Defining Security or Rejecting Security?

A Critical Analysis of the Relationship between Rights and Security

by

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ABSTRACT

Security is a term that fits easily in any context. It has become common to talk about security regarding terrorism, migration and, more recently, the Covid-19 pandemic. Food security, health security and environmental security have also become widespread expressions. More generally, any occurrence likely to have an adverse impact on people's lives can be framed as 'threat to security'. While security has gained increasing popularity in recent years, the consensus around human rights has been relentlessly eroded. Security is often invoked to undermine the human rights discourse. The logic of balancing rights and security, firmly entrenched also in International Human Rights Law, expresses the mainstream idea that rights can, and often should, be restricted to enhance security.

Disturbingly, such an erosion has happened as a result of a term, 'security', the meaning of which appears difficult to pin down. States have no interest in defining security, because a vague notion of security allows them to invoke the term in a broader set of circumstances. The more security means everything, the more it means nothing. As a result, the state power to restrict rights in the name of security is greater when it can rely on an expansive and undefined concept of security.

Against this background, this thesis discusses the issue of whether a legal definition of security could be an instrument to compel states to produce a legally meaningful invocation of security. Since an unrestrained power to invoke security damages human rights, a legal definition of the term is allegedly a tool to clarify in which circumstances a state can lawfully rely on the term and, conversely, in which circumstances is abusing the term.

Drawing from linguistics, semiotics and critical language studies, the thesis will show that a definition of security in law would not be able to constrain the state power to invoke the concept.

Defining security would not prevent states from exploiting a definition in order to construct their security narratives, and to manipulate and distort any proposed definition to pursue their security aims. Thus, a legal definition of security might contribute to enhancing power, rather than to constraining it.

For this reason, the thesis will challenge, more fundamentally, the necessity of the concept of security in the current legal and political lexicon. It will demonstrate that security should not be defined, re-understood or re-conceptualised, but instead it should be rejected in its entirety. At a conceptual level, there is no justifiable reason for which states should employ the security frame to tackle threats, rather than mobilise the protective regime provided by the human rights frame. States' preference for security rather than rights is the product of a strategic choice: by seeing threats through the security lens, states seek to escape the power-constraining features characterising the human rights frame, namely: legalisation, compliance pull and drive towards equality. Even though human rights, like security, have also a power-enhancing strand, they are much better equipped to constrain state power (and to protect individuals from the risk of an arbitrary exercise of state power) than any reformulation of security (for example, as 'human security' or 'right to security') has been capable of doing to date.

The argument against security is an argument pro rights. Rejecting security means liberating the legal and political vocabulary from the logic of a perpetual conflict between rights and security, as well as from inexplicable and generic synergies between them. Importantly, to reject security means to deprive states of a concept that is invoked to weaken human rights, rather than to reinforce them. Without security, it will be possible to re-focus on human rights, in order to better understand their virtues and embrace their enduring contradictions.

To my grandma,

who couldn't see the beginning of this journey

but would have supported me till the end of it

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
AFSJ	Area of Freedom, Security and Justice
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
CJEU	Court of Justice of the European Union
DSB	Dispute Settlement Body (of the World Trade Organization)
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
GATT	General Agreement on Tariffs and Trade
HRCttee	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHRL	International Human Rights Law
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSC	United Nations Security Council
WTO	World Trade Organization

INTRODUCTION

"It's a beautiful thing, the destruction of words"

George Orwell[1]

1. To define or not to define?

On the 12th of September 2016, the UK House of Lords was undertaking the pre-legislative scrutiny of what would have then become the 2016 Investigatory Powers Act (IPA).[2] During the discussion, Baroness Jones of Moulsecoomb tabled an amendment suggesting a definition of "national security", a term often used throughout the Bill under review by the Ladies and Lords. The proposed amendment read: "'national security' means the protection of the existence of the nation and its territorial integrity, or political independence against force or the threat of force"[3]. As she vehemently argued,

> the amendment seeks to put right a government oversight: there is no definition of national security under general definitions throughout the Bill. [...]
> Left undefined, national security is unnecessarily open, broad and vague and, I suggest, likely to be abused. As the decision will continue to lie with the Secretary of State, the test will be met by whatever she or he subjectively decides is in the interests of national security [...], so that individuals cannot foresee when surveillance powers might be used, granting the Secretary of State a discretion so broad as to be arbitrary. In the past, domestic courts have responded with considerable deference to government claims of

[1] George Orwell, *1984* (1st ed, Harcourt 1949) 49.
[2] The transcript of the meeting is available at < hansard.parliament.uk/Lords/2016-09-12/debates/C288017C-0092-4490-97BE-DFABDEAFEAD3/InvestigatoryPowersBill > (accessed 18 January 2021). The following quotes are taken from this transcript.
[3] Amendment 236A.

> national security—and not just domestic courts but other political parties at times. They have viewed them not as a matter of law but as Executive-led policy judgments. National security as a legal test is absolutely meaningless if left without a statutory definition.
> [...] In an era when parliamentarians from both Houses have been subjected to inappropriate surveillance by security services and the police, the continued undefined use of these terms in enabling legislation is not appropriate or sustainable.

Lord Paddick agreed that a definition was necessary, though he disagreed with the definition proposed by Baroness Jones of Moulsecoomb for being too narrow. Opposing the amendment, Lord Brown of Eaton-under-Heywood argued instead that the lack of a definition was not a government oversight, because national security "is a well-recognised term which [...] is enshrined in the European convention [sic]".

Earl Howe, the then Minister for Defence, put forward the government's view in the discussion, maintaining that

> [i]t has been the policy of successive Governments not to define national security in statute. [...] Threats to national security are [...] constantly evolving and difficult to predict [...].
> [...]I think the key point is that to define national security in statute could have the unintended effect of constraining the ability of the security and intelligence agencies to respond to new and emerging threats to our national security.

The amendment was eventually withdrawn. In fact, the 2016 Investigatory Powers Act,[4] in spite of its numerous sections replete with meticulous definitions,[5] does not define national security, a term that appears eighty-seven times in the text. National security, in the Act, is a term whose invocation has wide-ranging consequences, since it constitutes a ground to allow British intelligence services and law enforcement agencies to infringe on privacy rights, including by

[4] Available at < www.legislation.gov.uk/ukpga/2016/25/enacted > (accessed 18 January 2020).
[5] See Sections 4, 6, 261, 262, 263, 264, 265. Section 265 (entitled "Index of defined expressions") contains more than sixty entries.

carrying out bulk collection of data and interception of communications.[6] Baroness Jones of Moulsecoomb thus thought that a definition of national security would have helped to set some limits on the circumstances in which national security could have been lawfully invoked, putting a brake on the government's security power to snoop into the lives of its citizens. The government, with Earl Howe in the front line, unsurprisingly did not want to give up this power, reassuring the Peers that the real safeguard against any abuse of the government power lay not in a definition, but in the oversight carried out by the supervisory bodies established by the Act itself: "should the Government ever treat national security as a kind of blank cheque, I have no doubt that the ISC [Intelligence and Security Committee of Parliament] and the IPC [Investigatory Powers Commissioner] would make clear their position in their reports", Earl Howe maintained during the debate.[7]

Was Baroness Jones of Moulsecoomb right to believe that a definition of national security would have provided a safeguard against arbitrary interference by the government with the rights of those placed under surveillance? Or was she perhaps too naïve to believe that a simple definition would have set limits on the government's power, and especially the power to interfere with rights?

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[6] The IPA has been subject to wide criticism, especially by the UK-based NGO Liberty, that has promoted some legal challenges before the courts. See < www.libertyhumanrights.org.uk/fundamental/mass-surveillance-snoopers-charter > (accessed 18 January 2020). The main relevant case is *R (National Council for Civil Liberties) v Secretary of State for the Home Department and Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 975 (Admin), [2019] QB 481, in which the High Court found the IPA not compatible, in part, with fundamental rights as guaranteed by EU Law, ordering the government to amend the Act. The government responded by passing The Data Retention and Acquisitions Regulations 2018. However, in a subsequent challenge, the High Court found that bulk collection of data does not breach privacy rights: is *R (National Council for Civil Liberties) v Secretary of State for the Home Department and Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 2057 (Admin), [2020] 1 WLR 243. For a legal analysis of the IPA, see Lora Woods, 'The Investigatory Powers Act 2016' (2017) 3 European Data Protection Law Review 103. Recently, the ECtHR held that bulk interception of communications to safeguard national security (under the pre-IPA 2016 regime) is not per se unlawful: *Big Brother Watch and others v UK* (App. 58170/13, 62322/14 and 24960/15), 25 May 2021, § 332-347.

[7] Strangely, he did not mention the Investigatory Powers Tribunal, established by the 2000 Regulation of Investigatory Powers Act (RIPA).

2. The advance of security and the retreat of human rights

The debate in the House of Lords is a suitable starting point to illustrate the challenges that this thesis aims to address. The essence of the debate, in summary, pertains to the fear, expressed by Baroness Jones of Moulsecoomb, that an undefined notion of security would translate into the state's unrestrained power to invoke the concept in order to easily encroach upon human rights.

That this is more than a simple fear is amply demonstrated by the troublesome relationship between rights and security.[8] The claim that rights can, and perhaps must, be restricted in the name of security needs little introduction, if anything because we have been warned, at least since Thomas Hobbes' *Leviathan*,[9] that absolute freedom risks jeopardising the security we all crave for as much as freedom itself. In the post-9/11 environment, the dominant view has emerged that we cannot have both rights and security, and that we need to give up (at least some of) the former to enjoy the latter. As James B. Comey notes with reference to the US,

> [i]t has become a part of the drinking water in this country that there has been a tradeoff of liberty for security [and] that we have had to encroach upon civil liberty and trade some of that liberty we cherish for some of that security that we cherish even more.[10]

The claim that some trade-off is inevitable is not only a mantra that politicians and bureaucrats in international, trans-national and national institutions incessantly repeat. It is itself part of the logic that informs the whole machinery of International Human Rights Law (IHRL). Human

[8] This relationship will be explored from different angles throughout the thesis. For some themes in the post-9/11 environment, see Benjamin J. Goold and Liora Lazarus, *Security and Human Rights* (1st ed, Hart Publishing 2007) and Benjamin J. Goold and Liora Lazarus, *Security and Human Rights* (2nd ed, Hart Publishing 2019). More relevant literature will be referenced at the appropriate places.

