109]. Similar rulings have been given in other cases[110].

During 2019, the ECtHR have had the opportunity to study some cases against Turkey. In the Case of *Alparslan Altan v. Turkey*, the applicant is a former member of the Turkish Constitutional Court. He was arrested and taken into police custody on 16 July 2016, as a member of the FETÖ/PDY terrorist organization. The state of emergency was declared on 20 July 2016 and it was notified to the Secretary General of the Council of Europe on 21 July 2016 under Article 15 of the ECHR.

The European Court declared, «unanimously, the complaints concerning the lawfulness of the applicant's initial pre-trial detention, the alleged lack of reasonable suspicion

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[106] *Brannigan & McBride v. United Kingdom*, No. 14553/89, No. 14554/89, ECHR, (judgement of 26 Mar. 1993).
[107] *Aksoy v. Turkey,* No. 21987/93, ECHR, (judgement of 18 Dec. 1996). The same idea can be found in *Demir & Baykara v. Turkey* No. 34503/97, ECHR, (judgement of 23 Sept. 1998), *Nuray Sen v. Turkey*, No. 25354/94, ECHR, (judgement of 17 June 2003) and *Bilen & Coruk v. Turkey,* No. 14895/05, ECHR, (judgement of 21 Feb. 2006).
[108] *Elci & Others v. Turkey,* No. 23145/93, No. 25091/94, ECHR, (judgement of 13 Nov. 2003).
[109] *Sakik & Others v. Turkey,* No. 87/1996/706/898-903, ECHR, (judgement of 26 Nov. 1997).
[110] *Abdülsamet Yaman v. Turkey*, No. 32446/96, ECHR, (judgement of 2 November 2004) and *Bilen & Coruk v. Turkey,* No. 14895/05, ECHR, (judgement of 21 Feb. 2006).

that he had committed an offence and the alleged failure to provide reasons for his detention admissible», «by six votes to one, that there has been a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the applicant's initial pre-trial detention» and «by six votes to one, that there has been a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion, at the time of the applicant's initial pre-trial detention, that he had committed an offence»[111].

Formal notices are made in accordance with Article 59 of the ECHR and the Resolution of the Committee of Ministers (56) 16.

As already discussed, Ukraine notified the Secretary General of the Council of Europe by way of a Note Verbale of 5 June 2015. The notice was made in both official languages, English and French, although the original was in English and the French copy was a translation of the English. All other communications on extension of the period of suspension and updating of the list of locations and places in which the derogation applies, were made by Ukraine through declarations which the Council of Europe notified to the other Member States.

For its part, France served notice of application of the derogation clause of Article 15 of the ECHR by means of a Note Verbale of 25 February 2016, in a text originally written in French. It appended the consolidated version of the French law proclaiming a state of emergency. Subsequently, through declarations, France progressively notified the Council of Europe of the extensions to the periods of derogations of rights provided for in Article 15 of the ECHR.

Turkey gave notice by way of a notification, indicating the date of effect of the communication from 24 July 2016. This was to be very important in terms of the *ratione temporis* power of the ECtHR. The original is in English, one of the official languages of the Council of Europe. The notification explains the situation and appends the Joint Declaration by the Grand National Assembly of Turkey of 16 July 2016 (signed by the president of the Assembly and by four parties with parliamentary representation).

However, formal requirement of the notification states in the Article 15 of the ECHR is not sufficient. Contracting States must keep the Secretary General of the Council of Europe "fully informed" of the measures taken by way of derogation from the Convention and the reasons for them[112].

The three states analysed here have regularly notified the Secretary General of the Council of Europe of extensions to the derogation periods, in accordance with the procedures established in Article 15 of the ECHR. I do not consider that any issues might arise in this regard regarding legal interpretation.

Does the form of the notifications have any legal consequence? As we have seen in general practice, the important element is the affirmation that notification has been made; the formal means by which the notice is given are unimportant. There must be an accredited record of the event, independently of the way in which the information is given. What must occur is an official communication, through the appropriate diplomatic channel.

To date no actions have been taken against Ukraine, France or Turkey (the cases of derogation of human rights recently in operation), and we cannot therefore judge how the ECtHR might rule on the many actions I foresee will be taken. However, I believe it is

[111] Case of *Alparslan Altan v. Turkey*, Judgment 16 April 2019.
[112] *Mehmet Hasan Altan v. Turkey*, no. 13237/17 (judgment of 20 March 2018, § 89; *Şahin Alpay v. Turkey*, no. 16538/17, (judgment of 20 March 2018, § 73). Emphasis added.

unlikely that it might raise any objections with regard to procedure, which I believe to have been correct in all three cases.

