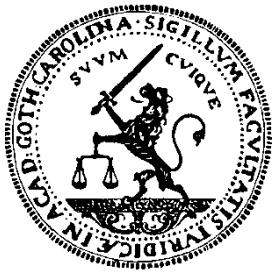

FACULTY OF LAW

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Mind the Gap

Exploring the Legal Void at the Intersection of Humanitarian Law and Human Rights Law in States of Emergency

JURM02 Graduate thesis

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Summary

The shifting paradigm from conflicts between countries to conflicts within countries has changed how national violence unfolds. Contemporary conflicts are characterized by protracted low-intensity belligerency, unlike the full-scale civil wars that shaped the understanding of non-international armed conflict under humanitarian law. Modern internal conflicts thus fall into the grey area between the laws of peace and the laws of war, as they are considered emergencies under human rights law while falling outside the scope of humanitarian law. As a result, international legislation is struggling to enforce human rights standards when they are at their most necessary. This thesis aims to investigate the legal void caused when states of emergency are invoked to manage low-intensity internal conflicts that fail to satisfy the criteria of non-international armed conflict.

The purpose of the thesis is fulfilled by applying the legal doctrinal method to ascertain the positive content of emergency law under the legal regime of human rights, and the definition of non-international armed conflict under humanitarian law. After establishing the international framework pertaining to the issue, the thesis employs an empirical research method by applying the legislation on the conflict in South-East Turkey. By using the conflict between the PKK and the Turkish government as a case study, the thesis seeks to clarify the causes and effects of the legal void for the purpose of identifying how the legal framework can be revised to address the issue. The findings of the thesis suggest that the definition of non-international armed conflicts in humanitarian law must be redefined to accommodate the nature of contemporary internal conflicts. In order to bridge the gap between IHRL and IHL, the binary distinction between peace and war must be superseded by a more flexible approach that allows the simultaneous application of both legal regimes.

Sammanfattning

Det nuvarande skiftet från mellanstatliga konflikter till inomstatliga konflikter har förändrat hur våld uttrycker sig nationellt. Nutida konflikter kännetecknas av utdragen lågintensiv krigföring, till skillnad från de fullskaliga inbördeskrigen som bidrog till att utforma definitionen av intern väpnad konflikt enligt humanitär rätt. Dagens nationella konflikter hamnar därmed i gråzonen mellan lagar som gäller i fredstid respektive krigstid, eftersom de betraktas som fredstida kriser enligt regelverket för mänskliga rättigheter samtidigt som de faller utanför den humanitära lagstiftningens tillämpningsområde. Folkrätten misslyckas således med att upprätthålla mänskliga rättigheter när de är som mest kritiska. Förevarande uppsats syftar till att undersöka det rättsliga tomrum som uppstår när undantagstillstånd införs för att bemöta lågintensiva nationella konflikter som misslyckas med att uppfylla rekvisiten för intern väpnad konflikt.

Syftet uppfylls med hjälp av den rättsdogmatiska metoden som tillämpas för att fastställa det positiva innehållet i undantagslagar enligt regelverket för mänskliga rättigheter, samt definitionen av intern väpnad konflikt enligt humanitär rätt. En empirisk metod används därefter i syfte att tillämpa det relevanta internationella ramverket på konflikten i sydöstra Turkiet. Konflikten mellan PKK och den turkiska regeringen utnyttjas därigenom som fallstudie för att klargöra orsakerna och konsekvenserna av det rättsliga tomrummet, samt för att undersöka hur lagstiftningen kan omarbetas för att bemöta problemet. Uppsatsens resultat visar att definitionen av intern väpnad konflikt enligt humanitär rätt måste omformuleras och anpassas till karaktären av nutida konflikter. Den nuvarande klyftan mellan regelverket för mänskliga rättigheter och humanitär rätt kan enbart överbryggas genom att ersätta den binära distinktionen mellan fred och krig med ett mer flexibelt tillvägagångssätt som möjliggör för samtidig tillämpning av båda rättsområden.

Abbreviations

ACHR	American Convention on Human Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal of the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
NIAC	Non-International Armed Conflict
OAS	Organization of American States
PKK	Kurdistan Workers Party
UN	United Nations
USSR	Union of Soviet Socialist Republics

1 Introduction

1.1 Background: Rethinking Legal Frameworks in Contemporary Conflict Dynamics

In recent years, the international community has witnessed a significant shift in the nature of violence.[1] Although there has been a noticeable decline in war-related fatalities, conflict and violence persists in different forms.[2] Traditional interstate war is becoming less common as modern-day belligerency often takes place within state borders between domestic groups such as militias, criminal networks, and international terrorist organizations.[3] The new avenues, methods and actors of warfare are challenging the accuracy of the existing legal framework concerning internal armed conflict. The current legislation regulating the definition of non-international armed conflict was developed in the aftermath of World War II,[4] and therefore fails to encompass the conflict situations of today. As a result, the low-intensity entrenched conflicts that have become commonplace fall outside the scope of humanitarian law.

The character and nature of contemporary internal conflicts differ significantly from the conventional fully-fledged civil wars that formed the basis for defining non-international armed conflict.[5] Modern conflicts often fail to meet the criteria for classification as war under international law, leading to their classification as peace despite the absence of stability. Consequently, such internal conflicts are relegated to the realm of human rights law. However, this categorization is not straightforward, as human rights law permits derogations in times of crisis.[6] When faced with a national emergency jeopardizing the existence of the state, human rights law temporarily grants governments extraordinary powers to avert the threat and ensure the survival of the nation. As such, the state of emergency operates on the idea that in times

[1] Bastian Herre et al., 'War and Peace', *Our World in Data*, 20 March 2024, https://ourworldindata.org/war-and-peace.

[2] United Nations, 'A New Era of Conflict and Violence', United Nations (United Nations), accessed 19 May 2024, https://www.un.org/en/un75/new-era-conflict-and-violence.

[3] 'Understanding Intrastate Conflict', CFR Education from the Council on Foreign Relations, 16 May 2023, https://education.cfr.org/learn/reading/understanding-intrastate-conflict.

[4] 'Non-International Armed Conflict (NIAC) | UNDRR', 7 June 2023, http://www.undrr.org/understanding-disaster-risk/terminology/hips/so0002.

[5] Stathis N. Kalyvas and Laia Balcells, 'International System and Technologies of Rebellion: How the End of the Cold War Shaped Internal Conflict', *American Political Science Review* 104, no. 3 (August 2010): 415–29, https://doi.org/10.1017/S0003055410000286. p. 415

[6] Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties', *International Organization* 65, no. 4 (October 2011): 673–707, https://doi.org/10.1017/S002081831100021X. p. 674

of crisis, exceptional measures may be necessary to safeguard the stability and security of the nation and its citizens.[7]

Although the rationale of the emergency regime may seem reasonable, it presents a complex reality. In order for the state to be awarded unconstrained powers in the event of an emergency, it is also authorized to derogate from its human rights obligations under international law. Somewhat contradictory, a state is thus allowed to suspend human rights in its efforts to ensure citizens' security.[8] Emergency law is therefore underpinned by multifaceted concerns relating to the enforcement of human rights as intrinsic entitlements and the protection of the population in violent settings, all while attempting to assure the continued existence of the state apparatus.[9]

The emergency regime is further complicated when implemented to mitigate the threats posed by internal strife. Although such situations technically fall within the legal regime of human rights, they can also be considered emergencies and therefore enable derogation from human rights. Meanwhile, they lack the intensity of non-international armed conflicts and therefore remain outside the scope of humanitarian law. This leaves them stranded in a legal grey area, existing somewhere between the domains of peace and war. As a result, the unique characteristics of these conflict situations evade adequate addressal by existing legal frameworks, creating a vacuum where neither human rights law nor humanitarian law applies seamlessly.[10]

The legal vacuum that presents itself when human rights law and humanitarian law converge in situations of armed conflict has been referred to in scholarly work as the derogation gap.[11] With multiple states considering the extension of their constitutional powers, while internal conflicts are taking new shapes, it is becoming increasingly important for international law to address the derogation gap. The question arises as to which field of law should govern situations currently escaping legal oversight.

The urgency to address the derogation gap is exemplified in Sweden, where a recent official report commissioned a parliamentary committee to investigate the government's ability to adopt emergency measures. In the report, the committee recommended expanding the government's emergency powers[12], a suggestion met with substantial criticism for potentially violating the

[7] Hafner-Burton, Helfer, and Fariss. p. 676

[8] Gerd Oberleitner, ed., 'War as Emergency: Derogation', in *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge: Cambridge University Press, 2015), 169–75, https://doi.org/10.1017/CBO9781316103869.016. p. 169-170

[9] Oberleitner. p. 170

[10] Fionnuala Ni Aolain, 'The Relationship between Situations of Emergency and Low-Intensity Armed Conflict', in *Israel Yearbook on Human Rights, Volume 28 (1998)* (Brill Nijhoff, 1999), 97–106, https://doi.org/10.1163/9789004423121_008. p. 101

[11] Oberleitner, 'War as Emergency'. p. 172

[12] SOU 2023:75, *Stärkt konstitutionell beredskap.* Justitiedepartementet. p. 317

rule of law and proposing overly vague criteria for the authorization of emergency powers.[13] The issue holds particular relevance in Sweden due to the prevalence of gang-related violence.[14] The organized crime currently permeating Swedish society could be indicative of a low-intensity internal conflict, which puts the situation at risk of being placed in the derogation gap. Issues that were previously considered exclusive to non-democratic states, such as human rights violations, breaches of the rule of law and reluctance to comply with international law, are therefore more tangible than ever.

Meanwhile, numerous states have resorted to emergency measures to address low-intensity internal conflicts. In Turkey[15], India[16], El Salvador[17] and Northern Ireland[18], the specific problems highlighted above have materialized in practice, which shows the imminence of the current legal shortcomings. Due to the inability of both IHL and IHRL to accommodate the characteristics of such conflicts, these states have all been subjected to permanent states of emergency in which restrictive measures and widespread human rights violations have become the new normal.[19] Despite their geographical, historical, cultural and governmental differences, these nations have all faced similar challenges. The impact of the derogation gap thus transcends borders and contexts, which highlights the relevance of the issue.

In conclusion, the evolving landscape of conflict has exposed significant gaps in the existing legal framework. The emergence of new conflicts thus challenges the applicability of both humanitarian law and human rights law, the shortcomings of which may result in a legal void that enables states to violate human rights. The urgency to address the issue is underscored by the prevalence of such conflicts globally, by the rising national instability and by government's efforts to expand emergency powers. By addressing the

[13] Moa Haeggblom, 'Yttrande över Stärkt konstitutionell beredskap (SOU 2023:75)', *Civil Rights Defenders* (blog), 23 April 2024, https://crd.org/sv/2024/04/23/yttrande-over-starkt-konstitutionell-beredskap-sou-202375/.

[14] 'Totalt 62 000 bedöms aktiva eller ha koppling till kriminella nätverk | Polismyndigheten', accessed 21 May 2024, https://polisen.se/link/26686af96e12443e90d5944a5aed6eb1.

[15] See Ece Göztepe, 'The Permanency of the State of Emergency in Turkey: The Rise of a Constituent Power or Only a New Quality of the State?', *Zeitschrift Für Politikwissenschaft* 28 (29 October 2018), https://doi.org/10.1007/s41358-018-0161-0.

[16] See C. Kumar, 'Human Rights Implications of National Security Laws in India: Combating Terrorism While Perserving Civil Liberties', *Denver Journal of International Law & Policy* 33, no. 2 (1 January 2005), https://digitalcommons.du.edu/djilp/vol33/iss2/3.

[17] See 'El Salvador State of Emergency', OHCHR, accessed 21 May 2024, https://www.ohchr.org/en/press-briefing-notes/2023/03/el-salvador-state-emergency.

[18] See Lynn Wartchow, 'Civil and Human Rights Violations in Northern Ireland: Effects and Shortcomings of the Good Friday Agreement in Guaranteeing Protections', *Northwestern Journal of Human Rights* 3, no. 1 (1 January 2005): 1.

[19] Fionnuala Ní Aoláin and Oren Gross, eds., 'Emergencies and Humanitarian Law', in *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2006), 326–64, https://doi.org/10.1017/CBO9780511493997.007. p. 342

derogation gap, fundamental principles of international law and the rights and freedoms of individuals can be maintained, regardless of the nature or intensity of the potential conflict.

1.2 Purpose and Research Questions

The intersection of International Humanitarian Law and International Human Rights Law, particularly as regards the interaction between internal conflict and emergency, significantly lacks legal and theoretical exploration. This thesis therefore aims to investigate the legal void that presents itself when emergency powers are invoked to address internal conflicts that fail to qualify as non-international armed conflicts. The international legal framework presented by the thesis is applied to the conflict in South-East Turkey for the purpose of exemplifying how and why the derogation gap manifests itself in practice. As such, the thesis seeks to conceptualize the legal ambiguities which reveal themselves in the grey areas of the traditionally straightforward peace-war dichotomy.

The purpose of the thesis will be achieved by answering the following research questions:

1. What legal issues emerge when emergency powers are invoked in internal conflicts which fall outside the scope of International Humanitarian Law, and how do these issues impact the protection of human rights?

2. How can the relationship between war and emergency, and the legal frameworks pertaining to that relationship, be redefined to more adequately address the complexities presented by the derogation gap?

1.3 Method and Methodology

To appropriately meet the purpose of the thesis, a mixed-method approach will be employed. Firstly, the existing international legal framework concerning emergency law and non-international armed conflicts will be presented using the legal doctrinal method. Legal doctrinal research is conducted with the purpose of systematically describing the principles, rules and concepts that are inherent to a specific field of law and analyze them with the aim of clarifying any legal gaps or uncertainties.[20] The doctrinal approach presupposes the adoption of an internal perspective, meaning that the person applying the doctrinal approach places themselves within the legal system. In other words, the legal system constitutes both the subject of and

[20] Jan M. Smits, 'What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research', in *Rethinking Legal Scholarship*, ed. Rob Van Gestel, Hans-W. Micklitz, and Edward L. Rubin, 1st ed. (Cambridge University Press, 2017), 207–28, https://doi.org/10.1017/9781316442906.006. p. 210

the normative framework for assessment.[21] Furthermore, a distinct feature of the method is its perception of the law as a system. The doctrinal approach seeks to find legal coherence by compressing large quantities of seemingly inconsistent material into general principles that interact within a larger system, rather than to simply describe existing legislation.[22] These traits of the legal doctrinal method work together to create a neutral and objective description of existing law (*de lege lata)* with the aim of establishing an understandable framework that can be used as a stepping-stone for further discussion.[23] In doing so, the doctrinal approach can also be leveraged to provide a critical viewpoint of the law and describe it not only as it is, but as it ought to be (*de lege ferenda*).[24]

The exhibition of the law *de lege lata* relies on an evaluation of primary sources of law relevant for the legal field in question. International legal documents, however, are dependent upon state consent. In other words, international legislation is generally only awarded legal power over those states which have agreed to be bound by them.[25] Therefore, it can be difficult to ascertain what sources constitute primary sources of international law, given the absence of uncontested, universally accepted legislation. Since the idea of the doctrinal approach is to extract objective principles and rules of the law, the commonly recognized legal sources of international law must be considered the most relevant objects of research. The International Court of Justice have identified them in Article 38(1) of their Statute as (1) international conventions, (2) international customary law, (3) general principles of law, and (4) as subsidiary means for the determination of rules of law, judicial decisions and scholarly work.

The large impact of state opinion on the effect and realization of the sources mentioned in the ICJ Statute does, however, further aggravate the ability to pinpoint what constitutes international customary law or general principles of law, for instance. To address these issues and fulfil the purpose of the thesis, all the sources mentioned have been used to analyze the positive content of emergency law and international humanitarian law pertaining to non-international armed conflict. Furthermore, in relation to each specific source, multiple documents derived from different parts of the world and different bodies of international law have been examined to establish the positive content of the law more adequately. For example, as regards human rights law, international conventions such as the ICCPR, the ECHR and the ACHR have been presented and analyzed. By investigating a larger collec-

[21] Smits. p. 210-211

[22] Smits. p. 211-212

[23] Smits. p. 212

[24] Suzanne Egan, 'The Doctrinal Approach in International Human Rights Scholarship', in *Research Methods in Human Rights*, 1st Edition (Routledge, 2018), 24–41. p. 25

[25] Vaughan Lowe, 'Where Does International Law Come From?', in *International Law: A Very Short Introduction*, by Vaughan Lowe, 1st ed. (Oxford University Press, 2015), 19–38, https://doi.org/10.1093/actrade/9780199239337.003.0002. p. 19

tion of various kinds of sources which may even contradict each other at times, the thesis aims to provide the reader with a more comprehensive and coherent view of the agreements and disagreement of the legal content in question.