[9] Thomas Hobbes, *Leviathan (1651)* (Richard Tuck ed, Cambridge University Press 1991). See Chapter 4, section 2.1 for more insights into Hobbes's thought.

[10] James B. Comey, 'Fighting Terrorism and Preserving Civil Liberty' (2006) 40 University of Richmond Law Review 403, 403 (italics in the original).

rights treaties expressly authorise states to invoke security reasons as a ground to restrict certain rights.[11] Thus, limiting the enjoyment of rights in the name of security is far from extra-ordinary, but constitutes an ordinary practice generally justified by the need to mediate between the individual and the collective interest.[12]

However, the impact that security has on rights extends far beyond the more visible aspect of the omnipresent logic of balancing. Governing through security has become widespread.[13] The security imperative has the capacity to shape state and supra-state responses to real or perceived threats. New institutions, bureaucracies and actors, within states as well as regional and international organisations, have mushroomed for the purpose of strengthening responses against what are considered "security threats". Counter-terrorism is the perfect example of this kind. As Fiona de Londras has shown, in the last two decades the need to fight terrorism has contributed to the creation of a transnational counterterrorism order that has summoned laws, policies and practices to extend the reach of security, resulting in an undervaluation or rights.[14] In fact, the seeping of security into institutions, practices, policies and law and, through them, in our lives, has carried with it the symmetrical retreat of human rights.

The powerful image of the collapse of the Twin Towers in New York City on the 11th September 2001 has contributed to this phenomenon. The post-9/11 environment has exacerbated the perception that rights and security are at two opposite ends. The implications of the fight against

[11] The issue will be examined throughout Chapter 1 (in relation to the case law on restrictions on the ground of security) and in Chapter 4, section 2 (in relation to the logic of balancing rights and security). For the time being, see generally Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (5th ed, Intersentia 2018).

[12] This is one of the key issues that strikes at the very core of the content of rights, whose implications have been examined by philosophers, lawyers, political scientists and many more. Chapter 4, section 2 will deal with this problem from the perspective of trading off rights and security.

[13] On the different modes of security governance, see James Sperling (ed), *Handbook of Governance and Security* (Edward Elgar 2014).

[14] Fiona de Londras, 'The Transnational Counter-Terrorism Order: A Problématique' (2019) 72 Current Legal Problems 203, 203-207.

terrorism through the frame of security have been wide-ranging: states of emergency, whether formally declared or not, have become the norm, losing their temporary character, and instead becoming permanent[15]; torture and other ill-treatment have been more widely employed and often condoned[16]; the protection afforded to detainees by habeas corpus has often been weakened[17]; fair trial rights have been adjusted to preserve the effectiveness of intelligence operations, with secrecy being upheld to ensure non-disclosure of sensitive investigations[18]; surveillance and bulk collection of data have been normalised in an effort to prevent other terrorist attacks.[19]

The advance of security and the retreat of human rights seem to constitute a relentless phenomenon even after twenty years since the climate of pressing emergency that characterised the aftermath of the 9/11 attacks. Evidence of this phenomenon can be seen everywhere. First, the increasing trend to securitize migration and asylum distinctly shows how the security paradigm has superseded the human rights framework. Once seen as fundamental components of an humanitarian obligation of states *par excellence*, that as such animated the spirit of the

[15] Alan Greene, *Permanent States of Emergency and the Rule of Law. Constitutions in an Age of Crisis* (Hart Publishing 2018). On the conceptualisation of emergency powers, see Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press 2006).

[16] For a critical overview of torture practices after 9/11, see W. Bradley Wendel, 'The Torture Memos and the Demands of Legality' (2009) 12 Legal Ethics 107. For some themes arising in respect of the prohibition of torture, see Natasa Mavronicola, 'Torture and Othering' in Lazarus and Goold (2nd ed) (n 8) 27-52; Cynthia Banham, 'The Torture of Citizens After 9/11: Liberal Democracies, Civil Society and the Domestic Context' (2016) 20 The International Journal of Human Rights 914. For an history of the infamous "Torture Memos", see David Cole, *The Torture Memos: Rationalizing the Unthinkable* (The New Press 2009). For a discussion on how judges engage with the challenges posed by torture, see Conor Gearty, 'British Torture, Then and Now: The Role of the Judges' (2021) 84 Modern Law Review 118.

[17] On this topic, see Fiona de Londras, *Detention in the 'War on Terror'. Can Human Rights Fight Back?* (Cambridge University Press 2011); Andrea Preziosi, 'Counter-Terrorism Detention in Wartime and Emergency' in Eran Shor and Stephen Hoadley (eds), *International Human Rights and Counter-Terrorism* (Springer 2019) 219-243.

[18] Among many, Daphne Barak-Erez, Matthew C. Waxman, 'Secret Evidence and the Due Process of Terrorist Detentions' (2009) 48 Columbia Journal of Transnational Law 3; Evelyne Schmid, 'The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights' (2009) 1 Göttingen Journal of International Law 29.

[19] See Kirstie Ball and Frank Webster (eds), *The Intensification of Surveillance: Crime, Terrorism and Warfare in the Information Era* (Pluto Press 2003).

1951 UN Refugee Convention, nowadays migration and asylum are increasingly dealt with through the security lens, by way of a mixture of restrictive border control and criminal prevention policies that have overshadowed, when not overtly rejected, the humanitarian character of refugee protection.[20] The perception of migration as a security threat has been facilitated by widespread stereotypes conflating asylum seekers with terrorists, generated by the still resounding echo of the 9/11 events.[21]

Second, the surge of populism[22] around the world has resulted in an enthusiastic embracement of the security frame, accompanied by antipathy, if not hostility, towards human rights.[23] Populists driven by nationalist agendas have easily exploited security narratives to reinforce hyper-inflated appeals to state sovereignty. The flip side has been a rejection of rights as elitist, as part of the efforts to trace that neat divide between "the people" and "the elite" that constitutes a characterising feature of populist discourse.[24] The corollary of this politics is a certain disdain for multilateralism,[25] crucially represented by organisations such as the UN and the EU. The

[20] The securitisation of migration has attracted a significant amount of scholarly attention. Among the more recent work, see: Raffaela Puggioni, *Rethinking International Protection. The Sovereign, the State, the Refugee* (Palgrave Macmillan 2016); Alexandria J. Innes, *Migration, Citizenship and the Challenge for Security. An Ethnographic Approach* (Palgrave Macmillan 2015); Maurizio Albahari, *Crimes of Peace: Mediterranean Migrations at the World's Deadliest Border* (University of Pennsylvania Press 2015); Krzysztof Jaskulowski, 'Beyond National Security: The Nation-state, Refugees and Human Security' (2017) 19 Kontakt 311.

[21] Gabriella Lazaridis and Khursheed Wadia (eds), *The Securitisation of Migration in the EU. Debates Since 9/11* (Palgrave Macmillan 2015); A. Chebel d'Appollonia, *Migrant Mobilization and Securitization in the US and Europe. How Does it Feel to Be a Threat?* (Palgrave Macmillan 2015).

[22] There has been considerable academic debate as to what "populism" means. According to Jan-Werner Müller, *What is Populism?* (Penguin Books 2017), typical features of populism are the hostility towards "the elites" and pluralism and the claim to speak on behalf of "the people".

[23] Generally on these topics, see: Thorsten Wojczewski, '"Enemies of the people": Populism and the Politics of (In)security' (2020) 5 European Journal on International Security 5; Veronika Bílková, 'Populism and Human Rights' (2018) 49 Netherlands Yearbook of International Law 143; Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1; Liora Lazarus and Benjamin J. Goold, 'Security and Human Rights: Finding a Language of Resilience and Inclusion' in Lazarus and Goold (2nd ed) (n 8) 1-2.

[24] Wojczewski (n 23) 13-15;

[25] On the challenges posed to multilateralism by populist movements, see José Luís de Sales Marques, Thomas Meyer, Mario Telò (eds), *Cultures, Nationalism and Populism. New Challenges to Multilateralism* (Routledge 2019). On the relationship between the UN and the US under the Trump's administration, see David Whineray, 'The United States' Current and Future Relationship with the United Nations' (*United Nations University, Centre for Policy Research,* 2020) < i.unu.edu/media/cpr.unu.edu/post/3833/UNU_US_Relations_Whineray.pdf > accessed 4 June 2020.

politics of fear and resentment espoused by populists, that often translates into hatred for foreigners and minorities, represents a seemingly natural continuation of the trend inaugurated by the post-9/11 era[26].

Third, the ongoing Covid-19 pandemic, which started in Wuhan, China, at the beginning of 2020 and rapidly spread across the whole world, has been increasingly tackled by governments by employing the security paradigm.[27] Some states have declared a state of emergency under human rights treaties to justify derogations of rights[28]. Many politicians have quickly declared that the pandemic is a "national security" threat[29], while others have defined it as a "health security" threat[30]. Even the search for a vaccine against Covid-19 has been deemed a matter of national security.[31] Predictably, many have expressed concerns that tackling the Covid-19 pandemic through the security lens might have a long-term detrimental impact on rights, fearing

[26] Alston (n 23) 4; Lazarus and Goold (n 23) 1.

