

## MARGINS OF CONFLICT

## SERIES ON TRANSITIONAL JUSTICE

The Series on *Transitional Justice* offers a platform for high-quality research within the rapidly growing field of transitional justice. The research is, of necessity inter-disciplinary in nature, drawing from disciplines such as law, political science, history, sociology, criminology, anthropology and psychology, as well as from various specialised fields of study such as human rights, victimology and peace studies. Furthermore, the research is international in outlook, drawing on the knowledge and experience of academics and other specialists in many different regions of the world.

The series is aimed at a variety of audiences who are either working or interested in fields such as crime and justice; human rights; humanitarian law and human security; conflict resolution and peace building. These audiences include academics, researchers, students, policy makers, practitioners, non-governmental organisations and the media.

All books published within the series are subject to a double-blind peer review by recognized authorities in the field.

### **The General Editors of the Series are:**

- Prof. Stephan Parmentier (Catholic University of Leuven, Belgium)
- Prof. Jeremy Sarkin (United Nations Working Group on Enforced or Involuntary Disappearances)
- Prof. Elmar Weitekamp (University of Tübingen, Germany)

The general editors receive the support from an Editorial Committee and an Advisory Board, consisting of internationally renowned academics and practitioners.

### **Published titles within the series:**

1. Stephen Peté & Max Du Plessis, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (2007), 978-90-5095-492-1
2. Laura Stovel, *Long Road Home. Building Reconciliation and Trust in Post-War Sierra Leone* (2010), 978-94-000-0028-5
3. Andy Aitchison, *Making the Transition: International Intervention, State-Building and Criminal Justice Reform in Bosnia and Herzegovina* (2011), 978-94-000-0140-4
4. Stef Vandeginste, *Stones Left Unturned. Law and Transitional Justice in Burundi* (2010), 978-94-000-0115-2

# MARGINS OF CONFLICT

## The ECHR and Transitions to and from Armed Conflict

*Edited by*

Antoine BUYSE



intersentia

Antwerp – Cambridge – Portland

*Distribution for the UK:*  
Hart Publishing Ltd.  
16C Worcester Place  
Oxford OX1 2JW  
UK  
Tel.: +44 1865 51 75 30  
Email: mail@hartpub.co.uk

*Distribution for the USA and Canada:*  
International Specialized Book Services  
920 NE 58th Ave. Suite 300  
Portland, OR 97213  
USA  
Tel.: +1 800 944 6190 (toll free)  
Tel.: +1 503 287 3093  
Email: info@isbs.com

*Distribution for Austria:*  
Neuer Wissenschaftlicher Verlag  
Argentinierstraße 42/6  
1040 Wien  
Austria  
Tel.: +43 1 535 61 03 24  
Email: office@nwv.at

*Distribution for other countries:*  
Intersentia Publishers  
Groenstraat 31  
2640 Mortsel  
Belgium  
Tel.: +32 3 680 15 50  
Email: mail@intersentia.be

Margins of Conflict. The ECHR and Transitions to and from Armed Conflict  
Antoine Buyse (ed.)

© 2011 Intersentia  
Antwerp – Cambridge – Portland  
www.intersentia.com

ISBN 978-94-000-0157-2  
D/2011/7849/4  
NUR 828

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.

## PREFACE

The European Convention on Human Rights (ECHR) was drafted more than 60 years ago, in the wake of World War II and in the midst of fears that communist dictatorship would gain firmer ground in ever increasing parts of Europe. The Court has functioned for over 50 years as a guardian of the 'engagements undertaken by the High Contracting Parties in the Convention', as Article 19 ECHR so succinctly formulates it. The dark shadows of war have not fully receded however. Although the State Parties to the Convention have for the most part experienced unparalleled decades of peace, armed conflict has resurged time and again, from Northern Ireland to Cyprus and Turkey, but also beyond the territories of the State Parties to the ECHR. And with the demise of the communist regimes in Central and Eastern Europe in the 1990s new waves of violence devastated parts of Europe, most violently in the States of the former Yugoslavia and in the Caucasus. Human rights, such as those enshrined in the European Convention, have not brought about the end of wars, but they have contributed to the strengthening of peace and they offer a myriad of tools to counter armed conflict and to deal with its aftermath.