In terms of international humanitarian law, it is more difficult to achieve a diversification of primary sources since the Geneva Conventions and its Additional Protocol II are the only recognized IHL conventions which contain a definition of non-international armed conflict.[26] The issue becomes even more complicated as state parties to the conventions and its protocols do not fully agree on the meaning and requirements of all elements of the NIAC-definition. Additionally, the broad wording and lack of guidance in the convention's provisions does not facilitate the difficulties in determining the rules of law. For that reason, several judicial decisions and a large body of scholarly work has been employed to interpret the definition of non-international armed conflict in Common Article 3 and Article 1 of Additional Protocol II, and to provide a multitude of perspectives on the threshold of application of the provisions. While some viewpoints have been more established and widespread than others, most of them have been included in the latter case-study of the thesis to enable a more nuanced discussion of the subject. Furthermore, the statements and suggestions presented in the judicial decisions and scholarly work have been compared to each other for the purpose of identifying similarities and differences that could aid in recognizing which aspects have been easier, respectively more difficult to agree on.

The legal doctrinal method was primarily developed in the research of domestic law and customized to the characteristics of the domestic legal system. The method therefore exhibits multiple drawbacks when applied to research of international law. The content of international law was largely developed by the very same subjects to which it was intended to apply, namely, sovereign states.[27] International law therefore displays a unique dynamic that challenges the traditional application of the legal doctrinal method, which usually relies on the interpretation of law within a singular legal system. As mentioned, the sources of international law are diverse and heterogenous, which imposes certain limitations on the doctrinal method. These limitations can be attributed to the decentralized nature of international lawmaking, as well as the diversity of legal traditions and practices among states, which aggravates the efficiency of the doctrinal method. Thus, alternative methods could be necessary to complement the study of international law.

[26] 'Non-International Armed Conflict | How Does Law Protect in War? - Online Casebook', accessed 13 May 2024, https://casebook.icrc.org/a_to_z/glossary/non-international-armed-conflict.

[27] Lowe, 'Where Does International Law Come From?'

After having established the content of the law, the thesis aims to anchor the recognized framework to a specific case study, hence why the legislation is applied and discussed in relation to the conflict between the PKK and the Turkish government in South-East Turkey. As such, the thesis also employs an empirical research method to supplement the findings of the doctrinal research and to enrich the discussion of the thesis' subject. Empirical research seeks to establish evidence by way of observation or experience. In other words, the legal researcher collects and analyses data, for instance in the form of legislation, and uses that information to draw inferences about similar situations that have not been directly observed.[28] One form of implementing the empirical method is the case study, in which a phenomenon is examined in a specific context. By applying the collected data to a particular case, the method can help explore, describe, and explain the why's and the how's of a legal situation.[29] The selection of the case study or studies requires a careful consideration of aspects such as spatial location, focus or time, which all impact the credibility and validity of the research. Furthermore, when deciding on a case, it is important to be mindful of selection bias. For example, selection bias could result in the unintentional choice of a case which already shows the effect that the researcher is interested in proving. Employing a multiple-case study is an example of an effective strategy to avoid the selection bias.[30]

As stated, the conflict in South-East Turkey constitutes the case study of the thesis. The conflict in Turkey is thus used to explore, describe, and explain why and how the so-called derogation gap occurs. Choosing a single case study, rather than multiple cases, is justified based on several factors. Firstly, focusing on one specific case allows for a more in-depth investigation of the complexities and nuances of the conflict. Moreover, it could be argued that a multiple-case study is unsuitable in this particular context, as it could risk steering the research towards the mere observation of outcomes, rather than grounding the research in the exploration of underlying causes. The focus on a single case study thus allows a more specific and detailed examination of causality between low-intensity internal conflict and high-intensity emergency. In terms of the spatial location, focus and time frame of the case, the conflict in Turkey was selected for several reasons. Its geographical location in Europe allows for a more comprehensive analysis of the international legal framework concerning the emergency derogation, as it opens up for a discussion of legal oversight mechanisms and its implications on both international and European level. Furthermore, the conflict in Turkey is suitable as a case study because it displays the aspects important for the focus of the thesis, namely an entrenched emergency rule and a protract-

[28] Lee Epstein and Gary King, 'The Rules of Inference', *The University of Chicago Law Review* 69, no. 1 (2002): 1, https://doi.org/10.2307/1600349. p. 2

[29] Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research', *Law and Method*, 2016, https://doi.org/10.5553/REM/.000020.

[30] Webley.

ed internal conflict. Finally, the drawn-out time frame of internal strife in the country is necessary for the application and investigation of several requirements pertaining to emergency provisions and the definition of a NIAC. The large temporal scope of the conflict is fitting for the thesis as the determination of whether a low-intensity internal conflict and a high-intensity emergency exists requires a comprehensive understanding of the conflict's historical context, evolution, and key events over time.

After having used the doctrinal approach to outline the positive content of the relevant legal framework *de lege lata*, and the empirical approach draw inferences by applying the legislation to a case study, the conclusion of the thesis once again implements the doctrinal method to discuss the law as it ought to be (*de lege ferenda).* As regards the subject of this specific thesis, such a discussion emphasizes how IHRL and IHL frameworks and legal oversight mechanisms should evolve and work together to effectively encompass situations that currently fall between legal stools. In doing so, the thesis integrates both theoretical analysis and empirical observation with the aim of offering a comprehensive understanding of the legal issue at hand. The methodology employed throughout the thesis thus not only provides legally substantiated findings, but also highlights the thesis' contribution to legal scholarship.

1.4 Delimitations

In order to accurately fulfil the purpose and provide focus to the study, it is imperative to establish the specific boundaries and limitations within which the research of the thesis will operate. The research of the thesis is conducted for the purpose of exploring the relationship between two fields of *international* law*,* namely IHRL and IHL, in the specific context of emergency measures invoked following an internal conflict. Therefore, the descriptive sections of the thesis are focused on explaining the specific provisions of IHRL pertaining to emergency law, respectively the provisions of IHL governing internal conflict.

The emergency provisions of three international conventions, namely the ICCPR, the ECHR and the ACHR, are used to establish the international legal framework of the state of emergency. However, it is important to note that constitutional law has a large impact on state's ability to lawfully invoke emergency powers since many states have established their right to resort to emergency measures in their constitution.[31] Furthermore, constitutional considerations provide important perspectives to the discussion, as states of emergency are closely linked to the exercise of state sovereignty. Emergency regimes have therefore historically developed through national

[31] See for example David Dyzenhaus, 'States of Emergency', in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), 0, https://doi.org/10.1093/oxfordhb/9780199578610.013.0023.

legislation, and the question of regulating the issue internationally has been controversial.[32] In addition, differences in states' constitutional emergency provisions can reveal differences in state's intentions of establishing strict boundaries to the emergency regime.[33] To summarize, there would have been multiple benefits to addressing the constitutional dimension of emergency law. However, such perspectives fall outside the scope of the study due to the international focus and character of the thesis.

In terms of the international framework concerning internal conflict, one major delimitation has been necessary. In the research of non-international armed conflict and its emergence in humanitarian law, so-called wars of national liberation are oftentimes mentioned since these were originally considered civil wars, before being reclassified as international armed conflicts.[34] While wars of national liberation, and their original classification as internal armed conflicts, could provide a broader understanding of the development of the international legislation pursuant to non-international armed conflict, such wars do not carry relevance for the topic of the thesis and therefore fall outside the scope of the study.

Lastly, the legal framework presented in the thesis has only been applied and discussed in relation to one single case-study, the conflict in South-East Turkey. While there are multiple examples of other states in which emergency powers have been invoked to counteract internal conflicts, such as India, Northern Ireland, and El Salvador[35], these have not been included in the thesis. Including additional examples and case-studies could have contributed to strengthening the conclusion of the thesis as they would have reiterated the suggested overlap between low-intensity internal conflicts and high-intensity emergencies. However, the thesis has been delimited to one case-study since the complete focus on one specific example allows for a significantly more detailed and in-depth description and analysis. The conflict in South-East Turkey has been chosen since it constitutes a textbook example of a real-life situation, the circumstances of which have contributed to the derogation gap.

1.5 Previous Research

[32] See for example Matthew Stibbe and André Keil, 'Introduction: State of Emergency Regimes in the First World War Era', *First World War Studies* 14, no. 1 (2 January 2023): 1–27, https://doi.org/10.1080/19475020.2024.2307037.

[33] See for example Linda Camp Keith and Steven C. Poe, 'Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration', *Human Rights Quarterly* 26, no. 4 (2004): 1071–97.

[34] See for example Sandesh Sivakumaran, *Part II The Substantive Law of Non-International Armed Conflict, 5 Identifying a Non-International Armed Conflict: Armed Conflicts and Internal Tensions and Disturbances*, The Law of Non-International Armed Conflict (Oxford University Press, 2012), https://doi.org/10.1093/law/9780199239795.003.0006.

[35] See Ní Aoláin and Gross, 'Emergencies and Humanitarian Law'. p. 342

While both emergency law and the legislation of non-international armed conflict have been thoroughly researched, the specific question of the interaction between these two concepts in the context of internal conflict is generally underexamined. The most prominent and comprehensive scholarly work on the topic has been conducted by Ní Aoláin and Gross in their book *Law in Times of Crisis: Emergency Powers in Theory and Practice* which provides a detailed assessment of emergency law and its relationship with other fields of international law. The subject of the current thesis is addressed particularly in chapter 6 of the book, *Emergencies and Humanitarian Law,* albeit with a more general perspective of war rather than a sole focus on non-international armed conflict. The chapter examines the broader topic of the relationship between emergency law and different forms of war.[36] By presenting their research and findings, Ní Aoláin and Gross seek to challenge the polarizing dichotomy that permeates the discussion concerning emergency law. The authors question the historically established assumptions that war and emergency are separate and distinct events, that emergency is the exception to rule of normalcy and suggest that emergency measures are more common to state practice than one might think.[37] As such, the scholars criticize and help loosen the boundaries that have previously justified the separation between different legal regimes. The chapter thereby enables a discussion on the specifically troubled relationship between international humanitarian law and the derogation regime of international human rights law. The overlap between low-intensity internal conflict and high-intensity emergencies discussed in this thesis is derived from the arguments and conclusions made by the authors. Ní Aoláin and Gross have majorly contributed to debunking the artificial separation of IHL and the emergency derogation of IHRL by visualizing the realities of state practice.

In addition to being co-author of the previously mentioned literature, Ní Aoláin is the author of the chapter *The Relationship Between Situations of Emergency and Low-Intensity Armed Conflict,* published in the *Israel Yearbook of Human Rights,* another source that has had a major influence on the thesis. The chapter explores the relationship between IHRL and IHL, specifically in situations of entrenched emergencies. Similarly to the literature discussed above, the research highlights the crossover between continuously extended so-called problem emergencies and low-intensity internal conflict and suggests that the occurrence of such emergencies could indicate that the situation falls under the lower end of the armed conflict spectrum.[38] Both scholarly works of Ní Aoláin on the topic naturally raise similar questions, arguments, and solutions.

[36] Ní Aoláin and Gross. p. 326

[37] Ní Aoláin and Gross. p. 326-327

[38] Aolain, 'The Relationship between Situations of Emergency and Low-Intensity Armed Conflict'. p. 97

Lastly, the chapter *War as emergency: derogation* written by Gerd Oberleitner in *Human Rights in Armed Conflict* deserves recognition for its contributions to the subject of the thesis. Oberleitner is responsible for coining the term "derogation gap", which has been used multiple times in the thesis, to describe situations in which neither IHRL nor IHL apply due to states lawfully invoking emergency derogations of human rights law while simultaneously denying the existence of an armed conflict under humanitarian law.[39] The topic of Oberleitner's work differs slightly from that of Ní Aoláin and Gross, even though they are similar in the sense that they both discuss the issues that arise when the emergency derogation is invoked in the specific context of armed conflict. Oberleitner's chapter distinguishes itself from the chapter of Ní Aoláin and Gross because it focuses on the derogation as such and presents its limitations in depth. In doing so, Oberleitner challenges the use of derogation clauses as justifications for the complete suspension of human rights in armed conflict. The chapter concludes with the assertion that human rights continue to apply even in situations of armed conflict, regardless of whether a state has proclaimed a state of emergency.[40]

While the subject of the present thesis is heavily influenced by the sources presented above, it brings additional perspectives to the subject. Specifically, the thesis distinguishes itself from the research mentioned because it is anchored in a concrete case study. The thesis applies the presented framework concerning emergency law and non-international armed conflict to the specific dispute between the PKK and the Turkish government, which helps visualize the nuances of emergency law and its interplay with both IHRL and IHL. Furthermore, the thesis introduces multiple viewpoints and definitions of legal concepts relevant to the subject. Most notably, the thesis provides several suggested definitions of "internal disturbances and tensions" which has not yet been defined in the Geneva Conventions or in its additional protocols. By grounding the analysis in a specific conflict scenario, the thesis aims to bridge the gap between theoretical discussions and the lived realities of individuals in such emergencies, thereby enriching the scholarly debate with practical considerations and implications for legal practice and policy making. Furthermore, the thesis includes multiple perspectives, definitions, and arguments in its discussion, thus offering a comprehensive foundation for understanding the complexities inherent to the subject.

Through its examination of legal ambiguities that appear in entrenched emergency situations and its application to a specific case study, the thesis hopefully advances the theoretical understanding of the topic, while simultaneously offering valuable implications for legal practice and policymaking, with the ultimate aim of meaningfully contributing to the ongoing discussion surrounding these issues.

[39] Oberleitner, 'War as Emergency'. p. 172
[40] Oberleitner. p. 175

1.6 Disposition

The first two chapters following the Introduction of the thesis aim to describe the current international framework pursuant to the emergency derogation on the one hand, and non-international armed conflict on the other hand. Chapter 2 is focused on outlining the state of emergency and begins with a brief history of ancient and modern societies that have implemented and assisted in developing emergency legislation. In light of the history surrounding the emergency derogation, the chapter continues by establishing the conceptual foundation of the state of emergency, for the purpose of creating a basic understanding of its underlying ideas and rationale. Thereafter, the chapter proceeds to present the emergency provision of the ICCPR by describing the elements and requirements of the provision in detail. The corresponding provisions of the ECHR and the ACHR are subsequently explained, mainly by discussing them in comparison with each other and the ICCPR provision. That way, the chapter provides a comprehensive understanding of the emergency derogation, its circumstances, and its scope of application.

Similar to Chapter 2, Chapter 3 uses the legal doctrinal method to explain how non-international armed conflict is regulated in international law. After a very brief introduction of the complexities concerning the legal description of such conflicts, the chapter plunges straight into giving a detailed exposition of the requirements pursuant to the definitions of non-international armed conflict in both Common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II. Against the backdrop of an extensive overview of the established threshold of application of non-international armed conflict, the chapter presents potential definitions of "internal disturbances and tensions" which are explicitly stated to fall outside the ambit of IHL.

In Chapter 4, the findings of Chapter 2 and Chapter 3 are brought together for the purpose of conceptualizing the derogation gap that emerges when emergency powers are justified on account of an internal conflict that falls outside the scope of IHL. The chapter explores the supposed overlap between low-intensity internal conflicts and so-called high-intensity emergencies by applying the established framework on the specific conflict between the PKK and the Turkish government. By using Turkey as a case-study, the chapter aims to showcase how the derogation gap materializes in practice, and thereby highlight the pitfalls of the current relationship between IHRL and IHL in this context.

The fifth and final chapter seeks to briefly summarize how and why the derogation gap occurs, what implications it carries for human rights and how the law can be improved to better encompass situations that currently fall between the cracks.

2 State of Emergency

Emergency powers can generally be described as "governmental action taken during an extraordinary national crisis that usually entails broad restrictions on human rights in order to resolve the crisis".[41] In both ancient and modern history, states have had access to emergency powers in one way or another and have not hesitated to use them.[42] The long tradition of establishing a safety valve in times of crisis is justified on the basis of citizen protection. By temporarily extending the power of the state's executive branch, the emergency rule enables immediate action to protect the inhabitants of the state.[43] At the same time, the emergency derogation constitutes and escape clause which releases the state from its human rights obligations in crisis situations.[44] The following chapter presents the history of emergency powers and its current framework while exploring the balance between collective and individual interests that lies at the core of emergency law.

2.1 History

2.1.1 Ancient Greece and the Roman Empire

The notion of emergency regimes can be traced back thousands of years to ancient Greece, which is often referred to as the earliest civilization with access to emergency powers.[45] The *aesymnétés* of ancient Greek cities was described as an "elected tyrant" who was brought to power in severe crisis with the mission of reinstating peace and order.[46] While the idea of the *aesymnétés* resembled an emergency regime, the history surrounding it is inconsistent, with uncertainties of its accuracy and whether the concept was in fact executed in an organized manner. Rather than forming a permanent and constitutional concept, the *aesymnétés* was presumably relied upon occasionally as a final resort in particularly desperate circumstances.[47]

The oldest example of an emergency regime in its contemporary form is the Roman dictatorship, which lasted for roughly three hundred years. When

[41] Claudio Grossman, 'A Framework for the Examination of States of Emergency under the American Convention on Human Rights', *American University Journal of International Law and Policy* 1 (1 January 1986): 35–56. p. 36

[42] Christian Bjørnskov and Stefan Voigt, 'Why Do Governments Call a State of Emergency? On the Determinants of Using Emergency Constitutions', *European Journal of Political Economy*, Political Economy of Public Policy, 54 (1 September 2018): 110–23, https://doi.org/10.1016/j.ejpoleco.2018.01.002.