[27] For a discussion on the securitization of Covid-19, see Nathan Alexander Sears, 'The Securitization of Covid-19: Three Political Dilemmas (*Global Policy*, 25 March 2020) < www.globalpolicyjournal.com/blog/25/03/2020/securitization-covid-19-three-political-dilemmas > accessed 5 June 2020. However, the securitization of global health is not a new phenomenon, and some scholars have noted that in some cases a securitizing move has also contributed to a more effective response against large-scale health issues (the fight against the wave of HIV/AIDS in the 1980s being a notable example): Simon Rushton, *Security and Public Health* (Polity Press 2019) 28-53. See also Colin McInnes and Simon Rushton, 'HIV/AIDS and Securitization Theory' (2013) 19 European Journal of International Relations 115.

[28] There has been some debate about the opportunity to formally declare a state of emergency. In favour, Alan Greene, 'States Should Declare a State of Emergency using Art.15 ECHR to Confront the Coronavirus Pandemic' (*Strasbourg Observers*, 1 April 2020) < strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/ > accessed 4 June 2020. Against, Kanstantsin Dzehtsiarou, 'COVID-19 and the European Convention on Human Rights' (*Strasbourg Observers*, 27 March 2020) < strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/ > accessed 4 June 2020. For more insights into emergency and Covid-19, see Alan Greene, *Emergency Powers in a Time of Pandemic* (Bristol University Press 2020).

[29] Unsurprisingly, the Trump administration has been among the first to determine that the pandemic is a national security threat: see the Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19 of 18 March 2020 < www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/ > accessed 5 June 2020.

[30] Typically, the World Health Organisation (WHO): see < www.who.int/health-topics/health security/#tab=tab_1 > accessed 5 June 2020.

[31] Chris Green, 'Securing Access to a Coronavirus Vaccine is a Matter of National Security' *Politics Home* (London, 24 March 2020) < www.politicshome.com/thehouse/article/securing-access-to-a-coronavirus-vaccine-is-a-matter-of-national-security > accessed 5 June 2020.

that the security frame employed to fight the pandemic might replicate the same post-9/11 scenario, characterised by an overreach of executive power and infringement on rights.[32]

That security has become, more generally, "*the* political vernacular of our time"[33] requires no further evidence. One can hardly listen to the news, read a newspaper, or scroll through the tweets of politicians without incurring in the word "security". Ruling elites, within national governments or sitting in international and regional organisations, relentlessly tell us that climate change is a threat to our security, that food scarcity is a security issue, that the spread of a virus is a security threat and so on.[34]

The correlated erosion of the consensus around human rights is also before everyone's eyes. What is worse, rights have shown a "disturbing elasticity"[35] vis-à-vis security. National and international courts have often played a role in this respect. Even though the judiciary has contributed to push back on security with many landmark decisions especially in the aftermath of 9/11,[36] on the long-term judges have shown an increasing reluctance to challenge security measures enacted by governments.[37] This has happened also beyond counterterrorism, with the European Court of Human Rights (ECtHR), for example, often refraining from intruding on

[32] Both the legal and non-legal blogosphere is immersed in this discussion. Among many, see Robert Malley and Stephe Pomper, 'The Perils of Hyping Pandemic Response as a National Security Issue' (*Just Security*, 4 May 2020) < www.justsecurity.org/70001/the-perils-of-hyping-pandemic-response-as-a-national-security-issue/ > accessed 5 June 2020; Alex Joel, '9/11 All Over Again' (*Just Security*, 10 April 2020) < www.justsecurity.org/69621/9-11-all-over-again/ > accessed 5 June 2020.

[33] Ian Loader, Neil Walker, *Civilizing Security* (Cambridge University Press 2007) 9 (italics in the original).

[34] For an overview of these "new security objects", see J. Peter Burgess (eds), *Routledge Handbook of New Security Studies* (1st ed, Routledge 2010) 121-184.

[35] Goold and Lazarus (n 23) 4.

[36] Examples are decisions of the US Supreme Court such as *Boumediene v Bush*, 553 U.S. 723 (2008) and *Hamdi v Rumsfeld*, 542 U.S. 507 (2004). Also, the UK Supreme Court's decision in *A and others v Secretary of State for the Home Department* [2004] UKHL 56, substantially confirmed by the ECtHR in *A and others v UK* (App. 3455/05), 19 February 2009. The European Court of Justice has also issued landmark decisions, such as Joined Cases C-402/05 P and C-415/05 P. *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351 ("Kadi II"). On the role played by courts in pushing back on security overreach, see Preziosi (n 17) 219-243.

[37] Generally, on counter-terrorism judicial review, see Fergal F. Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press 2014).

governments' decisions on security matters more generally.[38] Fair trial rights have been notable victims of this tendency, as amply demonstrated by the normalisation of closed material procedures in national security cases.[39]

Even more worrying is that governments have been joined by some intellectuals in advocating for a "downward recalibration"[40] of human rights in the name of security. For example, Michael Ignatieff, has attempted to draw specious distinctions between physical duress amounting to torture and "simple" coercion, such as sleep deprivation.[41] Unfortunately, he is in good company. From Steven Greer's argument that the prohibition of torture and other ill-treatment is only 'virtually', rather than strictly, absolute[42], to John Gray's abhorrent view that "in a truly liberal society, terrorists have an inalienable right to be tortured"[43], a fundamental tenet of human rights law has been called into question after 9/11. The list of similar positions is depressingly long and goes well beyond the prohibition of torture and other ill-treatment. Freedom from arbitrary detention and from arbitrary deprivation of life have been two other targets. For example, Bruce Akerman proposed "an emergency constitution [that] authorizes the government to detain suspects without the criminal law's usual protections of probable cause or even reasonable suspicion"[44]; and Michael Walzer suggested that in a situation of supreme

[38] See, for the relevant case law of human rights courts and bodies, Chapter 1.
[39] Eva Nanopoulos, 'European Human Rights and the Normalisation of the "Closed Material Procedure": Limit or Source?' (2015) 78 Modern Law Review 913.
[40] The expression is of de Londras (n 17) 4.
[41] Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton University Press 2004) 138-141.
[42] Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15 Human Rights Law Review 101, 132. For a rebuttal of Greer's argument, see Natasa Mavronicola, 'Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer' (2017) 17 Human Rights Law Review 479.
[43] John Gray, *Heresies: Against Progress and Other Illusions* (Granta 2004) 134.
[44] Bruce Ackerman, 'The Emergency Constitution' (2004) 113 The Yale Law Journal 1029, 1037.

emergency "political and military leaders may sometimes find themselves in situations where they cannot avoid acting immorally, even when that means deliberately killing the innocent"[45].

Against this background, it is no wonder, then, that many have started to preconise "the endtime of human rights"[46], and the beginning of "the post-human rights era".[47] Whether or not the end of human rights is nigh and a new era has begun, what appears clear is that in a world dominated by the security paradigm, the space for human rights seems to narrow down unrelentingly.

3. The ineffable meaning of security

Disturbingly, the retreat of human rights has occurred as a result of the invocation of a powerful word, "security", the meaning of which appears rather elusive. With that, I do not intend to say that what "security" means is totally obscure. After all, we can all approximately agree with a standard dictionary definition of security as "the state or condition of being or feeling secure" and "freedom from danger or threat"[48]. Those of us with some knowledge of Latin might even know the etymology of the term: *securitas* derives from *securus* (se-curus: "being without worries")[49].

[45] Michael Walzer, *Arguing about War* (Yale University Press 2004) 45-46.
[46] Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013).
[47] Alston (n 23) 13.
[48] 'Security, n' (Oxford English Dictionary, Oxford University Press October 2021) < www.oed.com/view/Entry/174661?redirectedFrom=security#eid > (accessed 14 November 2021).
[49] For the history of the term and its usage in the Roman and Christian tradition, see Ole Wæver, 'Peace and Security: Two Evolving Concepts and Their Changing Relationship' in Hans Günter Brauch et al. (eds), *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century* (Springer 2008) 100-101.

We might also agree, as the definition and the etymology of the term confirm, that "security", in theory, is a positive-loaded word, a "platform for liberty, simultaneously constituting a launching pad and safe landing place for the soaring self"[50].

It is perhaps due to this reassuring aura that we often let our guard down when security is invoked, often oblivious to the fact that the concept, as noted above, is also a powerful vehicle to undermine rights. As Ian Loader and Neil Walker remind us,

> States – even those that claim with some justification to be 'liberal' or 'democratic' – have a capacity when self-consciously pursuing a condition called 'security' to act in a fashion injurious to it […]. As monopoly holders of the means of legitimate physical and symbolic violence, modern states possess a built-in, paradoxical tendency to undermine the very liberty and security they are constituted to protect.[51]

This double dynamic, through which the positive-loaded concept of security might morph into a less reassuring one, shows the insufficiency of a notion of security vaguely understood as, for example, "freedom from danger or threat". To put is simply, should we allow such a generic concept to perform the delicate and potentially dangerous function of limiting our rights?