However, all of the above is unrelated to another problem that is common within the framework of the Council of Europe. This is the lack of application of the ECHR, in some part of the territory of a state for causes unrelated to the process established in Article 15. This is what the Parliamentary Assembly has called «Areas where the European Convention on Human Rights cannot be implemented», due to situations of conflict, an absence of state control, interventions by third countries, etc.[113], which prevent the victims from having access to the monitoring bodies or because the Contracting Parties cannot or do not wish to take action against the states responsible[114].

These circumstances will be especially important in the case of Ukraine, where extensive areas are under Russian occupation (and therefore control). Nonetheless, areas still exist where it is difficult to identify the authority responsible. No doubt, in the case of Ukraine, actions will be taken against both Ukraine and Russia. These will make it possible better to determine the way in which the ECtHR will address these questions.

In the cases of France and Turkey, I do not believe that situations of this kind will arise, because no specific areas of derogation have been established and because all the procedural formalities have been met.

The Committee of Ministers, the body overseeing compliance with the Convention, has presented its Opinion on the Recommendation of the Parliamentary Assembly of the Council of Europe 1606 (2003) of 23 June[115] requesting that the Commissioner of Human Rights of the Council of Europe should be actively authorised to bring actions before the European Court when he/she perceives that the Convention is not applied in certain areas without derogation having been made under Article 15[116].

The ECtHR has also ruled that when discrimination occurs on the basis of nationality in the adoption of measures involving the deprivation of liberty, albeit within the framework of Article 15 of the ECHR, this situation is a breach of the ECHR[117] and it should therefore be taken into account in applying these questions.

5. *Conclusions*

The ECHR was the first international treaty on human rights to regulate the possibility of suspending certain human rights in situations of war or public emergency threatening the life

[113] Report by Christos Pourgourides to the Parliamentary Assembly of the Council of Europe (Doc. 9730 of 11 Mar. 2003.

[114] See Recommendation 1606 (2003) of 23 June.

[115] Doc. 10037, of 24 Jan. 2004.

[116] See the complete text of the Committee of Ministers' reply to the Parliamentary Assembly in Documents Working paper, 2004 Ordinary Session (First part) 26-30 Jan. 2004, Council of Europe Publishing, Strasbourg (France), 2004 (ISSN 0252-0656, pp. 237-238. (https://books.google.es/books?id=WULyYbTyB9QC&pg=PA237&lpg=PA237&dq=Doc.+10037+of+24+January+2004&source=bl&ots=-aNDANLzFB&sig=phCvmJI0vVE7vjQeTuMMKHF02mY&hl=es&sa=X&ved=0ahUKEwjA-9-f18zWAhUPEVAKHcdcCXYQ6AEIKzAB#v=onepage&q=Doc.%2010037%20of%2024%20January%202004&f=false).

[117] *A. & Others v. United Kingdom*, No. 3455/05, ECHR, (judgement of 19 Feb. 2009).

of the nation. Therefore, unlike other subsequent treaties, it had no precedents to draw upon. These are the expressions used by the ECHR but they encompass different possibilities and do not match the current rules. They should therefore be interpreted (as they have been) in the context of the times in which they are applied.

The reference to war should be taken to refer to any situation of armed conflict, even if it does not constitute war in the classic and formal sense of the word (wars having been prohibited under contemporary international law). The expression «public emergency threatening the life of the nation» refers to the various situations that can occur such as states of siege, of emergency or any other situation otherwise provided for in domestic law and even to unclassified situations (terrorist activity, public disturbances etc.…). The idea is that they represent a situation in which the events threaten the state.

In the cases analysed here, Ukraine has chosen to use expressions such as anti-terrorist operations, whereas France and Turkey have used the explicit declaration of a state of emergency, in accordance with their constitutional norms, in referring to their reason for activating Article 15 of the ECHR, stating that the measures taken under this process may lead to the suspension of certain rights under the ECHR.

The text on the principles of law arising from application needs to be adapted.

The situation may therefore require a series of measures involving derogations (the expression used by the ECHR) of obligations established in the ECHR. Such measures cannot come into conflict with other obligations under international law. In particular, the obligations arising out of other rights applicable in the same situations should be taken into account, such as international humanitarian law and other obligations deriving from international human rights law. The ECtHR has ruled on the suitability of the different norms to determine the best one applicable.