[43] Savannah Valentine, 'Emergency Powers: Understanding the Benefits While Mitigating the Consequences', *U. Miami Int'l & Comp. L. Rev.* 30 (2022): 164–96. p. 166

[44] Oberleitner, 'War as Emergency'. p. 169

[45] Anna-Lena Svensson-McCarthy, 'Public Emergencies Yesterday and Today', in *The International Law of Human Rights and States of Exception* (Brill Nijhoff, 1998), 9–45, https://doi.org/10.1163/9789004479319_008. p. 9

[46] Svensson-McCarthy. p. 10

[47] Svensson-McCarthy. p. 11

faced with exceptional external or internal threats to their statehood, the Romans would appoint an authoritarian figure to avert the emergency.[48] The noteworthy feature inherent to the Roman dictatorship, and what set it apart from its Greek counterpart, was its constitutional nature. The system was a legally established emergency institution with specific limitations. The dictatorship was only authorised as a temporary solution to a well-defined problem, it recognized emergency situations as the exception from normalcy, it differentiated between those appointing the dictator and those who were awarded dictatorial powers and, most importantly, it sought to protect and preserve constitutional order rather than replace it.[49]

Prominent political philosophers and historians such as Niccolò Machiavelli and Clinton Rossiter have celebrated the Roman emergency regime, with Rossiter going so far as to say that "a study of modern crisis government could find no more propitious a starting point than a brief survey of the celebrated Roman dictatorship".[50] From a modern standpoint, the Roman system is flawed, considering its authoritarian premise, and ultimately contributed to the decline of the Empire.[51] Nonetheless, the Roman dictatorship has permanently embossed the law of emergency with a legacy that is consulted and resembled to this day.

2.1.2 France, the US and Germany

Modern emergency law was further developed from the *état de siege* or "state of siege", the French civil law crisis management model. The state of siege built on the idea that emergencies could be expected, which called for legal and institutional resources to counteract them.[52] Initially, the state of siege had a distinctly military character and sought to award the military commander with all necessary emergency powers in situations of foreign invasion. By virtue of the French revolution, however, the state of siege entered a more political realm. The internal rebellion and disquiet of the revolution expanded the concept to include internal threats and emergencies.[53]

In the same period, the idea of an emergency regime gained traction in North America, namely in conjunction with the American Civil War. The distinguishing feature of emergency law in the US was the suspension of *habeas corpus,* a common law writ that sought to protect against unlawful

[48] Fionnuala Ní Aoláin and Oren Gross, eds., 'Models of Accommodation', in *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2006), 17–85, https://doi.org/10.1017/CBO9780511493997.002. p. 19

[49] Ní Aoláin and Gross. p. 18

[50] Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton, NJ: Princeton University Press, 1948). p. 15

[51] Svensson-McCarthy, 'Public Emergencies Yesterday and Today'. p. 11-12

[52] Ní Aoláin and Gross, 'Models of Accommodation'. p. 27

[53] Ní Aoláin and Gross. p. 27

imprisonment. Under President Lincoln, those suspected of "disloyal and treasonable practices" were arrested and detained using the rhetoric of public necessity.[54] The emergency measures implemented during the American Civil War, along with the political evolution of the French state of siege, could be viewed as the launch of abusive states of emergency that aimed to curb internal tensions and stifle dissident forces.

Arguably the most internationally significant experience concerning states of emergency took place in the interwar period of Germany. The Weimar Constitution was written in the aftermath of World War I and, at the time, accounted for the biggest effort to draft a constitution that prevented constitutional failure in times of emergency.[55] Article 48 of the constitution in question constituted a derogation clause that allowed the president to exercise extraordinary powers to combat exceptional threats to the government. The emergency provision sanctioned measures necessary to re-establish law and order, it allowed the use of armed forces to reinforce such measures and it suspended a particular list of human rights.[56] After rising to power, Adolf Hitler proclaimed the Decree for the Protection of the People and the state, which entailed suspension of the Article in the constitution that protected personal liberties. The decree was never repealed by the Nazi government, essentially making Nazi Germany a twelve year long state of emergency. The fall of Nazi Germany and the subsequent end of World War II marked the beginning of an international framework for and oversight of emergency powers.[57]

2.2 The State of Emergency in International Law

2.2.1 Conceptual Foundation

Before delving into the international framework for states of emergency, it is necessary to account for its conceptual basis. Understanding the function of emergency regimes in international law and the international political landscape requires an inquiry of its development and the basic ideas underlying its formation.

The international legal system is largely founded on the distinction between times of peace and times of war, with corresponding frameworks applicable to the characteristics and challenges of each situation.[58] Until the formation of the League of Nations in 1919, war and the use of force was not illegal under international law. On the contrary, states often proclaimed war against

[54] Scott Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics', *Michigan Journal of International Law* 34, no. 3 (1 January 2013): 491–557. p. 497

[55] Sheeran. p. 497

[56] Sheeran. p. 497

[57] Sheeran. p. 497

[58] Ní Aoláin and Gross, 'Emergencies and Humanitarian Law'. p. 328

each other as a way of defending their rights or increasing their power. Waging war was a clear embodiment and exercise of state sovereignty.[59] However, despite regularly resorting to war for just and unjust reasons, and regardless of the legal right to do so, historical trends showed that states often avoided formally declaring war. Oftentimes, states preferred to resort to "hostile measures short of war", such as interventions and blockades, to avoid the applicability of the laws of war. Since it was difficult distinguishing these measures from full scale war, the peace-war dichotomy was ultimately rendered impractical and in practice replaced by a continuum that categorized state relations according to the level of force used.[60]

The reluctance to openly proclaim war lent way to multiple developments concerning the justification of the use of force against another state, including notions such as self-preservation, self-defence, and necessity.[61] Inevitably, the international legal framework demanded rules that accounted for states' need to defend themselves against perceived political and military threats. As a result, emergency regimes gained a foothold in national and international legal frameworks. The ability to declare states of emergency provided options to use extraordinary powers in severe crisis, and in turn limited the authorisation of such powers to exceptional circumstances and a narrow set of preconditions.[62] As war and the use of force was prohibited in international law, emergency regimes served as a compromise that allowed state security interests to manifest within the confines of an established international legal framework.

Similar to the previously common dichotomy of peace and war, emergency law operates on the conceptual idea of the exceptional as a counterpart to the normal. If faced with an extraordinary threat, the state must be allowed to temporarily prioritize security issues at the expense of other democratic values, in order to restore normal conditions.[63] states are relieved of the constraints associated with enforcing human rights in the event that such enforcement would compromise state survival.[64] A state of emergency is therefore often referred to as a derogation, since the measures adopted in emergencies would not be allowed unless demanded by the exceptional circumstances of the situation. As such, emergency regimes carefully tread the line between collective and state interests, such as the life of the nation, and individual interest such as human rights and liberties.[65]

2.2.2 Preparatory Works

[59] Ní Aoláin and Gross. p. 329
[60] Ní Aoláin and Gross. p. 329-330
[61] Ní Aoláin and Gross. p. 329-330
[62] Ní Aoláin and Gross. p. 332
[63] Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law'. p. 499
[64] Oberleitner, 'War as Emergency'. p. 170
[65] Oberleitner. p. 170

The right to resort to emergency powers is regulated internationally in Article 4 of the ICCPR. As expected, the drafting process of Article 4 was ridden with controversy, given the many risks and considerations that accompany states of emergency. The preparatory works of the Article provides insight into the disparate views and legal apprehensions that naturally follow efforts to balance state sovereignty with human rights concerns. A review of the preparatory works is helpful in the further study of emergency provisions since it illustrates the difficulties in effectively and poignantly regulating a sensitive concept.

Efforts to outline an international framework for human rights began in the aftermath of World War II. The initial draft of an International Bill of Human Rights was presented by the United Kingdom at the first session of the Commission on Human Rights in June 1947. Even then, Article 4 of the Bill contained the derogation provision concerning permitted measures in emergency situations.[66] Article 4 was generally worded and authorised derogations from the human rights obligations in Article 2 in times of war or other national emergency, however, only to the extent strictly limited by the exigencies of the situation. The United Kingdom explicitly stated the Article represented "a loophole for not enforcing the bill in the case of national emergency or some similar reason". The provision did contain a notification requirement but did not contain qualifications of the emergency concept, it did not mention non-discrimination and there was no attempt to protect certain essential rights as inviolable. Despite enabling far-reaching derogations and little to no safeguards, nothing suggests that the original draft was up for discussion at the Drafting Committee's first session.[67]

The provision was briefly discussed during the second session of the Drafting Committee, however, in a slightly modified form. The United Kingdom now clarified that the clause intended to prevent states from arbitrarily escaping their human rights obligations in times of war. The United Kingdom argued that states were not strictly bound by conventional obligations in times of war unless the conventions said otherwise. [68] Both the United States and Lebanon advocated for the removal of the Article and suggested that the convention already incorporated principles that governed the suspension and enforcement of human rights obligations in times of war.[69] The states did

[66] Anna-Lena Svensson-McCarthy, 'The Notion of Public Emergency at the Universal Level', in *The International Law of Human Rights and States of Exception* (Brill Nijhoff, 1998), 199–241, https://doi.org/10.1163/9789004479319_015. p. 200

[67] Svensson-McCarthy. p. 201

[68] United Nations Commission on Human Rights, 'Working Group on Convention of Human Rights : Summary record of the 8th meeting, held at the Palais Des Nations, Geneva, on Friday, 10 December 1947' (10 December 1947) UN Doc E/CN.4/AC.3/SR/8, p. 11

[69] UN Doc E/CN.4/AC.3/SR/8, p. 11

not find proof that retention of the Article was necessary, which ultimately led to the rejection of Article 4 by the Commission.[70]

The United Kingdom continued to argue for the adoption of its proposal before the Plenary Commission by emphasising the importance of counteracting the risk of suspension of all human rights obligations in times of emergency.[71] The United States stayed firm in its opposition to the Article, however, with new arguments that the provision could encourage the violation of human rights and that the inclusion of an Article "in which the possibility of war was implicit" was inappropriate in a Convention founded to prevent war.[72] In the third session of the Drafting Committee, the United States once again advocated for the deletion of the provision altogether, this time suggesting that it would wrongly imply that all of the rights in the Conventions were absolute. While some of the rights were considered absolute, such as the prohibition against torture, they thought it was important to distinguish these from other rights which had to be regarded as relative.[73]

The Commission held its fifth session in 1947, during which the United Kingdom presented a new amendment to its first draft of Article 4. The amendment proposed permission to derogate from the obligations in Part II of the Covenant, as opposed to Article 2 thereof. Furthermore, the amendment differed from the original draft provision since it proposed a new paragraph that listed certain non-derogable rights.[74] The latter amendment made the provision easier to digest for some states, as it meant that derogations were only allowed relative to specific rights, rather than all rights of the Convention. One such state was France, which approved the amendment with the view that it brought to the forefront an "essential distinction between the restriction of certain rights and the suspension of the Covenant's application". In its reasoning, France emphasized that the true purpose of the Article was to demand that states publicly proclaimed the restriction of human rights, rather than secretly, since that would decrease the likelihood of states adopting extensive restrictions on human rights.[75] France thus introduced and proposed an element of publicity and specific procedure to the provision.

At the same session, the USSR strongly advocated for the least possible limitation on human rights. The USSR believed that the current wording

[70] Svensson-McCarthy, 'The Notion of Public Emergency at the Universal Level'. p. 201

[71] United Nations Commission on Human Rights, 'Summary record of 42nd meeting, held at the Palais des Nations, Geneva, on Tuesday, 16 December 1947 : Commission on Human Rights, 2nd session' (16 December 1947), UN Doc E/CN.4/SR.42, p. 5

[72] E/CN.4/SR.42, p. 5

[73] Svensson-McCarthy, 'The Notion of Public Emergency at the Universal Level'. p. 203

[74] Svensson-McCarthy. p. 203

[75] Svensson-McCarthy. p. 205

risked the possibility for complete suspension of multiple Covenant provisions under "inadequately defined circumstances".[76] For that reason, the USSR proposed a limitation on the scope of the Article and suggested that derogations be allowed in time of war or public emergency *directed against the interests of the people.* That way, emergency measures would be limited to the defence of threats against the interests of the people.[77] While some states questioned the wording, purpose and scope of the derogation clause, the amendment proposed by the United Kingdom, including the additions of the USSR, were nonetheless accepted by the Commission. After a minor linguistic modification, the Commission adopted the following Article 4(1) in 1949:

> "1. In time of war or other public emergency threatening the interests of the people, a state may take measures derogating from its obligations under Part II of the Covenant to the extent strictly limited by the exigencies of the situation."[78]

Following multiple complaints and discussions regarding the vagueness of the Article and its overly broad scope, new additions were proposed. The wording of the Article was altered several times in efforts to adequately capture the situations in which derogation would be justified.[79] At the Commission's eighth session in 1952, the United Kingdom finally proposed that Article 4(1) would be applicable "In time of public emergency threatening the life of the nation…", thereby emulating the derogation clause of the ECHR adopted in 1950.[80] The United Kingdom suggested that the proposed formulation would limit derogations to grave cases of emergency and prevent abuse of the Article.[81] The suggestion was met with varying responses with most of the states questioning the ability to proclaim emergency powers in cases of threat against the life of the *nation* in particular. According to, for instance, France, Chile and Uruguay, it was considered more suitable to speak of the *interests of the people* rather than the *life of the nation*, since the Covenant involved the rights of individuals. The delegates eventually agreed to make the scope of the Article dependent upon threats to the life of the nation, since it was believed to also encompass situations that could impact only parts of the population. Despite some contradictions, the amendment of the United Kingdom was ultimately adopted by fifteen votes to

[76] Svensson-McCarthy. p. 204

[77] Svensson-McCarthy. p. 204

[78] United Nations Commission on Human Rights, 'Report of the 5th session of the Commission on Human Rights to the Economic and Social Council, Lake Success, New York, 9 May-20 June 1949' (23 June 1949), UN Doc E/CN.4/350, p. 27

[79] Svensson-McCarthy, 'The Notion of Public Emergency at the Universal Level'. p. 208-210

[80] 11/06/2024 16:58:00 p. 208-210

[81] United Nations Commission on Human Rights, 'Summary record of the three hundred and thirtieth meeting, held at headquarters, New York, on Tuesday, 10 June 1952, at 2.30 p.m.' (1 July 1952), UN Doc E/CN.4/SR.330, p. 3

none. The final form of the Article was thus established on June 11th, 1952.[82]

The preparatory works provide valuable insight into the various considerations surrounding the ability to suspend human rights in emergency situations. The arguments both in favour of and in opposition to the derogation were clearly influenced by the history preceding them and the fear of abuse of emergency powers. Nonetheless, history also shows an apparent demand for a safety valve that allows states to overlook human rights obligations in the face of a threat to their sovereignty. The original draft that was presented by the United Kingdom constitutes a tangible example of a state protecting its own interests. The mere fact that the United Kingdom described the initial draft provision as a "loophole" and its far-reaching derogations speaks to the original intent behind it. Only later did the United Kingdom clarify that the purpose of the Article was to prevent states from arbitrarily abandoning their human rights obligations in emergency situations.

It is worth recognizing that the driving forces of the discussion of the provision are states with an extensive history of resorting to emergency powers, including the United Kingdom, the United States and France. Interestingly, the United States was strongly opposed to the derogation and provided multiple inconsistent arguments against its adoption, which raises questions as to their actual intent. On the one hand, the United States expressed concerns that the provision might encourage human rights violations in times of emergency while, on the other hand, arguing that the provision could give the wrong impression that all rights of the Covenant are absolute. The United States' attitude towards the Article suggests a concern that it would impose restrictions on state behaviour in crisis situations, rather than genuine concern for potential human rights violations.

The distinction between the *interests of the people* and the *life of the nation* as the decisive factor in determining the existence of an emergency deserves more attention. While multiple states remarked that the Convention protected the rights of individuals, and that the interests of the individuals ought to govern the existence of an emergency, the latter wording was ultimately adopted with fifteen votes to none. As previously discussed in the conceptual explanation of a state of emergency, a threat to the life of the nation supposedly pertains to the collective interest and gives it precedence over the individual interest in crisis situations. However, equating threats to the *life of the nation* with threats to the population as a collective once again calls into question the intent behind the provision. The wording that was eventually adopted suggests that state interest prevailed, since it provides states with more flexibility to decide themselves what constitutes a threat or an emergency, rather than having to assess the situation according to its conse-

[82] Svensson-McCarthy, 'The Notion of Public Emergency at the Universal Level'. p. 211

quences for the people. It is true, however, that state interest can translate to collective interests, especially given the fact that the preservation of the state improves the security and human rights guarantees of the people in a democratic society. Moreover, state sovereignty already allows states to make their own judgments in this respect. Nonetheless, it is a distinction worth recognizing and discussing.