Since the concept of security as commonly understood[52] appears quite vague, many have attempted to investigate its meaning in more detail, often highlighting the elusiveness of it. Security studies and international relations long ago started struggling with the difficulties of grasping the meaning of security. Already in the 1950s – and thus around the same time when national security started making its appearance in US foreign policy[53] – Arnold Wolfers, in one

[50] Conor Gearty, *Liberty and Security* (Polity 2013) 2.
[51] Loader and Walker (n 33) 7.
[52] Chapter 3, section 3 will provide more insights into the so-called "ordinary" meaning of security, and how it influences the search for the legal meaning.
[53] The concept of "national security" became commonly used at the end of World War II, especially following the enactment by the US of the 1947 National Security Act, which however does not define it. For the genesis of the concept, see Joseph J. Romm, *Defining National Security: The Nonmilitary Aspects* (Council on Foreign Relations Press 1993) 1-8.

of the most well-known attempts to investigate the meaning of the term, called national security "an ambiguous symbol".[54] He pointed out that terms such as national interests and national security "may not mean the same thing to different people. They may not have any precise meaning at all"[55], warning that "it would be an exaggeration to claim that the symbol of national security is nothing but a stimulus to semantic confusion, [however] if used without specifications it leaves room for more confusion than sound political counsel or scientific usage can afford".[56]

Wolfers' warning might have been well-taken by generations of scholars over the years that have not been discouraged from trying to put forward their definitions of security in its various declinations (security, national security, international security and so on),[57] to the point that Richard Baldwin noted that defining security had become by the end of the 1990s "something of a cottage industry".[58] The proliferation of definitions, in any event, demonstrates that the continuous search for a meaning of security is considered a worthwhile effort by security and international relations scholars. After all, "[i]f we cannot name [security], can we ever hope to achieve it?",[59] Ken Booth keenly noted.

However, as enquiries into the meaning of security grew, so did scholars' awareness that there is something inherently unsatisfactory with the various definitional attempts. Due especially to the post-Cold War trend to expand the security agenda beyond military threats,[60] it has become

[54] Arnold Wolfers,' "National Security" as an Ambiguous Symbol' (1952) 67 Political Science Quarterly 481.
[55] Ibid 481.
[56] Ibid 483.
[57] For a list of some of these definitions, see Barry Buzan, *People, States and Fear. An Agenda for International Security Studies in the Post-Cold War Era* (2nd ed, Harvester Wheatsheaf 1991) 16-17. The first edition was published in 1983. All references are from the second edition, unless otherwise stated.
[58] David A. Baldwin, 'The Concept of Security' (1997) 23 Review of International Studies 5, 5.
[59] Ken Booth, 'Security and Emancipation' (1991) 17 Review of International Studies 313, 317. The article is often considered as the manifesto of the so-called "Aberystwyth School" of security studies, whose central themes revolve around the idea of security as emancipation.
[60] See section 5.1 below.

increasingly clear that security is indeed hard to define. Barry Buzan has been at the forefront of this consideration. In *People, States and Fear*, he contended that "the nature of security defies pursuit of an agreed general definition".[61] This is because, in his view, security belongs to the class of what Walter Bryce Gallie called "essentially contested concepts",[62] that is those "concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users".[63] Many other scholars would agree with him. Patrick Morgan, for example, finds that "[s]ecurity is a condition, like health and status, which defies easy definition and analysis".[64] Lawrence Freedman points out that "[t]here can never be an adequate definition of security because it is an inherently relational concept".[65] For Mark Neocleous, "talk about security is often unintelligible".[66] Over the years, security has been labelled, to name but a few, as a "difficult",[67] "inadequate"[68] and "elusive"[69] concept that is "ambiguous beyond remedy".[70]

To further complicate matters, the view that the meaning of security is contested is, also, contested. According to Bill McSweeney, Buzan has generated "a widespread myth of the 'essentially contested concept' of security – repeated ritually in the literature – concerning the peculiar intractability of security, and implying that other concepts of the social order are

[61] Buzan (n 57) 16.
[62] Ibid 7-8.
[63] Walter Bryce Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society. New Series, Vol.56 (1955-1956)* (Oxford University Press 1955) 169. The idea that there are "essentially contested concepts" is contested too. For a discussion of Gallie's view, see David Collier, Fernando Daniel Hidalgo and Andra Olivia Maciuceanu, 'Essentially Contested Concepts: Debates and Applications' (2006) 11 Journal of Political Ideologies 211.
[64] Patrick Morgan, 'Safeguarding Security Studies' (1992) 13 Arms Control 464, 466.
[65] Lawrence Freedman, 'The Concept of Security' in Mary Hawkesworth and Maurice Kogan (eds), *Encyclopedia of Government and Politics* (2nd ed, Routledge 2003) 730.
[66] Mark Neocleous, *Critique of Security* (Edinburgh University Press 2008) 2, referring to Michael J. Shapiro, *Reading the Postmodern Polity: Political Theory as Textual Practice* (University of Minnesota Press 1992).
[67] Buzan (n 57) 7.
[68] Hugh McDonald, 'The Place of Strategy and the Idea of Security' (1981) 10 Millennium: Journal of International Studies 229, 232.
[69] Laura Neack, *Elusive Security: States First, People Last* (Rowman & Littlefield Publishers 2007) 1.
[70] Bill McSweeney, *Security, Identity and Interests: A Sociology of International Relations* (Cambridge University Press 1999) 81.

different".[71] Ken Booth agrees with McSweeney, arguing that security has become just "contingently contested" as a result of the more in-depth interrogation of the concept that started in the 1980s.[72] In contrast to Buzan, Booth believes that "security, for sure, is a simple concept, not difficult to define, but how it is conceptualised and operationalised in the contingent contexts of world politics is not. [...] The problem of security is not in the meaning of the concept, but in the politics of the meaning".[73]

In any event, the belief that security is rather indefinable has never faded. The hugely influential "securitization theory"[74] is premised on the idea that security escapes easy definitions. By asking "what quality makes something a security issue in international relations?"[75] instead of "what does security mean?", their proponents effectively bypass definitional hurdles. In fact, Buzan, Wæver and de Wilde explicitly state that

> [t]he meaning of a concept lies in its usage and is not something we can define analytically or philosophically according to what would be "best". The meaning lies not in what people consciously think the concept means but in how they implicitly use it in some ways and not others.[76]

On this view, the fact that security as speech act allows practically any issue to be securitized (with the audience accepting a "securitizing move")[77] implicitly acknowledges that any

[71] Ibid 83.
[72] Ken Booth, *Theory of World Security* (Cambridge University Press 2007) 99-100, in which he relies on Terence Ball's view that power is contingently contested: Terence Ball, 'Power' in Robert E. Goodwin and Philip Pettit (eds), *A Companion to Contemporary Political Philosophy* (1st ed, Blackwell 1993) 553-554.
[73] Ibid 101. Booth, at 100, relies on a dictionary definition of security in order to show that its meaning can be simply broken down into the existence of a referent object, the existence of a danger and the desire to escape harm.
[74] The theory was first put forward by Ole Wæver, 'Securitization and Desecuritization' in Ronnie D. Lipzchutz (ed), *On Security* (Columbia University Press 1995) 46-86. It was further developed in Barry Buzan, Ole Wæver and Jaap de Wilde, *Security. A New Framework for Analysis* (Lynne Rienner Publishers 1998), which constitutes a key text of the so-called "Copenhagen School" of security studies.
[75] Buzan, Wæver and de Wilde 21.
[76] Ibid 24.
[77] Ibid 21-48, where the authors explain the mechanism of securitization.

supposed meaning of security is so elastic that its boundaries are actually blurred: "something is a security problem when the elites declare it to be so".[78] However, few critics have noted the risk that the meaning of security is "stretched to the breaking point",[79] and that the study of security "becomes the study of everything, and hence, effectively, nothing".[80]

The problem of the ineffable meaning of security and the resulting definitional challenges have been widely recognised also outside international relations and security studies' literature. So, for example, Laurence Lustgarten and Ian Leigh noticed that national security "cannot be defined, or even discussed, in the abstract. [...] the operative meaning of national security will therefore also vary correspondingly for each state".[81] In one of the most comprehensive studies on national security in the context of the European human rights regime, Iain Cameron – who draws at times from Buzan – acknowledged that "defining [security] is not without difficulties [...]".[82] In fact, he shies away from attempting some sort of an operative definition, recognising the limits of the ordinary meaning of the term and providing instead an overview of the usage of the term in different contexts.[83] Similarly, Mariana Valverde observed that "[t]he abstract noun 'security' is an umbrella term that both enables and conceals a very diverse array of governing practices, budgetary practices, political and legal practices, and social and cultural values and habits".[84] And Lucia Zedner does not spare adjectives when she calls security "a

[78] Wæver (n 74) 54.
[79] Freedman (n 65) 753.
[80] Richard Wyn Jones, *Security, Strategy, and Critical Theory* (Lynne Rienner 1999) 126.
[81] Laurence Lustgarten and Ian Leigh, *In From the Cold. National Security and Parliamentary Democracy* (Oxford University Press 1994) 3. The authors expressly acknowledge (at footnote 1) to have drawn from the work of Buzan in *People, States and Fear*. In fact, they seem to agree with him that security is "essentially contested" (at 4).
[82] Iain Cameron, *National Security and the European Convention on Human Rights* (Kluwer Law International 2000) 41.
[83] Ibid 39-49.
[84] Mariana Valverde, 'Governing Security, Governing Through Security', in Ronald Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada Anti-terrorism Bill* (University of Toronto Press 2001) 90.

promiscuous concept"[85] and a "slippery and contested term"[86] with an "inherent imprecision".[87] Others have acknowledged the vagueness of security in relation to specific aspects. Writing about the right to security, Liora Lazarus observed that "[t]he notion of security is dangerously opaque"[88]. Examining the post-Cold War concept of "human security",[89] Gerd Oberleitner noticed that "[d]efining human security has proven to be a difficult task; perhaps an impossible one".[90]

The task of defining security has proved difficult also for national courts. In the US, there is trace of just one (generic) definition in the case law of the Supreme Court.[91] In *Cole v Young*, it held that national security is

> intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare.[92]

In fact, the Supreme Court was called to interpret the concept under the National Security Act of 1947, the piece of legislation that popularised the term "national security".[93] In the Act, national security is used thirty-nine times without being defined once.