This edited collection arose from a seminar held at Utrecht University in October 2009 under the aegis of the research focus on conflicts and human rights, in which both legal scholars and academics from other disciplines cooperate. Its aim was to address some of the salient issues regarding the use of the European Convention in periods of tension, which could both involve transitions from peace to armed conflict and vice versa. It thus adheres to a broad conception of transitions, which do not always concern the often-researched transition from war to peace but also the other way around. This reflects the reality in many States which oscillate between war and peace. It is important to emphasize that this volume does not focus on the period of armed conflict itself, with its particular connection of human rights to humanitarian law – such a topic would merit a book of its own. Rather it studies the margins of conflict, as the title of this volume indicates. Firstly, it seeks to explore which limits human rights put on European societies which are on the brink of armed conflict. In order to give the book a clear focus and coherence the various contributions centre on the ECHR from an internal perspective, shedding light on the particular challenges of both States and the European Court in addressing transitions in the margins of armed conflict. And secondly, it surveys the legal consequences of human rights violations committed during the armed conflict

by looking at the aftermath of war. Thus it studies how transitions from and to war can be dealt with from a human rights perspective – materially, but especially procedurally. The procedural perspective has been adopted to shed light on an often overlooked element of this issue: procedural bars to litigation in Strasbourg often prevent the Court from addressing the merits. In addition, procedural elements of human rights obligations are often as crucial to policy latitude for States as material elements. These include issues such as when a state of emergency can be invoked to derogate from human rights, but also which procedural duties apply to States dealing with the aftermath of conflict. This collection obviously cannot exhaustively address all relevant aspects. Thus a number of salient and topical themes have been selected, without claiming exhaustive coverage.

The contribution of Judge Egbert Myjer – a lecture delivered at Utrecht at the occasion of SIM's (the Netherlands Institute of Human Rights) anniversary – focuses on the interrelations between human rights and armed conflict. The ensuing essays relate to this issue from specific angles. Jan-Peter Loof delves into the specific function of the ECHR's clause on states of emergency and war. The essay by Rick Lawson addresses which State is responsible and to what extent in times of armed conflict: the issue of jurisdiction. Yves Haeck and Clara Burbano Herrera address the practice of the Court's short-term means of safeguarding human rights before and in situations of armed conflict through the use of interim measures. Marloes van Noorloos assesses to what extent the freedom of expression may be limited to prevent the escalation of violence into armed conflict. Marthe Lot Vermeulen looks at State obligations concerning one of the gravest human rights violations ensuing from conflicts: enforced disappearances. My own chapter explores how the recent procedure of pilot judgments may help to address the massive human rights violations that armed conflicts often yield. It is hoped that this collection will contribute to a greater understanding of both the potential and limitations of the European Convention in trying to prevent armed conflict and in dealing with its consequences.

The contributions themselves raise a host of new and fruitful questions. In general the Strasbourg system of human rights supervision is limited in many ways in addressing the problems leading to and arising from armed conflict. How could the voice of human rights be made more audible on the ground in such a context? And more specifically, further research seems warranted on the extent to which states of emergency apply to interstate conflicts and how this interlinks with international humanitarian law. In addition, the territorial reach of the Convention may procedurally be the object of much debate, but the exact reach of material obligations extra-territorially is also a fertile field of research. It is hoped that further research on these important issues will follow in the future and that it can build upon the insights presented in this volume.

Finally, some words of thanks to the people without whom this book would not have come into existence. Sincere thanks are due to Professor Jenny Goldschmidt, director of the Netherlands Institute of Human Rights (SIM), who came up with the initial idea for this project and book, and has shown relentless support for it. Ineke Boerefijn, Anja Mihr, Peter Malcontent and Cedric Ryngaert – all researchers at Utrecht University – have reviewed the papers of the authors and offered valuable comments during the authors' seminar. Many thanks to Laura Henderson who meticulously and efficiently did the language and reference editing of all the contributions – a Herculean undertaking in its own right. This project would not have been possible without the generous support of the Utrecht University Focus and Mass Programme 'Conflicts and Human Rights'. And finally, I owe my gratitude to all the contributors to this volume.

This book is dedicated to all victims of armed conflict, for whom the European Convention will hopefully increasingly be both a beacon of hope and a shield of protection. Human rights treaties are neither swords nor ploughshares, but they can be important tools in the fight against the scourge of war.