In summary, the discussions between the delegates show the various political interests involved and illustrates the way that the provision was intended to be invoked. The preparatory works thus put the provision as it currently stands into perspective and help clarify its scope and application within the broader context of the treaty or legal instrument.

2.2.3 The International Framework

2.2.3.1 ICCPR

The right to resort to emergency powers is regulated internationally in Article 4 of the ICCPR. According to Article 4(1), the lawfulness of a state of emergency hinges upon five cumulative requirements. Firstly, states are only allowed to derogate from their obligations under the Covenant "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed". The remaining three conditions aim to regulate permissible behaviour in the period while Article 4 is invoked. Emergency measures must be strictly necessary in relation to the exigencies of the situation, they must comply with other international obligations, and they must be non-discriminatory. [83]

The first requirement of Article 4(1) that must be fulfilled before invoking emergency powers is, as mentioned, the existence of a public emergency threatening the life of the nation. According to the Siracusa Principles, a threat to the life of a nation exists if it:

> (a) affects the whole of the population and either the whole or part of the territory of the state; and
>
> (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant [84]

International and non-international armed conflict, natural catastrophes and major industrial accidents have been mentioned as examples of situations

[83] Article 4(1) ICCPR

[84] United Nations Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (28 September 1984), UN Doc E/CN.4//1985/4, p. 39

that could amount to the public emergency concept.[85] Internal conflict and unrest, as well as economic difficulties, do not necessarily justify derogations, if they do not constitute grave and imminent threats to the life of the nation. There are few guidelines in the Siracusa Principles and General Comment No. 29 that help determine the threshold that economic difficulties and internal conflict and unrest must meet to be considered grave and imminent threats in accordance with Article 4.[86] However, according to the Committee's earlier work, political and social disturbances that only take shape as protest movements and strikes cannot be considered severe enough to trigger the emergency measures allowed under Article 4(1).[87] Svensson-McCarthy suggests that a sufficiently severe public emergency is present when the state is faced with "very serious visible and violent political and social confrontations or turmoil that cannot be controlled by the ordinary means normally available to the authorities".[88]

The second requirement establishes the precondition of official proclamation. Pursuant to Article 4(1) of the ICCPR, state parties may derogate from their human rights obligations in times of public emergency which threatens the life of the nation *and the existence of which is officially proclaimed.* The present condition is especially important since it reinforces the principle of legality and rule of law by demanding that states must act within the confines of the constitution and the legal system even in emergencies.[89] The principle of legality and the rule of law further require that the procedure for the proclamation of a state of emergency is established in national law prior to any invocation of the derogation. National laws pertaining to the procedure for official proclamation of an emergency are regularly monitored by the Human Rights Committee, who ensure that such laws are correctly implemented in national legal systems and comply with the requirements set forth in Article 4(1).[90]

The first two conditions are relevant to determine whether a state party is in fact allowed to invoke emergency powers, and whether the state has done so correctly. However, in addition to these requirements, there are multiple criteria applicable to the conduct during a state of emergency. Firstly, emergency measures are only permitted to the extent that they are "strictly re-

[85] United Nations Human Rights Committee, 'CCPR General comment No. 29, States of emergency (article 4) : International Covenant on Civil and Political Rights' (31 August 2001), UN Doc CCPR/C/21/Rev.1/Add.11, p. 40-41

[86] UN Doc CCPR/C/21/Rev.1/Add.11, p. 40-41

[87] Svensson-McCarthy, 'The Notion of Public Emergency at the Universal Level'. p. 239

[88] Svensson-McCarthy. p. 240

[89] Paul M. Taylor, ed., 'Article 4: Derogation in Times of Officially Proclaimed Public Emergency Threatening the Life of the Nation', in *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge: Cambridge University Press, 2020), 106–28, https://doi.org/10.1017/9781108689458.007.

[90] Taylor.

quired by the exigencies of the situation".[91] The provision thereby imposes a principle of proportionality wherein a state must provide independent and realistic justifications for the measures that are implemented to combat the emergency.[92] Emergency measures must be strictly necessary to counteract the threat to the life of the nation, taking into consideration aspects such as severity, duration, and geographic scope. Only measures that objectively fulfil the principle of necessity are allowed, which means that a state cannot resort to emergency powers due to a concern for a potential threat. Instead, each measure "shall be directed towards and actual, clear, present, or imminent danger".[93] If a state has the option of different measures, it should always choose the least restrictive one.[94]

In addition to the requirement of strict necessity, emergency measures must comply with other international legal commitments of the derogating state. The international obligations that are referred to in Article 4(1) of the ICCPR include both treaty and customary international law. Consequently, a state cannot use the emergency provision to justify actions that would be unauthorised according to the UN Charter or humanitarian law treaties, among others.[95]

Lastly, Article 4(1) of the ICCPR stipulates that derogation measures must not "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". The noteworthy part of the non-discrimination requirement is the inclusion of the word "solely", which impacts the applicability of the condition. As follows, emergency measures that discriminate unintentionally can be permissible, given that the other conditions of the derogation provision are met.[96] The wording of the requirement thus aimed to prohibit the imposition of discriminatory measures for the intended purpose of targeting certain groups.[97]

The permitted extent of emergency powers is further limited by Article 4(2) and 4(3). The former paragraph lists certain rights of the Covenant as non-derogable, including the right to life, the prohibition against the torture and the prohibition against slavery.[98] The latter mentioned paragraph imposes a procedural condition that requires states to immediately inform other state Parties to the Covenant of the "provisions from which it has derogated and

[91] Article 4(1) ICCPR

[92] Taylor, 'Article 4'.

[93] UN Doc E/CN.4//1985/4, p. 51-54

[94] Council of Europe, The European Commission for Democracy through Law (the Venice Commission), 'Respect for Democracy, Human Rights and the Rule of Law During States of Emergency : Reflections' (19 June 2020), CLD-AD(2020)014, p. 5

[95] Taylor, 'Article 4'.

[96] Mark Klamberg, 'Reconstructing the Notion of State of Emergency under Human Rights Law', *The George Washington International Law Review* 52(1), 2020 (2016): 53–97, https://doi.org/10.2139/ssrn.2812635. p. 127

[97] Taylor, 'Article 4'.

[98] Articles 6, 7 and 8 of the ICCPR

of the reason by which it was actuated". The derogating state must also inform of any additional measures, as well as any extension or termination of existing measures. Failure to fulfil Article 4(3) does not, however, inhibit the right to proclaim a state of emergency, which sets it apart from the mandatory requirement of official proclamation in Article 4(1). Negligence of Article 4(3) nonetheless carries implications for the derogating state, since the Human Rights Committee oftentimes controls and questions the notification requirement when reviewing state reports.[99]

2.2.3.2 ECHR

In addition to Article 4 of the ICCPR, international law emergency provisions are also included in Article 15 of the ECHR and Article 27 of the ACHR. While both provisions strongly resemble the one in the ICCPR, nuanced differences exist between them. The following sections will explore these differences in detail and examine how each provision addresses the issue of derogation in times of emergency within the context of their respective regional human rights system. The comparison of these provisions provides a comprehensive understanding of the legal framework governing emergency situations and its implications for the protection of human rights across regions.

Article 15(1) of the ECHR is almost identical to Article 4(1) of the ICCPR in its wording, however, the are some differences. Firstly, Article 15(1) allows derogation "in times of *war* and other public emergency threatening the life of the nation". Furthermore, the ECHR provision does not contain a requirement of official proclamation of the emergency, nor does it contain a prohibition against discrimination. In principle, the inclusion of "war" in Article 15(1) does not distinguish it from its ICCPR counterpart. The wording of the Article, particularly the phrase "or other public emergency", speaks to the fact that "war" is intended to be an example of a public emergency.[100] Moreover, it is difficult to imagine a situation in which war would fail to meet the standard of a public emergency threatening the life of a nation according to Article 4(1) of the ICCPR. Nonetheless, the inclusion of "war" sets a standard for the necessary intensity of other public emergencies according to Article 15(1).

The significance of "public emergency threatening the life of the nation" is also similar in the ECHR provision, compared to its ICCPR counterpart. The ECtHR defined it in *Lawless v. Ireland* as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is com-

[99] Taylor, 'Article 4'.

[100] Mohamed M. El Zeidy, 'The ECHR and States of Emergency: Article 15-A Domestic Power of Derogation from Human Rights Obligations', *Michigan State University-Detroit College of Law's Journal of International Law* 11, no. Issue 2 (15 June 2002): 261–306. p. 283

posed".[101] In reference to Northern Ireland in *Ireland v. the United Kingdom* and South-East Turkey in *Aksoy v. Turkey,* the Court clarified that crises which only affect certain regions of the state can also meet the threshold in Article 15(1).[102] Most importantly, the emergency must be actual or imminent and exceptional in the sense that normal safety measures permissible under the Convention are inadequate.[103] Contracting states to the ECHR are afforded the discretion to determine whether such an exceptional situation is present. The national courts of each contracting state are considered best suited to determine the existence of a public emergency, and whether the emergency constitutes a threat to the life of that specific nation.[104] The margin of appreciation that national authorities are awarded is not, however, unlimited. In the so-called "Greek case", for example, the Commission concluded that there was no public emergency in Greece that could justify the emergency measures implemented by their military government.[105] Regardless, contracting states are awarded a much higher margin of appreciation than state parties to the ICCPR, which are generally denied any say in the matter. With respect to determining the legality of derogation according to Article 4(1) of the ICCPR, the Committee is considered the most appropriate judge.[106]

The lack of a requirement that demands official proclamation of the emergency is worth recognizing. The HRC placed great emphasis on the importance of official proclamation and its implications for the maintenance of the rule of law and a sense of accountability to international law.[107] Contrastingly, such a requirement is not included in Article 15(1) of the ECHR. However, despite not being included, the Commission found in *Cyprus v. Turkey* that the Article demanded "some formal and public act of derogation, such as a declaration of martial law or state of emergency".[108] In addition, Article 15 does require notification of a state of emergency and the Court has not accepted the use of emergency measures without prior notification.[109]

[101] *Lawless v. Ireland* (1961), No 332/57, para 28

[102] See *Ireland v. the United Kingdom* (1978), No 5310/71, para 205, and *Aksoy v. Turkey* (1996), No 21987/93, para 70

[103] ECtHR 'Guide on Article 15 of the European Convention on Human Rights', p. 6

[104] European Court of Human Rights (ECtHR), 'Guide on Article 15 of the European Convention on Human Rights' (31 August 2022), p. 7

[105] ECtHR 'Guide on Article 15 of the European Convention on Human Rights', p. 7

[106] Julian M. Lehmann, 'Limits to Counter-Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights', *Essex Human Rights Review*, 8.1 (2011). 102-122. p. 109

[107] Taylor, 'Article 4'.

[108] *Cyprus v. Turkey* (Commission Report of 10 July 1976), para. 527.

[109] Lehmann, 'Limits to Counter-Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights'. p. 111

Precisely as provided for in Article 4(1) of the ICCPR, derogation measures may only be executed to the extent "strictly required by the exigencies of the situation" according to Article 15(1) of the ECHR. In its assessment on whether derogation measures can be regarded as strictly necessary, the ECtHR has considered factors such as the sufficiency of ordinary laws to meet the danger, the genuineness of the measures as a response to an emergency, any disparity between the use of measures and the purpose for which they were awarded, the limitations and scope of the measures, and the proportionality of the measures, among other things.[110] While the current requirement imposes significant limits on contracting states' rights to determine appropriate emergency measures themselves, the Court still recognizes its own limitations to review the necessity of any derogations. The national authorities remain the principal judges of the necessary extent of emergency measures to address the threat, because of their proximity to the needs of the moment.[111]

The remaining parts of Article 15 of the ECHR largely coincide with the content of Article 4 of the ICCPR. Article 15 also demands that emergency measures are carried out in compliance with other international obligations and that states notify the international community when they invoke the derogation. Article 15 does list certain rights as non-derogable, although the list is not as extensive as the one in the ICCPR.

2.2.3.3 ACHR

The system of promotion and protection of human rights in the Americas is similar to that of the Council of Europe. However, the Inter-American Commission on Human Rights arguably operates under more complex preconditions, due to the diverse political landscape of the OAS. The lack of consistency of the IACHR and the IACtHR has further aggravated the establishment of a cohesive emergency regime across the Americas. As a consequence, the provision governing the right to emergency powers was drafted to align with American constitutional emergency terms and lacks coherency in its application.[112]

Article 27 of the ACHR has a slightly different wording compared to the emergency provisions of the ICCPR and the ECHR. Pursuant to Article 27(1), state parties are allowed to derogate from their obligations under the Convention "in time of war, public danger, or other emergency that threatens the independence or security of [the] state party". The difference in phrasing is presumably due to the ambition of accommodating to the emer-

[110] ECtHR 'Guide on Article 15 of the European Convention on Human Rights', p. 9

[111] *Ireland v. the United Kingdom,* para 207

[112] Anna-Lena Svensson-McCarthy, 'The Notion of Public Emergency in the Americas', in *The International Law of Human Rights and States of Exception* (Brill Nijhoff, 1998), 242–84, https://doi.org/10.1163/9789004479319_016. p. 242

gency terms used in the various constitutions of the American States.[113] Notwithstanding, the requirement has not been given a clear meaning, which can be attributed to a reluctance of the IACHR and the IACtHR to refer to its own conclusions and apply its principles in a consistent manner.[114] What can be deduced is that an emergency must be of a very serious nature to meet the threshold of Article 27(1), the threat must jeopardize the organized life of the state. In addition, the emergency must be objectively real. Perceived or potential threats do not constitute grounds for legally invoking a state of emergency.[115] The assessment of emergency situations thus follows a similar pattern to the ones conducted when determining the lawfulness of derogations according to the ICCPR and the ECHR.

A noteworthy feature of the provision and the Convention as a whole is its binding effect on the American States. Each member state of the OAS is required to issue domestic laws that ensure their compliance with the Convention, even if the state has not ratified the Convention.[116] The remainder of Article 27 of the ACHR, both in terms of wording and significance, resemble its counterparts in the ICCPR and the ECHR to the extent that it is not necessary to further account for its contents in this thesis.

[113] Svensson-McCarthy. p. 281
[114] Svensson-McCarthy. p. 281
[115] Svensson-McCarthy. p. 281-282
[116] Svensson-McCarthy. p. 282

3 Internal conflict

Although most modern-day conflicts are of a non-international character, the international law of armed conflict continues to place a disproportionate focus on international armed conflicts. The reluctance to further develop the legal framework surrounding internal conflicts could be attributed to the very fact that they take place internally within state borders, which raises questions as to the relevance and appropriateness of regulating them internationally. However, there is growing consensus that international regulation of internal conflict is necessary to ensure the protection of civilians and the enjoyment of human rights.[117] Nevertheless, the frequency, shape, extent, and structure of internal belligerency is moving at a rate which the international community is unable to match. As a result, few internal conflicts qualify as non-international armed conflicts according to the international framework, thus omitting multiple conflicts from necessary international legal oversight. Low-intensity internal conflicts, or internal disturbances and tensions, are clear examples of situations that do not amount to non-international conflicts, and therefore lack the legal oversight they arguably need. The following chapter aims to review and analyse the definition of both non-international armed conflicts and low-intensity internal conflicts according to international law.

3.1 Non-International Armed Conflict

3.1.1 Article 3 Common to the Geneva Conventions

Common Article 3 to the Geneva Conventions contains the international legal regulation of internal armed conflict. The provision has oftentimes been referred to as a "convention within a convention" and stipulates that the humanitarian principles of the four Geneva Conventions shall apply to non-international armed conflicts.[118] The content of the Article is unambiguous since it clearly states that each Party of a non-international armed conflict shall be bound the provisions of the Geneva Conventions. The scope of the Article, however, has been up for debate. Determining what types of conflicts are encompassed by the provision has proven to be a difficult and controversial task. To this day, there is no universally accepted definition of

[117] Lindsay Moir, ed., 'The Historical Regulation of Internal Armed Conflict', in *The Law of Internal Armed Conflict*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2002), 1–29, https://doi.org/10.1017/CBO9780511495168.002. p. 2

[118] Lindsay Moir, ed., 'Article 3 Common to the Geneva Conventions', in *The Law of Internal Armed Conflict*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2002), 30–88, https://doi.org/10.1017/CBO9780511495168.003. p. 31

the term. Article 3 does not offer much assistance, considering that it merely refers to "armed conflict not of an international character".[119]

Different schools of thought have offered different interpretations of the Article. Some suggest that the lack of an exhaustive definition is in fact a blessing in disguise since it allows for a broad application. The ICRC, for example, has adhered to a broad interpretation of the Article in order to take action in as many cases of civil unrest as possible.[120] It can even be argued that a comprehensive definition of internal armed conflict is unnecessary. "Armed conflict" likewise lacks a universally accepted definition and yet its meaning has rarely been contested when identifying international armed conflict. While there are some exceptions, identifying an international armed conflict is normally a simple task, which raises questions concerning the need to reach an agreement on a comprehensive definition of internal conflict.[121] Internal situations are, however, not equal to international situations of armed conflict. States are much more willing to apply force internally against its own citizens rather than against another state. Force is more common and authorised in internal environments where its use ranges from day-to-day law enforcement to full-fledged military operations against dissident groups, thus making it more difficult to determine the transition to armed conflict. The lack of a clear definition moreover allows states to avoid the application of humanitarian law.[122] The international framework concerning non-international armed conflicts could therefore benefit from a more specific definition.