[85] Lucia Zedner, *Security* (Routledge 2009) 9.
[86] Ibid 10.
[87] Ibid.
[88] Liora Lazarus, 'Mapping the Right to Security' in Goold and Lazarus (1st ed) (n 8) 329. On the right to security, see Chapter 4, section 4.
[89] On the concept, see section 5.1 below and, more in detail, Chapter 4, section 3.
[90] Gerd Oberleitner, 'Porcupines in Love: The Intricate Convergence of Human Rights and Human Security' (2005) 6 European Human Rights Law Review 588, 591. On human security, see more in detail Chapter 4, section 3.
[91] Oona A. Hathaway, 'National Security Lawyering in the Post-War Era: Can Law Constrain Power?' (2021) 68 UCLA Law Review 2, 6.
[92] *Cole v. Young*, 351 U.S. 536, 543 (1956) § 4.
[93] Hathaway (n 91) 6.

Generally, an in-depth interrogation of what security means in law is rather infrequent. As Jeremy Waldron observes,

> [..] we almost never address the question of what 'security' means. In fact, when people talk in literature or in court about 'the definition of security' what they usually produce is some view about what security requires at a particular time (in the way of legal or political measures). They say nothing about the meaning of the concept itself.[94]

Even when rare discussions about the meaning of security take place, different views ordinarily lead to unsettled disagreement. An instructive example is the discussion of the concept of national security in the Law Commission of England and Wales's Report on the Protection of Official Data.[95] The Law Commission asked consultees whether "safety or interests of the state" under the Official Secrets Act 1911 should have been replaced with "national security", arguing that the latter encompasses a narrower range of interests than the former.[96] Among the stakeholders consulted, the Bar Council and Criminal Bar Association argued that national security "is a concept more readily capable of definition"[97], whereas others maintained that the concept is "even less well-defined and/or potentially broader than 'safety or interests of the state'"[98]. One consultee suggested that "the lack of a definition in the United Kingdom of 'national security' means that the concept is 'effectively elastic, meaningless, and open to abuse'"[99], and another agreed that "if there is no definition set down in the legislation, 'national security' could in practice become as broad as 'safety or interests of the state'"[100]. Another consultee noted that

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[94] Jeremy Waldron, 'Safety and Security' (2006) 85 Nebraska Law Review 454, 455-456.
[95] Law Commission, *Protection of Official Data Report* (Law Com No 395, 2020).
[96] Ibid para 3.44.
[97] Ibid para 3.36.
[98] Ibid para 3.38.
[99] Ibid.
[100] Ibid para 3.39.

> [t]he Law Commission does not provide any definition of the term 'national security" despite suggesting that this term should replace the more specific wording "safety or interests of the state". This is not a like-for-like swap and simply introduces a different, wide-reaching and equally vague replacement.[101]

On the contrary, the Government argued that "national security" is narrower than "safety or interests of the state", thus opposing the change.[102] It is noteworthy that neither the Law Commission nor the consultees attempted to provide a definition of national security. Eventually, it was not recommended to use the term due to persistent disagreement among consultees.[103]

The Council of Bars and Law Societies of Europe (CCBE), after reviewing the concept of national security in the legislation of many EU member states, arrived at the conclusion that

> the concept of national security lacks precise definition in most States' legal systems. [...] The many and varied conceptual features attributed to the concept of national security remain flexible. There are several differing concepts of national security which are used in EU Member States, yet in most of the countries under examination there is no commonly held legal definition that meets the twin test of having legal certainty and being 'in accordance with the law'. This ambiguity leads to deficits and gaps in the accountability of the executive branches of each country, including their intelligence communities.[104]

From the preceding overview, it seems rather uncontroversial that the meaning of security (whatever its qualification) is ineffable. More problematically, the elusiveness of the meaning

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[101] Ibid para 3.40.
[102] Ibid para 3.41.
[103] Ibid paras 3.42-3.44.
[104] CCBE, *Recommendations on the Protection of Fundamental Rights in the Context of 'National Security'* (2019) 15 < www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Guides_recommendations/EN_SVL_20190329_CCBE-Recommendations-on-the-protection-of-fundamental-rights-in-the-context-of-national-security.pdf > (accessed 14 November 2021). The CCBE eventually developed a legal definition of national security based on the identification of some common features of the concept as deployed across EU member states.

of security seems to be not only the result of an inherent difficulty with defining the concept, but also an intended effect. In fact, states have no interest in defining security, because, as Barry Buzan observed,

> for the practitioners of state policy, compelling reasons exist for maintaining its symbolic ambiguity. […] Because of the leverage over domestic affairs which can be obtained by invoking it, an undefined notion of national security offers scope for power-maximising strategies to political and military élites.[105]

After all, Earl Howe's opposition to a definition of national security during the discussion in the House of Lords confirms this point, even though he did not openly admit that an undefined concept of security could have been useful to the government's power-maximising ambitions, instead expressing concern that a definition might have undermined the security agencies' operational ability to deal with "new and emerging threats". This is, admittedly, a position that has found some support also from the ECtHR, which has held more than once that "by the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance"[106]. However, true as it might be that threats are constantly evolving, this position often seems to constitute an easy pretext for states to avoid constraints to their security powers through a more circumscribed concept of security. In fact, as the CCBE notes, there is some conflation of two separate issues in such a position:

> [o]n the one hand, what constitutes the national security of the State may seem to be a constant, but, on the other hand, the *manner* in which national security is threatened is constantly changing. No one would dispute the proposition that the State should ensure

[105] Buzan (n 57) 11.
[106] *Kennedy v UK* (App. 26839/05), 18 May 2010, § 159; *Al-Nashif v Bulgaria* (App. 50963/99), 20 June 2002, § 121.

> that the security services are not unduly constrained (in the context of the State's regulation of those services) in dealing with those constantly changing threats, but this is about the nature of the challenge to national security, rather than the nature of national security itself.[107]

Admittedly, there is some circular logic in maintaining that threats to security are evolving and unpredictable if it is not entirely clear what security means. The more security remains a flexible concept, the more threats to it can become flexible too. This is because, if it is true that threats define the meaning of security[108], it is likewise true that the meaning of security defines what threatens it.

The more wide-ranging theme behind the states' unwillingness to define security is the existence of an intimate connection between undefined concepts and power-enhancing manoeuvring. This is nothing entirely new. In fact, the long-standing debate over the meaning of terrorism – an archetypical "security threat" – aptly illustrates that states have no desire to have their power to attach the terrorist label constrained by a carefully crafted definition of terrorism.[109] As Ben Saul points out in this respect, "the more confused a concept, the more it lends itself to opportunistic appropriation".[110]

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[107] CCBE, *Recommendations* (n 104) 5 (italics in the original).

[108] On this point, see section 5.4 below.

[109] The issue of the definition of terrorism has generated a great deal of literature. Among many, Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2010); Alex P. Schmid and Albert J. Jongman, *Political Terrorism. A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (Taylor & Francis 2005); Anthony Richards, 'Defining Terrorism' in Andrew Silke (ed), *Routledge Handbook of Terrorism and Counterterrorism* (Routledge 2019) 13-21; Ben Golder and Williams George, 'What is 'Terrorism'? Problems of Legal Definition' (2004) 27 University of New South Wales Law Journal 270.

[110] Saul (n 109) 3. That opportunistic appropriations of the concept of terrorism are more than a risk is demonstrated by the recent tendency of some governments to use terrorism charges to attack the work of NGOs and civil society. See UNCHR 'Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders', Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (1 March 2019) UN Doc A/HRC/40/52.

4. Aims of the thesis

This is a thesis about the concept of security. The central claim is that state power to invoke "security" must be restrained, because an expansive notion of security, without some constraints, damages human rights. The first aim of the thesis is to investigate whether a legal definition of security could constitute a means to set limits on the state power to invoke the concept.

Two remarks are necessary in this respect. First, the legal definition with which this thesis is concerned is not a definition that might "simply" clarify the meaning of security. Rather, by "legal definition" I mean a definition that would be able to clarify in which circumstances a state can lawfully rely on the term "security" and, conversely, in which circumstances a state is abusing the term if it seeks to invoke it. To put it differently, the present enquiry is concerned with a legal definition as a means to produce a *legally meaningful* invocation of security by the state. Evidently, conceptual analysis is also a fundamental component of such an enquiry because, as Lucia Zedner has observed, "without clarity, the concept [of security] remains unwieldy, scarcely capable of rational analysis. Precision not only is conceptually and analytically important; it also serves as a restraint on the claims that can be made in the name of security".[111] Therefore, references to a "legal definition" throughout this thesis must be understood as references to this particular purpose that the sought definition should serve.

Second, I am in no way suggesting that a *legal* definition is the only way to impose some sort of constraints to the state power to invoke security. I am suggesting, provisionally, that the law might be *one instrument*, perhaps among many, to serve as constraint to this power. It will be

[111] Zedner (n 85) 12.

part of this enquiry to confirm, or discard, this hypothesis.[112] However, it is appropriate to anticipate here that this thesis will also explore other attempts that have been made throughout the years from various disciplines to re-understand security with the more or less explicit aim of taking it away from the state power grab. Thus, this thesis will also try to understand the merits, and limits, of such attempts that do not explicitly employ the law as a possible power-constraining tool.

The enquiry into the possibility of defining security will be the driving force for a more fundamental investigation into the *necessity* of the concept of security as such, which constitutes the second aim of this thesis. Running in the background to such an investigation is the complicated, and often unclear, relationship between rights and security. This thesis will delve deep into this relationship, by showing the inherent, perhaps unsolvable, contradiction between an antagonistic understanding of rights and security (symbolised by the omnipresent logic of balancing) and their synergetic understanding (underpinned by concepts such as human security and the right to security). The thesis will try to navigate these intricacies with the purpose of challenging the conventional thinking that security and rights are two entities that must separately coexist, yet inevitably collide.