ANTOINE BUYSE  
Utrecht, the Netherlands  
October 2010





# CONTENTS

<i>Preface</i> .....	v
Human Rights without Peace? The European Court of Human Rights and Conflicts Between High Contracting Parties Egbert MYJER .....	1
1 War, never again. No peace without human rights .....	1
2 Did this succeed? .....	2
3 Execution of judgments .....	5
4 No human rights without peace? .....	7
4.1 How come it took 19 years before the case was finally decided? .....	9
4.2 Could Turkey be held responsible for what had happened in Cyprus in 1974? .....	9
4.3 Since Turkey is the respondent government, did the Turkish judge sit in the Grand Chamber? .....	11
4.4 What were the typical legal issues in the <i>Varnava and others</i> case? ..	12
4.4.1 Lack of legal interest? .....	12
4.4.2 Admissibility <i>ratione temporis</i> ? .....	13
4.4.3 Six-month rule (Article 35 paragraph 1) .....	17
4.4.4 Fact-finding: burden of proof and procedural obligations .....	22
4.4.5 Can relatives of the missing persons be considered victims of a violation of Article 3? .....	27
4.4.6 What is wisdom in cases like this as far as Articles 41 and 46 are concerned? No punitive damages imposed by the Court .....	28
5 Other post-conflict cases and situations .....	30
6 Interim measures: a paper tiger? .....	31
7 Conclusion .....	32
Crisis Situations, Counter Terrorism and Derogation from the European Convention of Human Rights. A Threat Analysis Jan-Peter LOOF .....	35
1 Introduction .....	35
1.1 The subject of this contribution from a historical perspective .....	35

1.2	Derogation of human rights in the post-9/11 era: what about the European supervision? . . . . .	37
2	History and content of the derogation clause . . . . .	38
3	The principle of exceptional threat . . . . .	40
4	The ‘normalcy-rule, emergency-exception’ hypothesis and ‘entrenched emergencies’ . . . . .	42
5	The level of scrutiny applied by the European Court and its ability to ascertain the existence of a ‘public emergency’ . . . . .	45
5.1	A wide margin of appreciation . . . . .	45
5.2	Risks . . . . .	46
5.3	The case of <i>A. and others v. the United Kingdom</i> and the inherent limits to review of the actual existence of a public emergency . . . . .	48
6	Supervision of derogations: a ‘legal grey hole’? . . . . .	51
7	Filling the grey hole: the principle of proportionality and non-derogable rights . . . . .	52
8	Article 15 ECHR: a relatively small problem. . . . .	55

Really Out of Sight? Issues of Jurisdiction and Control in Situations of Armed Conflict under the ECHR

	Rick LAWSON . . . . .	57
1	Introduction . . . . .	57
2	The basics of extra-territoriality: Article 1 ECHR and <i>Loizidou</i> . . . . .	59
3	Not designed to be applied throughout the world: <i>Bankovic</i> . . . . .	61
4	Moving beyond <i>Bankovic</i> : <i>Öcalan/Al-Saadoon, Issa/Pad</i> and <i>Ilaşcu/Treska</i> . . . . .	63
4.1	<i>Öcalan</i> : the confusion sets in . . . . .	63
4.2	<i>Issa</i> and <i>Pad</i> : outright rebellion against <i>Bankovic</i> . . . . .	65
4.3	<i>Ilaşcu</i> and <i>Treska</i> : a very generous approach . . . . .	67
5	Reading between the lines: <i>Saddam Hussein</i> . . . . .	68
6	Dying between the lines: <i>Isaak</i> and <i>Andreou</i> . . . . .	69
7	Outlook: <i>Medvedyev</i> and <i>Al-Skeini</i> . . . . .	70
8	<i>Tertium non datur</i> ? . . . . .	72
9	Some tentative conclusions . . . . .	75

The Use of Interim Measures Issued by the European Court of Human Rights in Times of War or Internal Conflict

	Yves HAECK and Clara BURBANO HERRERA . . . . .	77
1	Introduction . . . . .	77
2	Procedural aspects of interim measures . . . . .	79
2.1	Introduction of a request: easy access . . . . .	79
2.2	Receiving evidence: flexible criteria and lower level of proof . . . . .	81