Despite the absence of universally established criteria for the definition of an internal conflict, some criteria are widely accepted in the international community. Firstly, it is largely recognized that the group challenging the state must have some degree of organization, which has been deduced from the Article 3 phrasing that insurgents must be "party" to the conflict. In order to reach the level of organization required to be considered a "party" to the conflict, the insurgent group must be capable of fulfilling the obligations listed in Article 3, that is to say the humanitarian law obligations that all sides of the conflict must adhere to. The ability to carry out the obligations in Article 3 in turn presupposes some degree of military organization, such as a command structure and a controlling authority, of the group.[123]

A second criteria that has been agreed upon in large part concerns governmental use of armed forces. State recourse to armed forces for the purpose of controlling the situation should be an indication that the conflict has escalated to a non-international armed conflict according to Article 3.[124] At first

[119] Moir, 3. p. 31-32
[120] Moir, 'Article 3 Common to the Geneva Conventions'. p. 32–33
[121] Moir, 3. p. 33
[122] Moir, 'Article 3 Common to the Geneva Conventions'. p. 34
[123] Moir. p. 36
[124] Moir, 3. p. 38-39

glance, this criterion does not seem unreasonable, especially given the fact that the term "armed conflict" arguably indicates the use of armed forces. However, state differences in police and military competence aggravates the issue. For instance, some states authorise armed police force, while other states keep their police unarmed. Differences such as these raise questions of whether the use of armed police force is enough or if military involvement is required. Moreover, nothing would prevent a state from temporarily transferring army troops to the police force to avoid triggering the criteria, if the use of armed forces was equivalent to army involvement according to Article 3.[125] There are additional issues with using governmental resort to armed forces as a decisive factor of internal armed conflict, with one of the main ones being that Article 3 does not specify conditions concerning the parties involved. The provision does not contain any requirement that an internal armed conflict must be between government forces and rebel groups. Instead, conflicts between two or more groups within the state could also constitute a NIAC.[126] Hence, while the criterion presents a reasonable idea, it might not be suitable in practice.

One legally based definition of the concept has been offered by the Appeals Chamber of the ICTY in *Prosecutor v. Tadić.* The Appeals Chamber presented a relatively low threshold of application by suggesting that an internal armed conflict exists whenever there is "protracted armed violence between governmental authorities and organized armed groups or between such groups within a state".[127] The definition of the Appeals Chamber essentially proposes two requirements, that the violence reaches a certain level of intensity and that the armed groups have some degree of organization. The organizational requirement most likely imposes similar conditions as the one previously discussed, namely a command structure and a controlling authority. The requirement of "protracted armed violence" speaks to the minimum level of intensity necessary in terms of duration, rather than the magnitude of the violence.[128]

While the definition proposed in *Tadic* might settle the lack of an internationally viable definition of internal armed conflict, it will probably not solve the issues that characterize the international framework on non-international armed conflicts. Any definition that offers categorization of a conflict as an "internal armed conflict", regardless of how concrete or abstract it is, will ultimately be subject to the states' own judgment. Since there is no independent authority that can determine whether the criteria that govern when internal disturbances become internal armed conflicts, states will be left to decide for themselves whether an internal conflict is present

[125] Moir, 3. p. 38-39

[126] Moir, 'Article 3 Common to the Geneva Conventions'. p. 39

[127] *The Prosecutor v. Dusko Tadic,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (1995), para 70

[128] Moir, 'Article 3 Common to the Geneva Conventions', 3. p. 43

or not.[129] Consequently, given the fact that states are eager to avoid the application of humanitarian law standards, they can always claim that the insurgent groups do not fulfil the criteria of the definition. As a result, few conflicts will be encompassed by the obligations set out in Article 3 of the Geneva Conventions.

In summary, there is no universally accepted definition of common Article 3, although there is general consensus on which criteria are relevant to its application. The definition provided by the Appeals Chamber in the *Tadic* case has further helped clarify the scope and applicability of the provision. However, challenges remain in its interpretation and implementation, particularly considering states' ability to consider or ignore the Article depending on what suits their agenda.

3.1.2 Additional Protocol II of 1977

For a long time, Common Article 3 was the only humanitarian law provision that regulated non-international armed conflict. However, as previously discussed, the Article failed to contribute with a consistent and established definition of the concept of internal armed conflict. Therefore, it was not long before the international community recognized the demand for new regulations. As a result, two additional protocols were drafted as an extension to the Geneva Conventions. Additional Protocol II was primarily drafted for the purpose of providing a comprehensive framework for non-international armed conflicts.[130]

According to Article 1(1), Additional Protocol II is applicable to armed conflicts that occur in the territory of a state party to the Geneva Conventions "between its armed forces and dissident armed forces or other organized armed groups". The dissident armed forces or organized armed groups that challenge the state must "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". Article 1 furthermore contains an exemption in its second subparagraph, which clarifies that internal disturbances and tensions are excluded from the ambit of the Protocol. "Riots, isolated and sporadic acts of violence and other acts of a similar nature" are provided as examples of situations which can be considered as internal disturbances and tensions, and which therefore fall outside the scope of the legal instrument.

To fall within the ambit of the Protocol, the parties of the conflict must be the armed forces of a state party, on the one hand, and the dissident armed forces or other organized groups on the other hand. That way, Additional

[129] Moir, 3. p. 45

[130] Lindsay Moir, ed., 'Additional Protocol II of 1977', in *The Law of Internal Armed Conflict*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2002), 89–132, https://doi.org/10.1017/CBO9780511495168.004. p. 89

Protocol II addressed the previously discussed issue of whether governmental use of armed forces could constitute a suitable requirement to determine the existence of an internal armed conflict. Unlike Common Article 3 and the definition presented by the ICTY in *Tadic,* which both left room for the possibility of including hostilities between organized groups within the territory of the state in the definition of internal armed conflict, Additional Protocol II excludes such possibilities.[131] The meaning of "armed forces" is ambiguous as it lacks a clear definition. Just as discussed with regard to Common Article 3, the issue therefore remains of whether an armed police force is also included when speaking of "armed forces", or if the term only refers to military forces. The groups in conflict with the state must be under "responsible command", which indicates the necessity of a certain degree of collectiveness. Sporadic acts of individuals are thereby excluded from the ambit of the Protocol.[132]

As previously mentioned, the insurgents must additionally exercise sufficient territorial control for Additional Protocol II to apply to the conflict. The requirement of territorial control has been widely criticized for being too restrictive because it seemingly targets the quality of the control, rather than its proportion or duration. The dissident groups must exercise territorial control in a way that allows them to both perform concerted and sustained military operations on the territory, as well as possess the ability to implement the provision of the Protocol.[133] It is questionable whether dissident groups are capable of fulfilling this requirement in other situations than full-fledged civil wars. The fact that the military operations on the territory must be concerted and sustained further raises the threshold since it imposes a degree of scale and intensity of the conflict.[134]

The inclusion of the requirement that insurgents must have the ability to implement the provisions of the Protocol within their controlled territory resulted from the concern that they might not do so, even though they could. The requirement was suggested when drafting the Article because the delegates feared that states might be burdened with the obligations of the Protocol, while their enemies ignored such obligations. State enforcement of Protocol obligations was therefore made dependent upon insurgents doing the same. The inherent issue with introducing a principle of reciprocity to Additional Protocol II is the fact that international humanitarian law does not rely on reciprocity. On the contrary, IHL presupposed the maintenance of humanitarian obligations regardless of the other party's actions. The Geneva Conventions and its additional protocols are intended to apply automatically and unconditionally without being affected by the conduct of the opposi-

[131] Moir. p. 103-104
[132] Moir. p. 105
[133] Moir. p. 105
[134] Moir. p. 106-107

tion.[135] The requirement therefore presents an additional obstacle to the application of the Protocol since both Parties presumably seeks to avoid applying humanitarian principles, leaving neither Party to comply with their obligations.

After having reviewed the conditions that rebel groups must fulfil to be considered parties to an internal armed conflict, one must naturally turn to the question of how these rebel groups become bound by the Protocol. Insurgent groups cannot be signatories to the Geneva Conventions or its additional protocols, which make states the only legal entities on which the obligations of the Protocol can be conferred. That way, by becoming signatories to the Protocol, states assume obligations towards other states and the international community, but not towards dissident groups. In other words, dissident groups cannot hold states accountable for any violation of the Protocol.[136] The reason behind rejecting rebel groups as potential parties to the Protocol was states' reluctance to recognize insurgents as anything other than criminals and award them with the same status as states.[137]

The binding nature of the Protocol upon insurgents is determined by the customary rules on the effects of treaties on third parties, according to Cassese. The Vienna Convention on the Law of Treaties must therefore be consulted when deciding whether rebel groups are in fact bound by the obligations of the Protocol.[138] While the regulations of the Vienna Convention only apply to states, the customary rules found therein apply to all international subjects. According to Articles 34-36 of the Convention, treaty obligations or rights are imposed upon third parties (1) if the contracting party intended for that to happen and (2) if the third party accepts the obligations or rights imposed upon them. Cassese suggested than an objective assessment of state's intentions when signing the Protocol required an examination of the wording of Article 1.[139] One of his arguments targeted the Article 1 condition that the rebel groups needed to be able to implement the provisions of the Protocol. Since the Protocol is only applicable if the insurgents are capable of implementing its provisions, it must become legally binding on insurgents once they prove their ability to implement it. According to Cassese, the contrary view would not be logical since insurgents would never agree to implement the Protocol's provisions if they did not gain something in return.[140] Whether the insurgents accept the binding effect of the treaty upon them must be determined on a case-by-case basis. Most likely,

[135] Moir. p. 107-108

[136] Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts: The International and Comparative Law Quarterly', *The International and Comparative Law Quarterly* 30, no. 2 (1 April 1981): 416–39. p. 420

[137] Cassese. p. 420-421

[138] See Cassese. p. 424

[139] Cassese. p. 424

[140] Cassese. p. 425

such a determination requires an observance of the conduct of the insurgents, and whether such conduct fulfills the conditions of the Protocol.[141]

In conclusion, Article 1 of Additional Protocol II clearly establishes a far more restrictive definition of internal armed conflict in comparison with Common Article 3. The fact remains, however, that Article 1 of Additional Protocol II does not substitute Common Article 3. Instead, both provisions continue to apply alongside each other. Accordingly, questions arise as to the relationship between the provisions, and whether one takes precedence over the other or whether both retain the same status.

The initial sentence of Article 1 to Additional Protocol II states that the Protocol intends to supplement and develop Common Article 3 of the Geneva Conventions. The contents of the Article further illustrate its purpose of providing a more detailed description of different conditions, such as the requirements of the dissident group, for example. The provision thus explicitly articulates many of the principles which were implicit to Common Article 3. Despite specifically being dedicated to extending the understanding of non-international armed conflicts and Common Article 3, the provision remains incomplete according to some authors. Most notably, it has been criticized of failing to address one of the main pitfalls of Common Article 3, namely the lack of a definition that determines when an internal armed conflict exists.[142] Such reasoning is based on the fact that Article 1 of Additional Protocol II sets a significantly higher threshold of application in comparison to Common Article 3. Simultaneously, Article 1 of Additional Protocol II was said to develop and supplement Common Article 3, however, "without modifying its existing conditions of application". Consequently, both provisions apply at the same time and complement each other, which means that both provisions must be considered when determining the existence of a non-international armed conflict. As such, three categories of conflict arguably exist.[143]

The first category of conflict is those that fall outside the scope of both provisions, those that are described as "internal disturbances and tensions" in Article 1(2) of Additional Protocol II. Some have suggested that Article 1(2) was introduced for the purpose of raising the threshold of application of Common Article 3, thereby limiting its scope to conflicts that reach a certain intensity. Others have refuted this stance, however, on the grounds that Common Article 3 is autonomous from Article 1, meaning that the creation of Additional Protocol II does not have an impact on the contents of Common Article 3.[144] As previously discussed, it was largely agreed that Article 3 contained a condition that required the conflict to reach a certain intensity

[141] Moir, 'Additional Protocol II of 1977'. p. 99
[142] Moir. p. 101
[143] Moir. p. 101-102
[144] Moir. p. 101-102

to be considered an armed conflict. Therefore, whether Article 1(2) was implemented to alter the scope of application of Article 3 carries little significance. Either way, Common Article 3 would most likely not encompass internal disturbances and tensions.

The second category encompasses such internal armed conflicts that reach the threshold of Common Article 3 but fail to reach that of Article 1. Given that Common Article 3 is autonomous to Article 1, such conflicts would fall within the scope of Common Article 3, and thus be regulated by the obligations therein.[145] The third and final category of conflicts are those that fulfil the narrow set of requirements in Article 1 of Additional Protocol II. Such conflicts would naturally be governed by the provisions of Additional Protocol II, however, they would still need to comply with the conditions of Common Article 3.[146] The autonomy of Common Article 3 thus opens up for the application of humanitarian law to many several conflicts, even if they fall outside the scope of Additional Protocol II. Different bodies of international law have discussed whether the relationship between the provisions will inevitably force Common Article 3 to match the material scope of application of Article 1. A conclusion on the matter has yet been reached and in practice, it seems as though the scope of Common Article 3 has rather been lowered further through efforts from the ICRC, among others.

In summary, Article 1 of Additional Protocol II establishes a narrow set of preconditions to determine the existence of a non-international armed conflict. The restrictive scope of the Protocol clearly illustrates states' concern regarding their inability to combat dissident forces with measures they see fit. However, states cannot escape humanitarian law obligations since internal armed conflicts can fall within the scope of Common Article 3, even when they fail to meet the threshold of Additional Protocol II.

3.2 Internal Disturbances and Tensions

The international legal development concerning internal armed conflict clearly shows the controversies that accompany efforts to internationally regulate states' internal affairs. States are evidently interested in limiting the scope of non-international armed conflicts, which became even more clear through the implementation of Additional Protocol II and its narrowly construed scope of application. As described in Article 1(2) of Additional Protocol II, internal disturbances and tensions fall outside the ambit of the Protocol. Article 1(2) was, as mentioned, included for the purpose of limiting the scope of Common Article 3 according to some. Additionally, states have proven to be reluctant to categorize an internal conflict as a non-international armed conflict in accordance with either Common Article 3 or Additional Protocol II. That way, states have sought to maintain a façade of

[145] Moir. p. 102
[146] Moir. p. 102

normalcy in their internal affairs, both to avoid applying humanitarian law standards and appearing "weak" in the international political landscape.

Although internal disturbances and tensions are explicitly mentioned as falling outside the scope of Additional Protocol II, there is no universally accepted legal definition of what constitutes internal disturbances and tensions.[147] "Riots, isolated and sporadic acts of violence and other acts of violence" are mentioned in the Article as situations which should not be considered armed conflicts, however, these are presented as examples rather than a definition. The previous sections that have outlined and presented Common Article 3 and Article 1 of Additional Protocol II moreover demonstrate the difficulties in determining when an internal emergency transitions into an internal armed conflict. The challenges inherent to arriving at an accepted definition of internal strife are in large part due to the fact that the circumstances of internal conflict differ greatly from case to case.[148] Especially when drafting a legal definition of a concept, which needs to be somewhat delimited and precise to secure legal transparency, the issue grows even more complex. Furthermore, the definitions of internal armed conflict in Common Article 3 and Article 1 of Additional Protocol II consider factors such as intensity and degree of organization of dissidents. Factors such as these can be extremely different when examining different situations of internal strife, which consequently aggravates efforts to encompass such situations under one comprehensive definition.