Drawing from these findings, the thesis will show that the idea that security is something different from rights is misconceived. It will be argued that any issue that might fall within the scope of security is already captured by the human rights discourse. The key claim in this respect will be that security is best understood as a strategic framing that states put in place to avoid the human rights discourse. Thus, it will be central to this thesis to understand why states

[112] The discussion of the House of Lords reported earlier shows that Peers believed that legal definitions in fact constrain power. Baroness Jones of Moulsecoomb explicitly sought this effect, whereas Earl Howe tried, successfully, to avoid it.

might want to employ the security frame to tackle (real or perceived, actual or potential) threats, rather than mobilise the protective regime afforded by human rights. The thesis will conclude by making an argument against the necessity of the concept of security, arguing that there is no reason, at a conceptual level, for which security should be used instead of rights. Thus, the success of security, with the correlated erosion of rights, is the product of states' maneuvers to sidestep the power-constraining features of the human rights frame.

The argument *against* security is an argument *pro* human rights. It will be suggested that liberating the legal and political lexicon from the cumbersome presence of security, that forces us to moon over the ubiquitous logic of trading off, will allow us to (re)focus on human rights to try to strengthen them and embrace their persistent contradictions.

In the background of this thesis lies the more wide-ranging theme of the dissatisfaction with the way some concepts populate the legal and political vocabulary and, through it, our daily lives, and the misplaced, perhaps illusory, quest for "fixing" them on the often erroneous assumption that concepts must perforce continue to exist, simply because they already exist.

To pursue the aims of the thesis, I will draw from (legal and non-legal) scholarship on human rights as well as international law, with particular attention to those authors who have adopted critical, and often skeptical, stances on human rights. I will also draw from international relations and security studies to get more detailed insights into different conceptions of security, their historical evolution as well as some emerging trends, in order to obtain more nuanced perspectives about security that might help better understand its interplay with human rights.

Chapter 3 on defining security will rely on linguistic, critical language studies and semiotics in order to navigate the linguistic and extra-linguistic phenomena that influence the construction of meaning through a definition. Insights from these disciplines are valuable because, as

Chapter 3 will show, the process of defining in law is not immune from extra-legal dynamics that affect the meaning of concepts in law.

Concerning the scope of the thesis, the present enquiry is concerned with a possible definition of security that, as observed, is relevant also for the purpose of clarifying the interaction between security and rights. For this reason, the overall focus will be on International Human Rights Law. Chapter 1 will look for a definition of security (in all its declinations) in the case law of those human rights courts and bodies that are tasked with interpreting the provisions of the four main international and regional human rights treaties, that is the International Covenant on Civil and Political Rights (ICCPR), the European Convention of Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (ACHPR).

However, Chapter 2 will look beyond IHRL to understand whether some *non-human rights* international and regional courts have attempted to define security provisions under the treaties they are asked to interpret, with a view to investigating, more broadly, what are the challenges of defining security in law.

This is not to imply that definitions of security potentially relevant to human rights are only those that can be found in the judicial interpretation given by international and regional (human rights and non-human rights) courts and bodies. On the contrary, it is fully acknowledged that the case law of domestic courts, as well as international, regional and national legislation, together with soft-law instruments, might contain definitions of security likely to bear some

relevance to IHRL. However, it is not the purpose of this enquiry to conduct such a broad survey into the case law of national courts and into domestic and international legislation.[113]

More modestly, this enquiry will focus pre-eminently on international and regional human rights treaties. This is, in a way, a sensible choice because the concept of security analysed in the present work is one that might be able to set some limits on the capacity of security to undermine rights. For this reason, I have chosen to look into whether IHRL contains within itself some safeguard, in the form of a legal definition, against damages to rights made by security. In this respect, judicial decisions are important not only because human rights (as well as some non-human rights) courts and bodies are the ultimate interpreters of treaty provisions, but also because they are often called to review security claims by states. Thus, the expectation is that, while conducting such a review, they might say something about the concept of security, its meaning and its confines.

Finally, a clarificatory remark should be made here with regard to the terminology used in this thesis. I will employ, for operational purposes, the term "security" throughout this thesis as a broader category that includes other qualifications of the term, such as "national security" and "human security". When I will refer to security as a qualified term, I will explicitly do so. This does not mean, as we shall see in this thesis, that national security and human security are sub-categories of security broadly speaking. In fact, each of these terms has its own history and underpins different ideas of security.[114] As we shall also see, very often it is not entirely clear whether, and how, these qualifications of security interact with each other, or whether they should be treated as synonymous with unqualified "security".

[113]Admittedly, it would be an enormous task to look for a definition of security everywhere, if anything for the pragmatic reason that security is such a widely used term across many (if not all) branches of law that a search of legal databases normally produces thousands of security and security-related entries.

[114] See section 5.1 below.

5. Some factors influencing the search for the meaning of security

If the meaning of security is somehow elusive and seems to defy definitions, as noted earlier, this does not imply that the search for the meaning of security should start from scratch. In fact, there are some factors that have a direct influence on the concept of security that must be considered. It is appropriate to summarise them here because they will provide some guidance throughout the thesis and will reappear as recurring themes throughout the chapters.

5.1. Expansion of security

When it appeared on the international scene in the 1940s, security took the form of *national* security. Influenced by the theories of classical realism prevailing at that time[115], national security was born out of the idea that inter-state relations are shaped by power struggle, most evident in an historical contingency marked by the constant opposition between the US and the Soviet Union. In this context, national security meant pre-eminently defence, mostly through military means, against threats of foreign origin likely to endanger the stability, independence and territorial integrity of the state.[116] The famous definition of national security by Walter Lippmann reflects this understanding: "[a] nation has security when it does not have to sacrifice its legitimate interests to avoid war, and is able, if challenged, to maintain them by victory in such a war".[117]

[115]Realism, of which classical realism is a sub-set of views, emphasises the conflictual side of international politics, in which state actors compete against each other to pursue their own security and interests. On this view, the struggle for power is a central component of interaction between states. Among its proponents are E.H. Carr, John Herz and Hans Morgenthau. For an overview of realism, see W. Julian Korab-Karpowics, 'Political Realism in International Relations', *The Stanford Encyclopedia of Philosophy* (Summer ed, 2018) < plato.stanford.edu/entries/realism-intl-relations > (accessed 12 January 2021). A classical reading is the influential Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (2nd ed, Alfred A. Knopf 1954).

[116] Romm (n 53) 1-8.

[117] Cited in Arnold Wolfers, *Discord and Collaboration* (John Hopkins University Press 1962) 150.

Starting from the 1980s, as the Cold War began to fade and the realist orthodoxy came under increasing attack,[118] security became the object of an in-depth reconceptualisation. As new challenges made their appearance on the international scene, such as intra-state conflicts, immigration, the deterioration of the environment, the HIV/AIDS epidemic and others, it became apparent that the traditional focus of national security on military threats was too narrow. Gradually, then, the security agenda expanded to encompass economic, health, environmental, climate security and the like.[119] The concept of human security, as conceived for the first time by the 1994 UN Human Development Report, is a popular manifestation of this post-Cold War trend to widen the understanding of security beyond military-like threats.[120]

This expansion of security is, however, not entirely unproblematic. Pleading in favour of the more "traditional" understanding of security, Stephen Walt has opposed the expansion of security, observing that "[d]efining the field [i.e. security studies] in this [expansive] way would destroy its intellectual coherence and make it more difficult to devise solutions to any of these important problems".[121] Walt's traditionalist view, however, has remained a marginal one.

Critique aside, the fact that nowadays security is broader than militarised security is a matter of fact that one cannot but take note of. After all, economic, health, climate, environmental security and the like have all become part of the common lexicon of politics and beyond. The question remains, more generally, of whether talking about expanding the scope of security has

[118] On the critique of realist orthodoxy, see Justin Rosenberg, *The Empire of Civil Society. A Critique of the Realist Theory of International Relations* (Verso 2001).

[119] The topic of the evolution of security after the end of the Cold War has given rise to an immense amount of literature in security studies and international relations that cannot be fully recounted here. An excellent overview can be found in Barry Buzan and Lene Hansen, *The Evolution of International Security Studies* (Cambridge University Press 2009). See also Keith Krause and Michael C. Williams, 'Broadening the Agenda of Security Studies: Politics and Methods' (1996) 40 Mershon International Studies Review 229.

[120] Human security will be discussed in detail in Chapter 4, section 3.

[121] Stephen Walt, 'The Renaissance of Security Studies' (1991) 35 International Studies Quarterly 211, 213.

anything to do with the conceptual analysis of its meaning.[122] Arguably, the two issues cannot be fully separated, because the expansion (or the narrowing down) of the scope of a concept can occur only if the concept itself is vague enough as to allowing some elasticity of its boundaries.

5.2. The referent objects of security

Another fundamental aspect of security concerns its addressees, or, to use the terminology frequently employed in security studies, its "referent objects". As Buzan puts it, "[s]ecurity as a concept clearly requires a referent object, for without an answer to the question 'the security of what?' the idea makes no sense".[123] Booth, who as explained earlier believes that security is a rather easy concept, identifies as one of the "core element" of security the existence of a referent object ("someone or some thing is threatened"[124]). The identification of a referent object is essential in the dynamics of security as speech act that underpins the securitization theory: referent objects are "things that are seen to be existentially threatened and that have a legitimate claim to survival".[125]

The concept of national security, at least as originally developed to reflect realist theories, saw the state as the primary referent of security. With the expansion of the security agenda that started in the 1980s, there has been a gradual shift away from a state-centric concept of security

[122] Baldwin (n 58) 5 notes that "[m]ost such efforts [to redefine security], however, are more concerned with redefining the policy agendas of nation-states than with the concept of security itself. Often, this takes the form of proposals for giving high priority to such issues as human rights, economics, the environment, drug traffic, epidemics, crime, or social injustice, in addition to the traditional concern with security from external military threats. Such proposals are usually buttressed with a mixture of normative arguments about which values of which people or groups of people should be protected, and empirical arguments as to the nature and magnitude of threats to those values. Relatively little attention is devoted to conceptual issues as such".