2.3	Accepted or rejected: promptness of response . . . . .	84
3	Substantial aspects of interim measures . . . . .	85
4	Application in times of conflict <i>sensu stricto</i> within the territory of Member States . . . . .	87
4.1	Application and effect within the territory of the Member States . . . .	87
4.1.1	The United Kingdom in its crown colony: the death penalty . . . . .	87
4.1.2	Greece under the military junta: the death penalty . . . . .	88
4.1.3	Germany and the Rote Armee Fraktion: the preservation of evidence . . . . .	89
4.1.4	Turkey and the PKK, the DHKP-C and NGOs: the treatment of prisoners and the death penalty . . . . .	90
4.1.5	Russia and Chechnya: the death penalty, the treatment of prisoners and guaranteeing the right to application . . . . .	93
4.1.6	The Georgian-Russian conflict . . . . .	97
4.1.7	The Transdnjestrian conflict . . . . .	98
4.2	Application within and effect outside the territory of the Member States . . . . .	99
4.2.1	The Iraqi conflict . . . . .	99
4.2.2	The Sri Lankan conflict . . . . .	102
4.2.3	The Afghan conflict . . . . .	104
4.2.4	The Colombian drug war and the struggle against paramilitary forces . . . . .	105
4.2.5	The Algerian situation . . . . .	106
4.2.6	The Somalian conflict . . . . .	107
4.2.7	The Darfur conflict . . . . .	108
4.2.8	The United States and the struggle against terrorism . . . . .	109
4.2.9	Uzbekistan . . . . .	110
4.2.10	Peru . . . . .	112
4.2.11	Tunisia . . . . .	113
4.2.12	Jordan . . . . .	114
5	Application in post-conflict situations . . . . .	115
5.1	Application and effect within the territory of the Member States . . . .	115
5.1.1	Post-Ceausescu Romania . . . . .	115
5.1.2	Post-conflict Bosnia-Herzegovina and Kosovo . . . . .	116
5.2	Application in and effect outside the territory of the Member States . . . . .	117
5.2.1	Post-Pinochet Chile . . . . .	117
5.2.2	Cameroon and ex-Yugoslavia . . . . .	118
6	Compliance: a clear tendency of States to comply with provisional measures in conflict-related situations, but . . . . .	119
7	Conclusions . . . . .	124

Foretelling the future, facing the past. Hate speech and conflict situations under the ECHR	
Marloes VAN NOORLOOS .....	131
1 Introduction .....	131
2 The role of hate speech and the media in conflict situations .....	132
2.1 Setting limits to hate speech: rationales .....	132
2.2 The ‘marketplace of ideas’ in conflict. ....	133
2.3 Hate speech before conflict .....	134
3 Article 10 ECHR and the European Court of Human Rights’ case law ...	136
3.1 General framework Article 10 .....	136
3.2 Extreme speech in the context of terrorism .....	137
3.2.1 Legitimately restricted speech, context and consequences ..	138
3.2.2 Violations of Article 10. ....	141
3.2.3 <i>Leroy v. France</i> : glorifying the WTC attacks .....	142
3.2.4 Conclusion: restricting extreme speech. ....	143
3.3 ‘Traditional’ hate speech .....	144
3.3.1 Equality, ‘militant democracy’ and Article 17 ECHR. ....	144
3.3.2 Racial and religious discrimination under Article 10. ....	146
3.3.3 Denial or justification of historical facts. ....	149
4 Conclusion .....	151
 The Duty to Take Preventive Operational Measures. An Adequate Legal Tool to Hold States Responsible in Enforced Disappearance Cases?	
Marthe Lot VERMEULEN .....	153
1 Introduction .....	153
2 The doctrine of positive obligations .....	155
3 The protection against enforced disappearances .....	157
4 The scope and content of the duty to take preventive operational measures in enforced disappearance cases .....	160
4.1 The general test for the obligation to take preventive operational measures. ....	160
4.2 Application of the test in enforced disappearance cases .....	161
5 Discussion of the duty to take preventive operational measures in enforced disappearance cases .....	165
5.1 The scope and content of the duty to take preventive operational measures. ....	166
5.2 The difference between a procedural and a substantive violation of Article 2 ECHR. ....	166
5.3 The role of the circumstances under which the enforced disappearance took place. ....	169

5.4	The relationship between preventive operational measures and the right to liberty.....	173
6	Conclusion: is the protection offered by the duty to take preventive operational measures adequate? .....	173
Airborne or Bound to Crash? The Rise of Pilot Judgments and Their Appeal as a Tool to Deal with the Aftermath of Conflict		
	Antoine BUYSE.....	175
1	Introduction.....	175
2	Pilot judgments: combining individual and general redress .....	176
3	Underlying reasons for the creation of the pilot judgment procedure ....	185
4	Challenges for the pilot procedure .....	188
5	Possible use in post-conflict situations. ....	192
6	Conclusion .....	195