There have been multiple attempts to define what constitutes internal disturbances and tensions, and thus what separates such situations from non-international armed conflict. Among others, Hans-Peter Gasser has drafted a proposal for a Code of Conduct concerning internal disturbances and tensions, in which he set out to define the concept. According to Gasser, internal disturbances and tensions can initially be recognized by a degree of violence that surpasses that of "normal", peaceful times. Gasser follows the same line of reasoning as Common Article 3 and Article 1 of Additional Protocol II by characterizing "normal" violence as the use of ordinary and lawful police measures to combat common internal issues such as criminality.[149] Hence, what sets internal disturbances and tensions apart from normalcy is an open outbreak of violence and, as a result, recourse to measures that exceed the usual boundaries. Gasser mentions mass arrests followed by arbitrary detention, bad conditions of detention, disappearances, unacknowledged detention, ill-treatment, and suspension of or failure to respect the most elementary legal guarantees as a few examples of the extraordinary use of repressive measures. Common to all the examples men-

[147] Hans-Peter Gasser, 'A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct', *International Review of the Red Cross (1961 - 1997)* 28, no. 262 (February 1988): 38–58, https://doi.org/10.1017/S0020860400061465. p. 39-40

[148] Gasser. p. 41

[149] Gasser. p. 41

tioned is their disregard of human rights standards.[150] Human rights violations could therefore be indicative of the occurrence of internal strife. As Gasser points out, however, humanitarian law is less concerned with the actual violation of human rights and more concerned with the effect that such violations have on its victims. In other words, humanitarian law focuses on the suffering that human rights infringements cause. Therefore, it is rather the victims suffering that should be considered as an indication of internal disturbances or tensions.[151]

Gasser's definition of internal disturbances and tensions brings to the forefront a variety of legal considerations. A prominent question that requires addressing is the fact that he, in principle, proposes the same criteria as the ones already existing in both Common Article 3 and Article 1 of Additional Protocol II. In both these provisions, an internal armed conflict is distinguished from internal strife when the authorities resort to armed forces, rather than ordinary police forces, to address and combat internal threats. The primary issue with applying the same condition to identify internal strife as the one used for identifying internal armed conflicts relates to the issue already connected to defining internal armed conflict, namely distinguishing when internal strife transitions into an internal armed conflict. The definition proposed by Gasser therefore fails to provide more clarity to the difference between these concepts. However, Gasser does propose other conditions that are distinct in relation to the conditions of internal armed conflict in the Geneva Conventions. Perhaps it could be argued that the combination of Gasser's suggested requirements provides a well-rounded definition of internal strife that sets it apart from the definition of internal armed conflict, even if one of the requirements is not unique in itself. Thus, it is the combination of the resort to extraordinary and repressive measures and their subsequent cause of suffering in the population that separates internal strife from both normal conditions and internal armed conflict. By emphasising that the human rights violations should be viewed through a humanitarian lens, Gasser furthermore separates the concept from international human rights law. Considering the suffering that is caused by human rights violations, instead of considering the human rights violations as such, also means that more actions and more actors can contribute to creating a situation of internal disturbances and tensions, since mostly states are capable of officially infringing on human rights standards.

The ICRC has also made efforts to define internal disturbances and tensions. Internal disturbances have been described by the ICRC as "situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seri-

[150] Gasser. p. 41
[151] Gasser. p. 41

ousness or duration and which involves acts of violence".[152] The acts of violence can, according to the ICRC, manifest themselves in different ways. For instance, the acts of violence could constitute sporadic spurts of revolt or could consist of conflicts between the state and groups which are "more or less organized". Just as Gasser, the ICRC furthermore recognizes a requirement of governmental recourse to extensive police forces or armed forces to stifle the internal disturbances and restore normal conditions.[153] When it comes to internal tensions, the ICRC refers to situations of serious political, religious, racial, social or economic tensions or to "sequels of an armed conflict or internal disturbances".[154] The meaning behind the latter explanation of internal tensions is not described in detailed but could presumably refer to the situation in the aftermath of armed conflict or internal disturbances. Internal tensions could therefore supposedly encompass such challenges that follow periods of more widespread violence or upheaval, thereby highlighting the impact of such periods on the fabric of the state.

Much like Gasser, the ICRC acknowledges a requirement concerning the level and form of the force used. In other words, both Gasser and the ICRC believe that internal disturbances and tensions are characterized by the departure from ordinary measures of force to extraordinary methods of force. The definitions provided by Gasser and the ICRC speak to a view of the state's internal affairs as a scale ranging from normal, peacetime conditions to full blown civil war. Every level of the scale requires a degree of increase of the intensity of the violence, which is referred to in legal documents as an amplification of force. During normal conditions, normal policiary measures are used to combat daily and regularly occurring issues. The ICRC thereafter distinguish between internal tensions and internal disturbances, where internal tension seems to be the step above normal conditions. A state suffering from internal tensions is dealing with issues of a more specific character, which can be related to, for example, racial, religious, or political differences. Moving up the ladder, internal disturbances require a further increase in the use of force. Internal disturbances must be considered present when the state implements extraordinary measures to remedy the internal tensions, and when these measures result in human rights violations that cause suffering in the population. Internal disturbances could therefore be distinguished from internal armed conflict that necessitate recourse to armed forces in pursuit of restoring normal conditions, and that furthermore presuppose that the groups challenging the state are highly organized.

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[152] 'ICRC Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law', International Review of the Red Cross, 29 February 1988, http://international-review.icrc.org/articles/icrc-protection-and-assistance-activities-situations-not-covered-international. p. 12

[153] 'ICRC Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law'. p. 12.

[154] 'ICRC Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law'. p. 12-13.

While internal disturbances and tensions do not have an official definition, the highlighted attempts to crystallize its meaning are nonetheless helpful in understanding the grey area between normal conditions and internal armed conflict, as well as the escalation that takes place in between the two. By identifying such situations, it becomes clear that states adopt far-reaching measures to restore security and normalcy, oftentimes at the expense of the human rights of the population. The lack of a definition of internal strife thus allows states to escape their obligations under international law.

4 States of Emergency in Low-Intensity Internal Conflict

4.1 Conceptualizing the Derogation Gap

In light of the two previous sections concerning states of emergency and non-international armed conflict, a grey area is made visible at the intersection of international human rights law and international humanitarian law. As discussed, a state of emergency can be invoked because of "a threat to the life of a nation", given that certain conditions are fulfilled. It is highly likely that one such threat could be a non-international armed conflict. "War" is explicitly mentioned as an emergency in the derogation provision of the ECHR, which further speaks to the likelihood that a state would resort to emergency measures to control an internal armed conflict. The invocation of a state of emergency due to an internal armed conflict is relatively uncontroversial. In such a situation, the state would be allowed to derogate from several human rights obligations of international human rights law, but would, in turn, be bound by human rights obligations of international humanitarian law. That way, a certain degree of human rights can always be guaranteed. The issue is, however, when emergency measures are invoked to combat internal disturbances and tensions that do not amount to non-international armed conflicts according to Common Article 3 or Article 1 of Additional Protocol II. In that case, states would be authorised to derogate from their obligations according to international human rights law, while at the same time avoiding the application of international humanitarian law. As a result, human rights are upheld by neither area of law.

Normally, the proclamation of a state of emergency in the face of internal disturbances and tensions would not be an issue since every derogation provision imposes a requirement of temporariness to the state of emergency. In other words, once the threat has been averted, the state should revert to normalcy in which all human rights are respected and sustained. However, many times, states have evidently failed to respect the legal boundaries of emergency measures, meaning that they have oftentimes extended the state of emergency without end and applied overly restrictive measures unproportional to their purpose. Some authors argue that the probability of a state of emergency transitioning into a permanently authoritarian rule is higher when it is proclaimed with the aim of counteracting internal strife or an internal armed conflict. The invocation of emergency measures for that specific purpose is therefore riddled with multiple risks and the absence of sufficient legal oversight.

Ní Aoláin and Gross have suggested that entrenched emergencies largely correlate with situations of internal disorder. That way, states have been able maintain and justify their power, while simultaneously obscuring their dete-

riorating internal affairs, under the guise of the emergency typecast.[155] Ní Aoláin and Gross refer to "high-intensity emergencies" which, according to them, constitute a special type of emergency. High-intensity emergencies are described by the authors as a permanent situation in which the state continuously derogates from its human rights obligations and neglects normal constitutional and judicial safeguards for extended periods of time. Meanwhile, emergency powers are widespread, far-reaching, and consistently extended.[156]

The aspect that distinguishes high intensity emergencies from other contingencies is their substantial overlap with consistent patterns of internal violence. Ní Aoláin and Gross have carved out certain requirements that help determine the presence of a persistent internal conflict. Firstly, one determining factor concerns the state's discourse regarding the dissident groups. Since these non-state actors challenge the state's authority and sovereignty, they are often depicted as terrorist groups and thus stripped of any political legitimacy.[157] Secondly, Ní Aoláin and Gross recognize that situations of sustained internal violence generally require recourse to more serious measures than a normal policing response. In the same vein as Gasser and the ICRC, Ní Aoláin and Gross therefore argue that internal strife is characterized by the protracted use of military forces or militarized police forces.[158] Lastly, the authors suggest that a hallmark of high-intensity emergencies is the continuous exposure to violence which originates from the same source or sources over a prolonged period of time. In line with the previous description of internal strife, such experiences are mostly categorized as internal disturbances and tensions by states. As mentioned earlier, states are then able to escape the application of humanitarian law norms while simultaneously derogating from human rights standards.[159] To avoid the legal vacuum that occurs in the grey area between international humanitarian law and international human rights law, Ní Aoláin and Gross have suggested a reconceptualization of the criteria of intensity that determines whether an internal conflict is categorized as a non-international armed conflict. According to the current definitions, states experiencing internal disturbances and tensions are correct in arguing that a snapshot examination of the country's exposure to violence at a certain moment would prove that the conflict lacks the intensity required to trigger the application of IHL. To amend the situation, Ní Aoláin and Gross advocate the application of a horizontal test of violence, rather than a vertical one. In other words, the authors suggest that "attention should be focused on the experience of violence over time." The argument is supported by the fact that there are multiple examples of conflicts in which the government implements restrictive military measures

[155] Ní Aoláin and Gross, 'Emergencies and Humanitarian Law'. p. 342
[156] Ní Aoláin and Gross. P. 342-343
[157] Ní Aoláin and Gross. P. 343
[158] Ní Aoláin and Gross. P. 343
[159] Ní Aoláin and Gross. P. 343-344

over a long period of time, even when the intensity of the violence would be considered low when examining it at any particular moment. Therefore, persistent levels of violence, even if that violence is low intensity, should be the indicator of the existence of a non-international armed conflict.[160]

The following section of the thesis aims to present the conflict in South-East Turkey, one example of a state which has proclaimed a state of emergency due to internal conflict. By evaluating this example, the suggested correlation between high-intensity problem emergencies and low-intensity internal conflict can be examined. The conflict in Turkey will be discussed against the backdrop of the legal framework concerning states of emergency and non-international conflict, as well as the proposed requirements for defining internal disturbances and tensions. In that way, the conflict between the PKK and the government in Turkey could provide detailed insight into the actual issues that riddle the invocation of emergency measures to combat internal issues, which can in turn clarify which body of law that most appropriately should govern these situations.

4.2 Turkey

4.2.1 Background

Dating back to 1984, the conflict between the Turkish Government and the Kurdistan Workers Party has permeated the internal affairs of Turkey in general, and South-East Turkey in particular.[161] The Kurdish population of roughly thirty million people is dispersed throughout several countries in the Middle East and comprise around one fifth of Turkey's inhabitants.[162] In spite of its large prevalence in the Middle East, the Kurdish population has never achieved statehood. On the contrary, Kurdish efforts of self-determination have historically been answered with persecution and forceful assimilation.[163] In the 1960's and 70's, Turkey underwent major societal changes during which the Turkish government actively suppressed Kurdish culture and committed several human rights violations against the Kurds.[164] As a result, Kurdish nationalist groups were proliferated and radicalized. The PKK was one such group, founded in 1978 by Abdullah Öcalan as a

[160] Ní Aoláin and Gross. p. 344-345

[161] Oren Gross, '"Once More unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', Yale Journal of International Law, 1 January 1998, https://openyls.law.yale.edu/handle/20.500.13051/6386. p. 484

[162] 'Conflict Between Turkey and Armed Kurdish Groups | Global Conflict Tracker', accessed 15 April 2024, https://www.cfr.org/global-conflict-tracker/conflict/conflict-between-turkey-and-armed-kurdish-groups.

[163] 'Kurdistan Workers' Party | Kurdish Militancy, History & Ideology | Britannica', accessed 15 April 2024, https://www.britannica.com/topic/Kurdistan-Workers-Party.

[164] 'Examining Extremism: Kurdistan Workers' Party (PKK) | Examining Extremism | CSIS', accessed 15 April 2024, https://www.csis.org/blogs/examining-extremism/examining-extremism-kurdistan-workers-party-pkk.

Marxist organization, which aimed to establish an independent Kurdistan in Turkey.

Early on, the PKK distinguished itself from other nationalist groups through its willingness to resort to violence in its pursuits of independence and fight against adversaries.[165] Since 1984, when the PKK officially launched its military campaign against the Turkish government, around thirty to forty thousand people have been killed, three million have been displaced and more than three thousand villages have been destroyed.[166] Simultaneously, the Turkish government has committed grave human rights violations in their efforts to combat the PKK. Human rights reports have indicated that the Turkish security forces have forcibly displaced civilian non-combatants, caused deaths in detention due to the use of excessive force, carried out killings by so-called "execution squads" and committed torture during investigations, among other things. Furthermore, the government is responsible for suspending civil and political rights of the Kurdish minority.[167]

Due to the violent nature of the PKK and its operations, there is large consensus in the international community that it represents a terrorist organization. Accordingly, the Turkish government has argued that the measures implemented against the PKK constitute "domestic counterterrorism" and have thereby denied the application of international humanitarian law. In addition, the government has claimed that the PKK does not fulfill the requirement of territorial control set out in Article 1 of Additional Protocol II and that the Party is incapable of respecting the rules of war since it is a terrorist organization.[168] Even the Turkish Chief of General Staff has referred to the conflict as a "low-intensity internal conflict".[169] The reasoning behind Turkey's refusal to recognize the conflict as a non-international armed conflict according to the Geneva Conventions can be attributed to numerous factors. Firstly, the Turkish government is most likely reluctant to acknowledge the situation as an internal armed conflict because such a categorization would point to their inability to control their internal affairs and make them appear weak internationally. Another presumable factor is the government's fear that the application of international humanitarian law would award dissidents with more rights, which would in turn limit the gov-

[165] 'Kurdistan Workers' Party | Kurdish Militancy, History & Ideology | Britannica'.

[166] Susan C. Breau, 'The International Law Implications of the Turkish/Kurdish Conflict Dossier: L'Insurrection et Le Droit International - Insurgency and International Law', *Revue Belge de Droit International / Belgian Review of International Law* 41, no. 1–2 (2008): 426–57. p. 428

[167] Gross, 'Once More unto the Breach'. p. 484

[168] Şehmus Kurtuluş, 'Characterization of the Violence between Türkiye and the PKK', *Leiden Journal of International Law* 37, no. 1 (March 2024): 274–93, https://doi.org/10.1017/S0922156523000456. p. 282

[169] Deniz Arbet Nejbir, 'Applying Humanitarian Law: A Review of the Legal Status of the Turkey–Kurdistan Workers' Party (Pkk) Conflict', *Journal of International Humanitarian Legal Studies* 12, no. 1 (25 March 2021): 37–70, https://doi.org/10.1163/18781527-bja10026. p. 45

ernment's ability to carry out their preferred measures with little to no legal consequences.[170]

4.2.2 Categorization of the Conflict in Turkey

While Turkey has neglected the rules of IHL and continues to deny their applicability, many view the conflict in South-East Turkey as a non-international armed conflict. Before discussing these perspectives, it is worth clarifying that the classification of a conflict as a non-international armed conflict under IHL remains unaffected by the perspectives of different international stakeholders. In other words, the mere fact that international organizations and states categorize the PKK as a terrorist organization does not inhibit characterizing it as an internal armed conflict. In *Akayesu,* the ICTY firmly established that such an assessment must be based on objectively verifiable criteria, rather than the subjective opinion of involved parties.[171] Consequently, the situation in Turkey qualifies as a non-international conflict if it fulfills the requirements of Common Article 3 or Article 1 of Additional Protocol II from an objective standpoint, provided that the Turkish government is bound by these regulations. In that case, the obligations following from IHL would be automatically applicable to the parties of the conflict irrespectively of their own judgment of the situation and attitude towards their counterparty.[172]

Since 1954, Turkey has been a state signatory to the four Geneva Conventions and is therefore bound by the provision concerning non-international armed conflicts in Common Article 3. In addition, Common Article 3 holds the status of customary international law, meaning that Turkey would be bound by the provision regardless of whether it had accepted the treaty obligations of the Geneva Conventions.[173] Turkey has not, however, signed or ratified Additional Protocol II. On the contrary, Turkey has consistently argued in favor of the categorization of PKK as a terrorist organization, thus rejecting the application of the Protocol to the conflict. Since Additional Protocol II has not achieved recognition as customary international law, Turkey cannot be considered obliged to adhere to the provisions therein.[174] The possibility of holding the Turkish state accountable under IHL therefore hinges upon the applicability of Common Article 3.