[123] Buzan (n 57) 26.

[124] Booth (n 72) 100-101.

[125] Buzan, Wæver and de Wilde (n 74) 36. The other "units" are the securitizing actors (those who securitize issues) and functional actors (those who influence decisions in the field of security, without being securitizing actors or referent objects).

and towards a more human-centric one. Human security is the paradigmatic example of a concept of security that puts the individual at the centre of its focus.

Unfortunately, the nature of security seems to be far more complex than the state-individual dichotomy might suggest. In fact, as we shall see[126], even human security has not managed to clarify how the state and the individual level of security interact with each other, even less how a human-centred conception of security would be able to coexist with the everlasting state-centric idea of security. In fact, Buzan observes, "the security of individuals is inseparably entangled with that of the state".[127]

Arguably, it seems more sensible to understand security as a concept with multiple referent objects, all of them inextricably linked to each other. As Buzan[128] and Wæver[129] show, security is a multi-layered concept that has state security in the middle, and that extends downwards to the security of individuals and upwards to international security (with regional security in between the state level and the international level).[130]

The existence of multiple layers of security then adds another layer of complication to the search for the meaning of security.

5.3. Objective and subjective security

As the dictionary definition mentioned above confirms, security is both an objective state ("being secure") and a subjective state ("feeling secure"). According to Wolfers, "security, in an objective sense, measures the absence of threats to acquired values, in a subjective sense,

[126] In Chapter 4, section 3.
[127] Buzan (n 57) 39.
[128] Ibid 35-55 and 328-360.
[129] Ole Wæver, 'Security, the Speech Act: Analysing the Politics of a World' (1989) Copenhagen Centre for Peace and Conflict Research Working Paper 1989/19, 14.
[130] See the 'Regional Security Complex Theory' in Barry Buzan and Ole Wæver, *Regions and Powers: The Structure of International Security* (Cambridge University Press 2003).

the absence of fear that such values will be attacked".[131] As both an objective and subjective state, security can never be fully achieved. As Zedner puts it, "absolute security (objective or subjective) is a chimera, perpetually beyond reach. Even if security were today obtainable (which arguably it is not), the potentiality for new threats means that the pursuit can never be said to be over. It requires continuing vigilance."[132] Arguably, absolute security is not even a desirable end, if it is pursued at the expense of liberty. By eradicating risk, absolute security might neutralise "the right to take risks" that is implied in the idea of liberty.[133]

To complicate things, objective and subjective security are not necessarily in harmony. In fact, one might feel (subjectively) safe without actually being (objectively) safe, and likewise it is possible not to feel safe from dangers (subjectively) even if there is no actual danger (objectively).[134] Therefore, "subjective security is hazardous: it may mean almost anything anyone chooses".[135] That the feeling of security is not necessarily related to objective conditions of security has much to do with the construction of threats, as I will explain right below.

For the time being, it suffices to say that the duality of objective and subjective security adds yet another complication to the search for the meaning of the concept. Admittedly, the "appearance of firmness"[136] that the concept of security seems to convey (one is either secure or insecure) seems to be mostly illusory.

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[131] Wolfers (n 117) 150.
[132] Lucia Zedner, 'The Concept of Security: An Agenda for Comparative Analysis' (2003) 23 Legal Studies 153, 157.
[133] Liora Lazarus, 'The Right to Security' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *The Philosophical Foundations of Human Rights* (Oxford University Press 2015) 440. See also Booth (n 72) 105, for whom "[a]bsolute security is a dream, perhaps a nightmare, for absolute freedom from (any) fear is synonymous with absolute freedom from imagination, which is no freedom at all".
[134] Booth (n 72) 105; Buzan (n 57) 36.
[135] Zedner (n 85) 19.
[136] Buzan (n 57) 18.

5.4. Threats

As much as security needs the identification of referent objects, likewise it needs a threat for it to have some content at conceptual level. In fact, the term "security" seems to make sense only as security *against* some types of threats.[137] The widening of security illustrated above has carried with it the widening of the number of threats that can be subsumed under the concept of security: if (traditional) national security was concerned mostly with military threats of foreign origins, nowadays a greater number of threats can be deemed as affecting (the modern understanding of) security, ranging from threats to the economy, the environment, health, the climate and even personal wellbeing. For Booth, "impending or actual danger", together with "the desire to escape harmful possibilities" constitute some core elements of security.[138]

Objective security is premised on the existence of threats, because "security implies a condition of being without threat, which, even if it could be achieved today, always remain to be liable to negation by new threats tomorrow".[139] The continuing appearance of new and old threats thus confirms that security – by its very nature – can never be fully, even less durably, achieved.

Threats to security, however, do not exist (only) in the physical world, but are often construed. The securitization theory, in fact, explains how securitizing actors can move any issue out of the realm of "normal" politics and transform it into an "existential threat"[140] pertaining to the realm of security. As their proponents observe, "'security' is thus a self-referential practice,

[137] For the meaning of "threats" in an historical context, see Hans Günter Brauch, 'Concepts of Security Threats, Challenges, Vulnerabilities and Risks' in Hans Günter Brauch et al (eds), *Coping with Global Environmental Change, Disasters and Security. Threats, Challenges, Vulnerabilities and Risks* (Springer 2011) 61-106.
[138] Booth (n 72) 100-101.
[139] Zedner (n 85) 14. See, more extensively, Lucia Zedner, 'Too Much Security?' (2003) 31 International Journal of the Sociology of the Law 155.
[140] Buzan, Wæver and de Wilde (n 74) 23-26.

because it is in this practice that the issue becomes a security issue – not necessarily because a real existential threat exists but because the issue is presented as such a threat".[141]

The construction of threats depends heavily also on how security actors, and pre-eminently the state, are able to exploit people's sense of insecurity, and thus affect subjective security. Stanley Cohen has famously explained how moral panic is construed by rousing public concern through the designation of something or someone as a threat, often amplified by the media, with a view to provoke a response from the authorities that in turn will result in social changes within the community.[142] Panic dynamics have not eluded the attention of legal scholarship alike. In the context of counter-terrorism, for example, Fiona de Londras has argued that the state response against terrorism in the aftermath of 9/11 has been driven by a combination of "bottom-up popular panic" (triggering popular pressure for more security that has influenced political actors) and "top-down manufactured panic" (instigated by political actors with a view to maximise their power to fight terrorism).[143]

Even when the existence of a certain threat is less contestable, political actors are still able to amplify its real magnitude before an audience, not least because of the monopoly of information that governments usually hold, and the secrecy surrounding risk assessment that implies little disclosure to the general public.[144] Thus, the construction of threats is also the construction of the meaning of security, in so far as threats contribute to the shaping of the concept.

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[141] Ibid 24.

[142] Stanley Cohen, *Folk Devils and Moral Panics: The Construction of the Mods and Rockers* (3rd ed, Routledge 2002).

[143] de Londras (n 17) 10-29.

[144] For a conceptualisation of secrecy, see for example Lydia Morgan, '(Re)conceptualising State Secrecy' (2018) 69 Northern Ireland Law Quarterly 59. More generally, see Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage 1989); Patrick Birkinshaw, *Reforming the Secret State* (Open University Press 1991).

This brief overview of some fundamental features of security demonstrates the complexity of security and the evolution that the concept has undergone in the last forty years. Emma Rothschild captures this complexity in a clear fashion, pointing out that

> [t]he extension [of security] takes four main forms. In the first, the concept of security is extended from the security of nations to the security of groups and individuals: it is extended downwards from nations to individuals. In the second, it is extended from the security of nations to the security of the international system, or of a supranational physical environment: it is extended upwards, from the nation to the biosphere. The extension, in both cases, is in the sorts of entities whose security is to be ensured. In the third operation, the concept of security is extended horizontally, or to the sorts of security that are in question. Different entities (such as individuals, nations, and "system") cannot be expected to be secure or insecure in the same way; the concept of security is extended, therefore, from military to political, economic, social, environmental, or "human" security. In a fourth operation, the political responsibility for ensuring security [...]itself extended: it is diffused in all directions from national states, including upwards to international institutions, downwards to regional or local government, and sideways to nongovernmental organizations, to public opinion and the press, and to the abstract forces of nature or of the market.[145]

As she admits, the resulting geometry is of "dizzying complexity".[146] This complexity has an enormous impact on the quest for the meaning of security. Admittedly, even though it was argued that these factors might orient this quest, they in fact seem to disorient. In any event, it is important to take them into account because they confirm the fluidity of the concept of security, and how it is subject to continuous shaping and re-shaping.

The main takeaway arising from these factors is that, due to its expansion, its multiple referents, its objective and subjective connotation, as well as its dependency upon threats, there is a risk

[145] Emma Rothschild, 'What is Security?' (1995) 124 Daedalus 53, 55.
[146] Ibid.

that security might mean everything and, ultimately, nothing. To see the extent of the problem, one might flip the question "what is security?" as follows: if security is everything, what security *is not*?

6. Thesis overview

This thesis can be ideally divided into two parts, each of which will deal with one of the two overarching problems to be addressed. Chapters 1, 2 and 3 will engage the concept of security and the possibility of defining it.

Chapter 1 will review the case law of the four main human rights courts and bodies to try to locate a legal definition of security in IHRL. The Chapter will show that the reason why these judicial and quasi-judicial institutions have failed to define the concept has something to do with the adjudicatory technique that they employ when reviewing the lawfulness of restrictions of rights on the ground of (mostly national) security. Through this technique, courts and bodies tend to sidestep the substantive enquiry into the meaning of the legitimate aim and shift the focus of their review on the necessity and proportionality of the restrictions. It will be argued the reasons for this shift lie in conceptual challenges, as well as legitimacy challenges.