The expression «derogation in time of emergency» used by the ECHR, in its official texts in English and French («dérogation en cas d'état d'urgence») does not sit well in Spanish («derogación en tiempo de emergencia o en caso de urgencia») given that the legal expression «derogación» has a different meaning to that for which it was incorporated into Article 15 of the ECHR. The best expression that could be used is «suspensión» which is the effect produced by application Article 15 of the ECHR and is that used in Article 57 of the Vienna Convention on the law of treaties.

Proportionality is the rule established in Article 15 § 1 and therefore any measure used must be consistent with the exigencies of the circumstances – i.e., it must be proportional. This proportionality can and must be overseen by the European Court of Human Rights, which is responsible for overseeing the measures adopted and their compliance with the requirements of the ECHR.

There is a group of non-derogable rights established in Article 15 itself. Particularly relevant among these are the right to life (except for cases of deaths resulting from legitimate acts of war), which, in the case of the ECHR, includes a prohibition on imposition of the death penalty. This limitation is not included in the text of Article 15 but may be inferred from the additional Protocols 6 and 13. Indeed, these protocols may be viewed as a protocol derogating Article 2 § 2 of the ECHR, in that all the contracting parties, without exception, have abolished the death penalty, although not all the contracting parties have ratified Protocol No. 13 abolishing it in all circumstances (including situations of armed conflict).

Ukraine, France and Turkey have all ratified Protocols 6 and 13. France and Turkey have not presented reservations. Ukraine, within the framework of Protocol 6, reserves the right to introduce legislation on restoration of the death penalty in times of war but has not done so.

It is true that Turkey has on occasions discussed the need to reintroduce the death penalty. However, I do not believe that it this would have consequences in ECtHR case law. Moreover, were Turkey to seriously consider such a move, it would only be in times of war, which is not the present case. Furthermore, it would face many difficulties during the process.
As to the procedure, this is a constitutive and material matter. Notice must be made to the Secretary General of the Council of Europe, indicating the measures taken and the reasons therefor, as well as the date on which these measures will cease to be effective.

From a procedural point of view, this might appear to be a mere formality but as I have said, it is constitutive. No derogation from obligations and guarantees established in the ECHR will be admitted if it has not been formally notified to the Secretary General of the Council of Europe. Nonetheless, the form of notification is at the discretion of the state. Normally it takes the form of submitting a simple letter or a written Note Verbale (as Ukraine and France have done) or a Notification (in the case of Turkey) sent by the representative of the state accredited to do so.

The three States analysed here have served notice by way of notifications. The three were addressed to the Secretary General of the Council and in compliance with the ECHR indicated the periods of the derogation, which were later renewed. In this regard, the three states have complied with their strict obligations. They could have indicated the rights or articles being derogated but this is not formally required. The fact that it would have been advisable does not mean that it was necessary. Nor are they required to indicate the geographical area of the derogation, although this too is advisable. In practise, extensions are made to the initial period, normally every three or six months, with no requirement for a maximum or final deadline. The duration of the measures may last years because situations of emergency may be considered to be long-lasting.

Ukraine has been the most scrupulous with regard to these questions, indicating not only the rights suspended and their specific scope but also listing the geographical areas and indicating the areas controlled by the Ukrainian Government. France and Turkey have been more lax in this regard, referring only in general terms to the suspension of all derogable rights and the suspension of rights throughout the geographical area of the country (extending in the case of France to its overseas territories.

The states have a margin of appreciation in application of this article. However, effective control is in the hands of the ECHR's oversight system. For this reason, once the system of derogation or suspension has been activated, it is the Secretary General of the Council of Europe, the Committee of Ministers and the European Court of Human Rights who have the powers established for said oversight, as established in the ECHR.

For the moment, the court has had no opportunity to consider any complaints by these bodies in the cases of Ukraine, France and Turkey. Nonetheless, in the monitoring performed to date, one body of the Council of Europe, the Commissioner for Human Rights, has adopted some form of oversight, visiting Ukraine on 11 July 2016, following the derogation notified in Ukraine's Note Verbale[118]. With respect to Turkey, he has issued statements on press freedom[119].

[118] https://rm.coe.int/16806db7ba
[119] https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2961655&SecMode=1&DocId=2397286&Usage=2.