Among the authors that consider the conflict between the Turkish state and the PKK a non-international armed conflict, there seems to be consensus that the PKK has reached a sufficient level of organization to be qualified as a party to the conflict in accordance with Common Article 3. Firstly, the existence of an established command structure within the Party is generally

[170] Kurtuluş, 'Characterization of the Violence between Türkiye and the PKK'. p. 282
[171] Nejbir, 'Applying Humanitarian Law'. p. 46
[172] Nejbir. p. 46
[173] Nejbir. p. 49
[174] Nejbir. p. 49

uncontested. The structure of the PKK has a military character with a clear hierarchy containing identifiable ranks and positions.[175] The organization is led by its creator Abdullah Öcalan who exercises his influence over the Central Executive Committee that is tasked with supervising the organization's activities and representing it publicly. The Central Executive Committee is, in turn, superseded by the Central Committee which constitutes the highest governing body of the organization. Every year, the PKK holds an Annual Congress in which the members of the Committee are elected. Moreover, the PKK has a political branch which engages in a range of activities including the spread of propaganda, systematic recruitment of new members and intelligence and political training to the organization's operational forces.[176] The PKK has a great number of members and is reportedly capable of exercising effective control over them. Overall, every aspect mentioned fulfills the decisive factors pursuant to the degree of organization of a dissident group, as emphasized by the ICC and the ICTY among others.[177] Accordingly, the Party must be considered sufficiently organized to qualify as an organized armed group under Common Article 3.

To trigger the applicability of Common Article 3, the organized armed group must be capable of carrying out "protracted armed violence", meaning that the conflict must reach a certain level of intensity to be considered a non-international armed conflict. While the discussion of whether the PKK qualifies as an organized group generally lacks opposing views, the arguments concerning the requirement of intensity are much more scattered with some authors arguing that the conflict reaches a sufficient level of intensity while others suggest the opposite. It is also mainly with regard to the present requirement that Turkey bases its argument that the conflict does not reach the threshold of non-international armed conflict set out in Common Article 3. The authors that have argued that the intensity requirement has been fulfilled highlight factors such as the scale of PKK attacks and the number of casualties they have caused. In the beginning of the 1990s, for instance, the PKK carried out some of their most large scale and violent attacks. Between 1993 and 1995 alone, the PKK had carried out around 10 000 attacks. As a result, roughly 20 000 people had been killed in the first half of the 1990s, half of which were militants and the other half security personnel and civilians.[178]

Furthermore, many authors underscore the actions of the Turkish security forces and the fact that Turkey has continuously invoked emergency powers in South-East Turkey to counteract the PKK.[179]. Between 1987-2002, the Turkish government has consistently proclaimed states of emergency in

[175] Kurtuluş, 'Characterization of the Violence between Türkiye and the PKK'.
[176] Nejbir, 'Applying Humanitarian Law'. p. 53
[177] Kurtuluş, 'Characterization of the Violence between Türkiye and the PKK'.
[178] Kurtuluş.
[179] See e.g. Nejbir, 'Applying Humanitarian Law', p. 57-58 and Kurtulus, 'Characterization of the of the Violence between Türkiye and the PKK'.

most of the cities in South-East Turkey. During this time, the Turkish government made use of its armed forces in its efforts to maintain control over the Kurdish regions. In 1993, for instance, the Turkish state harnessed its special police units, its special anti-terror unit, village guards and around half of its military forces to carry out operations against the PKK. In total, the governmental forces comprised of more than 300 000 members, which is in stark contrast to the 15 000-20 000 members of guerilla that the state forces sought to contain.[180] Despite being overwhelmingly outnumbered, as well as outmatched in terms of funding, training and equipment, the PKK managed to seize the control of certain regions in South-East Turkey through the employment of attacks such as kidnappings, bombings, sabotage, roadblocks and shooting incidents. The PKK thus remained undefeated and capable of carrying out impactful guerilla actions against Turkish military bases.[181] Authors that suggest that the conflict in Turkey reaches a sufficient level of intensity therefore point to the PKK's ability to sustain influence and control in Kurdish regions while managing to implement potent attacks against an army more than ten times its size and with 450 million dollars in its arsenal. The foregoing indicators speak to the capacity of the PKK to sustain armed violence over a protracted period.[182]

The authors that classify the belligerency in South-East Turkey as a low-intensity conflict, rather than a fully-fledged non-international armed conflict according to IHL, highlight the character of the insurgent's military conduct. Özdag and Aydinli differentiate between offensive and defensive forms of low-intensity conflict. On the one hand, offensive types of conflict include, for example, revolts or riots against the government of a state by citizens of that state, which could be carried out for the purpose of disrupting the state's territorial integrity or overthrowing the state. Terrorism is another offensive type of conflict in which non-military or irregular groups use violence against civilians and/or military personnel or facilities with a political aim.[183] Defensive types of conflict, on the other hand, are defined broadly as "counterinsurgency" by the authors. Such counterinsurgency includes, for instance, counterterrorism efforts or military actions employed to defeat an insurgency taking place within the state.[184] Özdag and Aydinli argue that the conflict between the Turkish government and the PKK demonstrates both offensive and defensive forms of low-intensity conflict since the PKK has performed terrorist attacks against civilian and military targets while the Turkish state has responded with counterterrorism policies.

[180] Nejbir, 'Applying Humanitarian Law'. p. 58
[181] Nejbir. p. 62
[182] Nejbir. p. 62
[183] Ümit Özdag and Ersel Aydinli, 'Winning a Low Intensity Conflict: Drawing Lessons from the Turkish Case', in *Democracies and Small Wars*, 1st ed., vol. 2003 (London: Routledge, n.d.), 101–21. p. 102
[184] Özdag and Aydinli. p. 102-103

According to Özdag and Aydinli, a characterizing feature of low-intensity conflicts is the state army's difficulty to defeat their counterpart. The reason behind this struggle can be attributed to the fact that they have been trained and accustomed to battle other armies, hence why they lack the experience to fight dissidents with unconventional force structures, equipment, and strategies. In addition, the authors identify characteristics such as the prevalence of political objectives over military ones and the protracted nature of the conflict.[185] As explained above, the Turkish government mobilized parts of the military, as well as their security forces, their special police units, and their special anti-terror units to stifle the PKK. However, in spite of great efforts and extensive use of resources, the Turkish government were unable to eradicate the threat that the PKK posed to them even when the PKK had recourse to significantly fewer resources. As Özdag and Aydinli suggest, the asymmetry between the large scale of Turkish forces and the actual impact of these forces could be attributed to their inexperience of fighting against guerilla groups. Furthermore, the Turkish government's military measures could be considered secondary to their political objectives. In other words, the military measures are implemented to reach political goals, rather than the other way around. The political discourse in which the Turkish government has asserted that the PKK is a terrorist organization and that their measures constitute attacks towards, and violations of, the sovereignty and territorial integrity of the Turkish state speak to the primacy of the political dimension of the conflict.

By comparing the conflict in Turkey with the definitions of internal disturbances and tensions outlined by Gasser and the ICRC, as well as the defining characteristics of a low-intensity internal conflict as identified by Ní Aoláin and Gross, further perspectives arise. As discussed, many authors who advocate for the categorization of the Turkish conflict as a NIAC highlight the organized features of the PKK and the Turkish government's recourse to armed forces. While these aspects are decisive for determining whether the conflict qualifies as an internal armed conflict according to international humanitarian law, the interpretation of these aspects is questionable. The Turkish state has indeed adopted measures that exceed those of normal times. However, these measures do not necessarily trigger the application of Common Article 3. For example, the authors in favor of such an interpretation have argued that the Turkish recourse to military forces, security forces, as well as special anti-terror and police units speak to the occurrence of protracted armed violence. Moreover, they have argued that the Turkish state's continuous invocation of emergency powers indicates the existence of a non-international armed conflict. However, these arguments are somewhat flawed, since they disregard the previously explained spectrum of internal conflicts, which increase in intensity with each step. For instance, as Ní Aoláin and Gross have suggested, even low intensity internal conflicts presuppose a level of force that surpasses the ordinary. Furthermore, pointing

[185] Özdag and Aydinli. p. 103

to the proclamation of a state of emergency as an indication of protracted violence is faulty, since states of emergency clearly also encompass situations of much less severity than non-international armed conflicts, which have a relatively high threshold of application. In addition, Ní Aoláin and Gross suggested that a characteristic of low-intensity internal conflicts is the continuous exposure to violence from the same source during an extended period. The attacks and persistent presence and influence of the PKK in South-East Turkey could therefore also indicate that Turkey suffers from internal disturbances and tensions. The PKK's ability to withstand strikes from large-scale Turkish forces could also demonstrate Turkey's inexperience with battling guerrilla groups, rather than the PKK's unique potential to maintain protracted armed violence.

To conclude, there are valid and convincing arguments both for and against the classification of the internal strife in Turkey as a non-international armed conflict. However, as discussed and emphasized in multiple sections of the thesis, the existent definitions of a NIAC lack clear indication of the transition from normal conditions to internal disturbances and tensions, and from the latter to an internal armed conflict. Although the eagerness of categorizing the conflict in Turkey as an internal armed conflict is understandable, given that it enables the application of humanitarian law, such willingness does not alter the wording or meaning of the law as it stands. The fact of the matter is that the absence of a clear distinction between internal disturbances and tensions vis-à-vis non-international armed conflict entails difficulties in fitting a conflict into one or the other. As proven, states can leverage these ambiguities to their favor by claiming that a conflict constitutes internal disturbances and tensions rather than an internal armed conflict. In combination with the absence of international oversight mechanisms for the identification of such a transition, states are awarded the discretion of determining the issue themselves.

4.2.3 State of Emergency in Turkey

From June 1970 to July 1987, Article 15 of the ECHR was invoked by Turkey for over 77 % of the period. Between September 1980 and May 1987, a state of emergency was in effect continuously for seven years.[186] In 1990, the Turkish state once again implemented an emergency regime which remained in place until 2002.[187] The issue is particularly prominent in South-East Turkey, where most provinces have been consistently subjected to emergency powers since 1987.[188] In more recent times, a state of emergency

[186] Gross, 'Once More unto the Breach'. p. 486

[187] 'The legacy of state of emergency rule in Turkey – Mesopotamia Observatory of Justice', accessed 27 April 2024, https://mojust.org/2020/05/27/the-legacy-of-state-of-emergency-rule-in-turkey/.

[188] Gross, 'Once More unto the Breach'. p. 486

was declared in 2016 following an attempted military coup which was not lifted until 2018, two years later.[189]

In addition to carrying out emergency powers for far longer than what is authorized by international law, the Turkish state has also been criticized of adopting measures that cannot be considered proportional to the scale and extent of the public emergency. In other words, it is questionable whether the measures taken fulfill the requirement of necessity imposed by both Article 4 of the ICCPR and Article 15 of the ECHR.[190] As part of the state of emergency, the Turkish government has adopted decrees which allow the detainment of suspects for up to thirty days without judicial review, contrary to the Turkish Constitution, the ECHR and the ICCPR, which all contain provisions guaranteeing that those arrested or detained on a criminal charge should promptly be brought before a judge or other officer. The Turkish government has also been accused of violating the prohibition against torture, even though it is non-derogable according to international law. Furthermore, the emergency decrees have allowed for the review of detention, objection to detention and request for release to be carried out on the grounds of the case file, which violates constitutional and international human rights law provisions stating that every detainee is entitled to a legal proceeding in which the lawfulness of the detention is determined. The freedom of expression, the freedom of association, the right to private life and the right to liberty of movement can be added to the list of rights and freedoms which have been violated by Turkey in the name of a public emergency.[191]

The facts of the Turkish case clarify that the government has contravened multiple conditions of the derogation provisions of both the ICCPR and the ECHR. First, both provisions impose a requirement of temporariness, meaning that a state of emergency is only allowed as an exception and should therefore be phased out once the public emergency has been addressed. As shown, the Turkish government has continuously extended its emergency regime with a state of emergency spanning over roughly 15 years during the period 1987-2002. Due to constituting derogations, Article 4 of the ICCPR and Article 15 of the ECHR only authorize the use of emergency powers for exceptional circumstances and for a temporary period. The enforcement and maintenance of all human rights should constitute the default mode in a state, hence why the suspension of human rights is only ever allowed as exceptions. While it is undisputed that Turkey maintained a derogation re-

[189] 'Turkey Ends State of Emergency after Two Years', 18 July 2018, https://www.bbc.com/news/world-europe-44881328.

[190] 'The Turkish State of Emergency Under Turkish Constitutional Law and International Human Rights Law | ASIL', accessed 26 April 2024, https://www.asil.org/insights/volume/21/issue/1/turkish-state-emergency-under-turkish-constitutional-law-and.

[191] 'The Turkish State of Emergency Under Turkish Constitutional Law and International Human Rights Law | ASIL'.

gime to the point where the exception became the normal, it can be discussed whether Turkey or the law is at fault for this outcome. It goes without saying that the Turkish government's human rights violations that were justified as emergency measures are completely indefensible both morally and legally. That being said, human rights law nonetheless deserves scrutiny on this matter. As previously established, the derogation can be invoked for multiple reasons, one of them being an internal armed conflict. However, situations which fail to reach the threshold of internal armed conflict pursuant to IHL can still reach the threshold of public emergency according to IHRL. That way, internal disturbances and tensions can qualify as a public emergency since it is not unlikely that such circumstances can pose threats to the life of the nation. The issue that arises is that the emergency provisions of IHRL do not account for the protracted nature of internal disturbances and tensions which, unlike other emergencies such as natural disasters or pandemics, involve interests that are highly politically, legally, and socially sensitive. Internal disturbances and tensions presuppose that the threat is stemming from groups that, in one way or another, disagree with and challenge the state. Therefore, it could be argued that such conflicts have higher stakes both for the state and for the dissidents, which could contribute to the adoption of more severe measures from both sides. Thus, if a state of emergency is proclaimed because of internal disturbances and tensions, it is highly likely resulting in a permanent emergency.

The systematic violation of several human rights, in combination with the continuous extension of the emergency regime, points to the transition from a state of derogation to a more permanent state of affairs in which human rights violations have become commonplace. Another alarming aspect of IHRL in respect of permanent emergencies is its lack of adequate legal oversight. International courts have demonstrated both inability and reluctance to question state practices in such circumstances, which can be attributed to a variety of reasons. Firstly, it is worth noting that international human rights law is intended to operate in normal, peacetime situations. When a peacetime context transitions into an armed conflict, the baton is passed over to international humanitarian law in terms of the protection of human rights.[192] Therefore, bodies of international human rights law, such as the Human Rights Committee and the European Court and Commission of Human Rights, have generally avoided the application of humanitarian law principles in their decisions. Even when faced with situations in which a state has repeatedly extended its state of emergency and implemented disproportionately restrictive measures, human rights bodies have not found it appropriate to apply or consider humanitarian law.[193] The avoidance of the application of humanitarian law by human rights bodies grows even more remarkable given the fact that a public emergency can be proclaimed due to an armed conflict. For instance, Article 15 of the ECHR explicitly mentions

[192] Ní Aoláin and Gross, 'Emergencies and Humanitarian Law'. p. 345-346
[193] Ní Aoláin and Gross. p. 346-347

that derogation is allowed on account of "war or other public emergency". Nevertheless, international human rights bodies have showed reluctance to assess these situations according to the principles of humanitarian law and have thus continued to affirm the separate application of IHRL and IHL. Situations in which these two areas of law overlap therefore continue to lack legal oversight and will, as a result, fall between the cracks. [194]

Secondly, the procedural approach of human rights tribunals prevents a holistic review of the entire derogation or conflict experience. Processes are brought before human rights tribunals through individual complaints, which means that each case is treated independently. As a result, the Court in question lacks the discretion to consider preceding cases that have treated similar or the same situation.[195] Regarding the emergency regime in Turkey, specifically, many cases concerning human rights violations in South-East Turkey have been brought before the European Court and the European Commission. In each of these cases, the Court or the Commission has assessed the situation on a case-by-case basis, without considering any of the other cases previously brought before them. As an illustrative example, in more than sixty cases found admissible by the European Commission, every single applicant was deemed to have been denied the adequate remedies by the Turkish government to address their complaints. Despite reaching this conclusion in every application, the Commission never found it necessary to address Turkey's liability for systematic violations of the right to effective remedy.[196] The Commission failed to address the question of systematic human rights violations even though virtually all the complaints stemmed from the same jurisdiction and concerned similar allegations aimed towards the Turkish security forces. In addition, some cases provided external evidence gathered by international organizations that highlighted the systematic human rights abuses conducted by the Turkish government. Regardless of the judicial and procedural approach of the Commission, the previous cases and the continuously extended derogations must, at the very least, have carried relevance for the general lawfulness of the derogation and the question of whether the derogations were proportional.[197]

Finally, human rights tribunals could be reluctant to claim the existence of a permanent emergency since their legitimacy hinges on keeping state parties satisfied. Awarding Courts with the discretion to hover between different legal regimes would entail legal uncertainty for states and impose a legal position on them which they did not agree to. As proven, the issue is moreover particularly sensitive when dealing with states of emergency and internal conflicts since states oftentimes view criticism of their conduct in such

[194] Ní Aoláin and Gross. p. 347
[195] Ní Aoláin and Gross. p. 347
[196] Gross, 'Once More unto the Breach'. p. 488
[197] Ní Aoláin and Gross, 'Emergencies and Humanitarian Law'. p. 348

circumstances as a challenge to their sovereignty.[198] Human rights tribunals will therefore likely be even less eager to challenge states on their own judgments in such situations.

