CONTENTS

Preface ................................................................. 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 Varnava and others case?.. 12
      4.4.1 Lack of legal interest? .......................................................... 12
      4.4.2 Admissibility ratione temporis? ............................................. 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
4 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

Intersentia

ix
## Contents

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 A. and others v. the United Kingdom 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 Loizidou .......... 59
3 Not designed to be applied throughout the world: Bankovic ......... 61
4 Moving beyond Bankovic: Öcalan/Al-Saadoon, Issa/Pad and Ilascu/Treska ...................................................................... 63
4.1 Öcalan: the confusion sets in ................................................... 63
4.2 Issa and Pad: outright rebellion against Bankovic ..................... 65
4.3 Ilascu and Treska: a very generous approach ......................... 67
5 Reading between the lines: Saddam Hussein ................................ 68
6 Dying between the lines: Isaak and Andreou ............................. 69
7 Outlook: Medvedyev and Al-Skeini ........................................... 70
8 Tertium non datur? ................................................................. 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 sensu stricto 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 Transdniestrian 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 Leroy v. France: 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
## Contents

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