4.3 The Overlap: High-Intensity Emergency vs. Low-Intensity Internal Conflict

The issues discussed above beg the question of whether international human rights law is the appropriate legal regime to apply on situations of internal disturbances and tensions. In other words, the adequacy of the current view of internal disturbances and tensions as legally equal to normal conditions is debatable. Perhaps, as previously argued, it would be more suitable to rephrase the definitions of non-international armed conflict so that low-intensity internal conflicts are encompassed as well. However, before reaching that conclusion, it is important to explore whether permanent emergency regimes in fact overlap with situations of low-intensity internal conflict as Ní Aoláin and Gross have suggested.

The conflict in South-East Turkey constitutes a typical example of a "high-intensity emergency" as defined by Ní Aoláin and Gross. The situation in Turkey essentially showcases all identified characteristics of a high-intensity emergency. A historical perspective of the conflict between the PKK and the Turkish state indicates that the emergency regime has become permanent more than one time. Both between 1987-2002, as well as between 2016-2018, the Turkish state has extended emergency powers for intervals which cannot be considered temporary. As such, Turkey has suspended human rights and disregarded normal constitutional and judicial safeguards for multiple years at a time. Furthermore, the measures that have been adopted during such protracted states of emergency have not taken the requirement of proportionality and necessity into consideration. Instead, said emergency measures have imposed widespread and far-reaching restrictions on the individual's rights and freedoms. As stated, the Turkish government has infringed on several rights and freedoms that were protected both constitutionally and internationally and have even reportedly violated such rights which under no circumstances may be derogated from.

Having established that Turkey's internal strife does demonstrate the characteristics of a high-intensity emergency as provided by Ní Aoláin and Gross, the presence of a low-intensity internal conflict must be evaluated next. As discussed in the international legal classification of the conflict, Turkey displays all the hallmarks of a low-intensity internal conflict. There has been a prominent political component of the conflict where the PKK have been labelled terrorists in public discourse by the Turkish state in efforts to remove any justifiability of the PKK's political objectives. Additionally, the Turkish government have responded to the threat of the PKK

[198] Ní Aoláin and Gross. p. 349

with serious measures, rather than normal policiary force. Finally, the Government have faced continuous and protracted exposure to violence from the same source, namely the PKK, for extended periods of time.

Although the law can never be completely comprehensive, the analysis of the conflict in Turkey shows that a major pitfall of the emergency regime in human rights law is its inability to account for the characteristics of different emergency scenarios and for the distinguishing features of internal disturbances and tensions. As suggested, the nature of internal disturbances and tensions inherently contributes to a protracted conflict, due to the highly sensitive interests and issues at stake. Consequently, the emergency provisions of IHRL are incapable of adequately regulating the boundaries of emergency powers when they are implemented in situations of internal disturbances and tensions. The big culprit is the requirement of temporariness, which cannot be satisfactorily applied to such conflicts. The reason for this can be attributed to the protracted nature of internal disturbances and tensions, but also to the previously discussed absence of an established definition of the phenomenon. Since there is no accepted definition of internal disturbances and tensions in IHL, or low-intensity internal conflicts as some call it, it is impossible to determine when the internal affairs of a state have transitioned from normality to low-intensity internal conflict and the other way around. The blur between the normal and the exceptional in such circumstances in turn entail difficulties in deciding when the threat posed by internal disturbances and tensions has been averted. As a result, there are few ways to question states that have continuously extended their emergency regimes to the point where they become permanent, since that would require a legal classification of the internal situation of the state which is impossible to make with the current legal framework. Human rights tribunals' unwillingness to address humanitarian law considerations in their oversight of states of emergency is not helpful in resolving these issues. The failure of emergency provisions to account for the specific characteristics of internal disturbances and tensions, combined with the failure of humanitarian law to adequately define the starting point of internal armed conflict, therefore contributes to a legal vacuum which states are likely to exploit.

To conclude, the internal affairs of Turkey help exemplify the overlap of high-intensity emergencies and low-intensity internal conflicts. Therefore, reviewing all the facts of the conflict in South-East Turkey is helpful in materializing and concretizing the issue at hand. It is important to note, however, that only one example has been analyzed, and that it cannot by itself showcase that there is a general overlap between permanent emergencies and low-intensity internal conflict. Additional conflicts must be considered and evaluated before it is possible to determine the existence of such correlations. Nonetheless, examining one example is useful to pinpoint the specific causes and considerations that need attention regarding a potential issue. Now that the reasons and consequences of the so-called derogation gap

have been discussed in relation to the conflict in South-East Turkey, it can be addressed and understood in a more tangible manner. Moreover, it allows for a more in-depth discussion of the related concerns. As a result, prospective solutions can be presented in a more nuanced and informed way.

5 Conclusion

5.1 Causes and Effects of the Derogation Gap

The thesis set out to explore the so-called derogation gap, in other words the legal void that arises when an emergency regime is implemented for the purpose of mitigating an internal conflict that falls outside the ambit of humanitarian law. By outlining the international legal framework relevant to emergency law and non-international armed conflict, and by applying that framework to the conflict in South-East Turkey, the thesis has attempted to uncover both the theoretical and practical implications of current legislation. To summarize, the research of the thesis indicates that states of emergency established in times of internal strife run a high risk of resulting in entrenched and permanent emergencies. Such risk can be attributed to the character of the emergency, as internal strife typically implies a protracted experience of low-intensity violence. In addition, the definition of non-international armed conflict is narrowly construed, which means that low-intensity internal conflicts fail to trigger the application of humanitarian law. Consequently, neither IHL nor IHRL applies, which ultimately gives rise to the derogation gap.

The derogation gap that has been made visible at the crossroads of humanitarian law and human rights law occurs for a variety of reasons and is attributable to shortcomings of both legal regimes. The underlying factor contributing to the emergence of the derogation gap is the black and white peace-war distinction that governs which body of law applies to a certain situation. While the traditionally rigid boundaries between IHL and IHRL have loosened considerably with time, the strict separation of these legal regimes continues to be enforced by both scholars and courts when reviewing conflict situations.[199] Adopting the perspective that an internal situation of a state must be placed either within the category of war, or within the category of peace, gives rise to multiple legal concerns. Most importantly, such an either/or position fails to envisage that both humanitarian law and human rights law can overlap and apply at the same time.[200]

The binary peace-war classification that permeates the relationship between IHL and IHRL has influenced emergency law, which similarly operates on a division between the normal and the exceptional. Much like the clear-cut separation between peace and war, the idea of the emergency as the exception from normalcy is misleading. In reality, neither situations of war nor situations of emergency materialize in an obvious and straightforward manner. On the contrary, it is oftentimes difficult to recognize shifts in the internal situation of a state, as extraordinary measures normally only authorized

[199] See Aolain, 'The Relationship between Situations of Emergency and Low-Intensity Armed Conflict'. p. 98

[200] Aolain. p. 98-99

in emergencies are much more common to everyday state practice than has been alleged.[201]

The rigid categorization that influences both IHL and IHRL in general, and emergency law in particular, therefore fails to account for the blurred lines that permeate real life situations. As a result, the law is unable to capture the grey area specific to this thesis, internal situations that experience both an entrenched emergency regime and a low-intensity conflict. On the one hand, an entrenched emergency means that emergency measures have become standard practice and can therefore no longer be considered extraordinary. Meanwhile, such measures deviate from those deemed ordinary, hence why it is likewise impossible to categorize the situation as normal. On the other hand, the low-intensity conflict implies that the situation is neither acute enough to be considered war according to humanitarian law, nor uneventful enough to be considered peace. Consequently, the inhabitants of the state are denied their human rights, while the law has its hands tied.

The most obvious consequences of the derogation gap are widespread human rights violations, as seen in the case study of Turkey. The examination of the conflict in Turkey illustrates how emergency regimes often exceed their intended scope. The crisis actions are oftentimes disproportional to their purpose, and the state of emergency is frequently prolonged for longer than what is permitted. Since the derogation gap also implies that humanitarian law is not applicable, the human rights guarantees pertaining to that field of law are also discarded. Neglecting humanitarian law is particularly problematic in terms of non-international armed conflicts as these involve non-state groups which, in addition to the state, are powerful enough to significantly impact human rights concerns.

When discussing the effects of the derogation gap, it is important to highlight that it involves the suspension of human rights when they are needed the most.[202] In times when the state experiences emergency and internal conflict, individuals experience heightened risks to their safety and are therefore at their most vulnerable. State action in such situations therefore constitutes the litmus test for their dedication and willingness to respect human rights, as safeguards against abuses of power are particularly crucial to these situations.[203] The derogation gap thus constitutes a loophole to the international legal mechanisms set in place to maintain human rights. By legitimizing the suspension of human rights under the pretext of emergency, while simultaneously neglecting the application of humanitarian law, states are eroding the foundations of democratic governance and creating a precedent for future abuses of power. The normalization of such practices can therefore eventually lead to the normalization of authoritarianism. As such,

[201] Ní Aoláin and Gross, 'Emergencies and Humanitarian Law'. p. 327
[202] Oberleitner, 'War as Emergency'. p. 169-170
[203] Oberleitner. p. 170

the derogation gap desperately needs addressing, as it undermines not only fundamental rights and freedoms, but also democratic principles and the rule of law.

5.2 Bridging the Gap: Policy Recommendations

In order to protect individual rights and freedoms, the rule of law and the principles on which international law was founded, the current framework concerning emergency law and non-international armed conflict must be redesigned to effectively capture situations which currently fall between the stools. The thesis' thorough examination of all provisions relevant to the issue has assisted in identifying the inadequacies of existing legislation and, in turn, the underlying causes of the derogation gap. In light of this, the concluding part of the thesis will be dedicated to suggesting how the relationship between war and emergency can be revised to address the issues that have been presented.

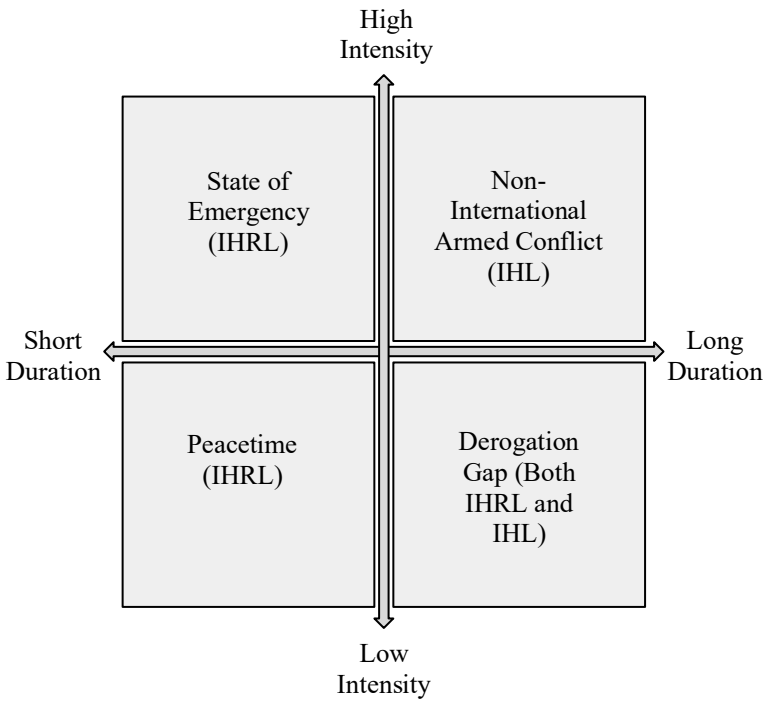
Firstly, it is worth mentioning the suggestion put forward by Ní Aoláin and Gross. According to them, preventing the derogation gap requires rethinking the current definition of non-international armed conflict under humanitarian law. Initially, it is important to clarify that the scholars argue that the establishment of a permanent emergency is an indicative factor that the situation would benefit from being governed by humanitarian law, rather than human rights law. Categorizing such situations under humanitarian law is favorable as it clarifies the legal status of the conflict and the obligations of the actors operating within it.[204] To enable such categorization, Ní Aoláin and Gross have proposed changing the approach to the criteria of intensity. The current requirement applies a vertical test to assess the violence of the conflict. Low-intensity internal conflicts thereby fail to satisfy the criteria, as the violence experienced in such conflicts is not of sufficient magnitude. To counteract this issue, Ní Aoláin and Gross recommend applying a horizontal test to the criteria of intensity. That way, the violence can be assessed over time, rather than at a specific point.[205] The proposal of these scholars brings important contributions to humanitarian law and can significantly improve the legal regimes' ability to encompass contemporary conflict situations.

Ní Aoláin and Gross furthermore contend that crisis situations are capable of fluctuating between legal regimes, and therefore suggest that the relationship between IHL and IHRL should be viewed as a continuum rather than two separate entities. Ní Aoláin elaborates on this idea by conceptualizing the continuum as a line stretching from one point to the other. Along the line, there are fixed points which each represent legal standards agreed upon by states. Traditionally, people have thought of conflicts as capable of fit-

[204] Ní Aoláin and Gross, 'Emergencies and Humanitarian Law'. p. 363
[205] Ní Aoláin and Gross. 344-345

ting neatly into one category or the other. In reality, however, a conflict situation will likely fall somewhere in between the fixed points of the line. In other words, it is argued more accurate to think of conflicts as entities which move along the continuum, thereby continuously shifting between different standards or categories.[206]

The continuum and the linear representation of the conflict spectrum proposed by Ní Aoláin and Gross is useful to better understand how conflict or crisis situations materialize in reality as opposed to theory. The assessment of conflict situations in relation to a continuum acknowledges the dynamic and complex nature of actual conflict experiences and removes the rigid categorizations which fail to adequately capture the nuances of a situation. While the suggestion facilitates the understanding of the relationship between IHL and IHRL, there are multiple questions left unanswered. For instance, the suggestion does not clarify what specific legal standards are intended to represent the fixed points of the line. Furthermore, the scholars have not explained what the positioning of a conflict implicates for the legal classification of that conflict. What legal regime applies, for example, if a conflict places itself right in the middle of the continuum? Moreover, what factors determine where a conflict should be placed on the continuum? To provide more clarity and legal certainty to the contribution of Ní Aoláin and Gross, and in an attempt to further build on the recommendation, the findings of the thesis suggest conceptualizing internal conflict and crisis situations in accordance with the following illustration:



[206] Aolain, 'The Relationship between Situations of Emergency and Low-Intensity Armed Conflict'. p. 106

The horizontal axis represents the duration of the internal conflict situation of the state, while the vertical axis represents the intensity of the conflict situation. Each quadrant of the grid thus represents the different combinations of duration and intensity that a conflict can demonstrate. That way, conflicts can be mapped onto the grip based on its specific characteristics. The conflict's placement on the grid thereafter determines which legal regime is deemed most appropriate to apply. As illustrated, the derogation gap manifests itself in the bottom right quadrant of the thesis. Conflicts that place themselves in this quadrant must therefore be governed both by IHRL and IHL.

The grid aims to provide an overview of the relationship between IHRL and IHL, as well as the relationship between emergency situations and non-international armed conflicts. Mapping out internal conflict and crisis situations on the grid hopefully facilities visualizing the intersecting areas of the legal concepts and regimes in question. However, the thesis cannot provide a completely comprehensive conceptualization of the relationship between emergency and non-international armed conflict and how the issues inherent to that relationship should be addressed. Instead, the grid presented above provides a foundation for further understanding the issues discussed throughout the thesis. However, it is important to emphasize that the grid constitutes an extremely simplified illustration of a highly complex problem that involves numerous legal and political considerations. For instance, the determining factors of intensity and duration have not been identified in the thesis. Additional factors relevant to the requirements of the emergency provisions and the definition of non-international armed conflicts are further necessary to consider when attempting to map out the issue.

In summary, addressing the derogation gap requires rethinking existing legal frameworks and adapting them to contemporary conflict dynamics. The proposals by Ní Aoláin and Gross come a long way in doing so, however, they also give rise to critical questions that have been left unanswered. The grid model presented in this thesis aims to build on the ideas of Ní Aoláin and Gross by incorporating both the duration and intensity of conflicts. As such, the model can hopefully serve as a starting point for further research. Ultimately, bridging the gap between emergency law and the law of non-international armed conflict demands continuous scholarly and practical efforts to develop legal mechanisms that are flexible, comprehensive, and capable of addressing the realities of today's conflict landscape.

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