Chapter 2 will broaden the enquiry into the legal meaning of security by looking beyond IHRL. The Chapter will review the case law of other non-human rights courts and bodies (namely, the Dispute Settlement Body operating under the World Trade Organisation system, the International Court of Justice and the Court of Justice of the European Union) to try to locate a definition of security. It is part of this enquiry to understand whether these courts and bodies have faced similar challenges when defining security as those encountered by human rights

courts and bodies. The Chapter will show that the issue of whether these courts have tried to define security, or have avoided defining security, is intimately linked to the type of review of security provisions they carry out. It will be shown that, in the few cases in which courts and bodies have tried to define security provisions, these definitions have remained rather open-ended, and have failed to distinguish carefully between different security-related terms employed across treaties. The Chapter will conclude that, even when the type of review of security provisions differs from the review available under IHRL, the conceptual challenge of defining security is generally faced also by other courts, and thus is not peculiar to human rights adjudication.

Chapter 3 will ask whether a legal definition of security that would be able to constrain the state power to invoke the concept can be devised. To do so, the Chapter will draw from linguistic, critical language studies and semiotics to explain the "process of defining" (that is, how definitions are constructed). It will show that defining is not a process whose aim is to discover supposed "essential features" of a term, but rather a process of persuasion through a definition that often generates unavoidable disagreement among proponents of alternative definitions. For this reason, the Chapter will argue that a legal definition of security would most likely be unable to constrain the state power to invoke the concept. On the contrary, a definition might serve as a device for states to construe their preferred security narratives. In addition, the Chapter will show that states have in any event a creative power to distort and manipulate definitions when they stand in the way of achieving their predetermined goals.

Chapter 4 and 5 will engage more in detail the relationship between rights and security to question more fundamentally the necessity of the concept of security.

Chapter 4 will start challenging the conventional thinking that rights and security are two distinct conceptual entities. Instead, it will show that rights and security overlap in many ways, to the extent that it is very often unclear how they (should) interact. The Chapter will explore three issues in which this overlapping is particularly evident. First, it will show that the logic of trading off rights and security is based on an antagonistic understanding of the two that does not sufficiently explain their also synergetic relationship. Second, it will show that the synergetic relationship between human security and rights not only is theoretically unclear, but in practice morphs easily into an antagonistic relationship likely to undermine rights. Third, it will show that the right to security, understood both as a legal right and as a right to the good of security, has an unclear meaning and therefore tends to absorb other rights, or the human rights discourse as a whole. The Chapter will conclude by observing that, even when not overtly in opposition to rights, security usually manages to turn into an antagonistic force pitted against rights.

Finally, Chapter 5 will argue that security should not be defined, reconceptualised or re-understood, but should be rejected in its entirety. The Chapter will show that, at a conceptual level, there is no reason why occurrences likely to endanger individuals should be tackled by using security, rather than human rights. As it will be demonstrated, the state's preference for security rather than human rights is a matter of framing. States find convenient to employ the security frame in order to bypass some inherent power-constraining features of the human rights frame, such as its legalisation, its compliance pull and its drive towards equality. The Chapter will delve in detail into these features, at the same time outlining the persistent contradictions of human rights, such as their power-enhancing strand. The Chapter will conclude that expunging security from the legal and political lexicon is a way to avoid continuous damages to human rights caused by security. In fact, rejecting security constitutes also a step towards

refocusing on rights, with a view to strengthening them and better understanding their enduring problems.

CHAPTER 1

THE INTERPRETATION OF SECURITY PROVISIONS IN INTERNATIONAL HUMAN RIGHTS LAW

1. Introduction

The purpose of the first Chapter is to try to develop a sense of how security is understood in IHRL. In order to do so, I will survey the case law[1] of human rights courts and bodies that are charged with the task of interpreting security provisions featuring across international and regional human rights treaties.

This survey aims to identify whether a definition of security, or at least some conceptual elements of the term, have emerged in the case law. In keeping with one of the main objectives of the thesis set out in the Introduction, the definition sought is not one that might provide a mere linguistic explanation of the term "security", but rather a type of definition that might be able to compel states to legally justify their invocation of the concept.

As the analysis of the relevant case law will show, human rights courts and bodies have to date failed to develop a legal definition of security. In fact, the structure of the review of restrictions of rights available under IHRL appears to have provided courts and bodies with a rather easy way to escape the task of defining security. The Chapter will demonstrate that courts and bodies, in the course of the review process of the compatibility of restrictions with human rights treaties,

[1] I am using the word "case law" for the sake of simplicity, although the body of views of the Human Rights Committee is not always referred to as "case law". Similarly, I will use the word "judges", even though members of the Human Rights Committee are not technically "judges" but "independent experts".

ordinarily sidestep the substantive enquiry into the meaning of the legitimate aim of security, shifting the focus of their scrutiny to necessity and proportionality.

The Chapter will suggest that the reason for this definitional avoidance can be found in two types of interrelated challenges encountered by courts and bodies when they are confronted with the interpretation of security provisions: a conceptual challenge (defining security is inherently difficult) and a legitimacy challenge (defining security is also indirectly telling states what sort of threats should, and should not, fall within the scope of the concept).

2. Classification of security provisions in International Human Rights Law

The survey into the human rights case law on security will examine security provisions across the European Convention on Human Rights,[2] the International Covenant on Civil and Political Rights,[3] the American Convention on Human Rights[4] and the African Charter on Human and Peoples' Rights.[5]

These international and regional human rights treaties contain various *express* references to the term "security". It is useful to attempt a categorisation of the ways the term features across these treaties in order to begin to make sense of the meaning of security in IHRL. The table below shows the different terms employed in the treaties, as well as the frequency of their mentions:

[2] Adopted in Rome on 4 November 1950 and entered into force on 3 September 1953.
[3] Adopted by UNGA Res 2200A (XXI) (16 December 1966) and entered into force on 23 March 1976.
[4] Adopted in San José on 22 November 1969 and entered into force on 18 July 1978.
[5] Adopted in Nairobi on 28 June 1981 and entered into force on 21 October 1986.

TERMS	ICCPR	ECHR	ACHR	ACHPR	TOTAL MENTIONS
NATIONAL SECURITY (as a ground to restrict some rights)					
	Art.12(3) Art.13 Art.14(1) Art.19(3)(b) Art.21 Art.22(2)	Art.6(1) Art.8(2) Art.10(2) Art.11(2) Art.2(3) Prot. No 4 Art.1(2) Prot. No 7	Art.13(2)(b) Art.15 Art.16(2) Art.22(3)	Art.11 Art.12(2)	**18**
SECURITY AS A RIGHT					
- right to liberty and security	Art.9(1)	Art.5(1)	Art.7(1)	Art.6	**4**
- right to international peace and security				Art.23(1)	**1**
SECURITY OF THE STATE					
- threatened by war, public danger or other emergency [6]			Art.27(1)		**1**
- duty not to compromise it [7]				Art.29(3)	**1**
OTHER SECURITY TERMS (employed as *general* limitation clause)					
- security of all [8]			Art.32(2)		**1**
- collective security [9]				Art.27(2)	**1**

[6] Art.27(1) ACHR: 'In time of war, public danger, or other emergency that threatens the independence or security of a State Party […].' It is useful to compare this provision with similar ones in other treaties, such as Art.15(1) ECHR, where there is no mention of security: 'In time of war or other public emergency threatening the life of the nation [...].' See also Art.4(1) ICCPR.

[7] Art.29 ACHPR: 'The individual shall also have the duty: […] 3. Not to compromise the security of the State whose national or resident he is.'

[8] Art.32(2) ACHR: 'The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.'

[9] Art.27(2) ACHPR: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

The table shows that security takes on multiple forms in IHRL. This Chapter will not discuss the right(s) to security, thus for the time being we can set aside the issue of their meaning, to which we return in Chapter 4.[10] Of the remaining terms, *national* security is the one that is mentioned most often (eighteen mentions across the treaties).[11] As we shall see in more detail below, the function of those human rights treaties' provisions making *express* references to national security is to provide states with a ground to rely on in order to justify limitations of some specific rights.[12]

In addition to these *express* limitations, human rights courts and bodies have also recognised that other rights might be subject to *implicit* national security limitations, that is limitations that are not explicitly laid down in human rights treaties. The best-known examples of this kind concern fair trial rights (for example, disclosure of some sensitive information to a party might be limited on national security grounds).[13] There are also other grounds, such as "public interest" and "general interest" in relation to the right to property under the ECHR[14] that might be understood as encompassing also potential implicit references to national security.[15]

[10] The right to security will be fully discussed in Chapter 4, section 4.

[11] Although not included in the present survey, it is useful to mention that the International Covenant on Economic, Social and Cultural Rights (ICESCR) also contains national security provisions (Art.8(1)(a) and (c)), according to which trade union rights can be limited on national security grounds. It is also useful to mention that national security limitations are not foreseen in the EU Charter of Fundamental Rights, since the Charter is binding upon EU institutions, bodies, offices and agencies, as well as Member States, only when they implement EU legislation (Art.51). According to Art.4(2) TEU, national security falls outside the competences of the EU.

[12] As we shall see soon, "security of all" and "collective security" also serve the same function.

[13] See, among many, the leading cases of *Chahal v. UK* (App. 22414/93), 15 November 1996, § 131; and *A. and others v. UK* (App. 3455/05), 19 February 2009, § 205-211. For a critique of non-disclosure and the role of special advocates, see Cian C. Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates' (2013) 24 King's Law Journal 19.

[14] See Art.1 of Protocol No. 11 to the ECHR (right to property). In *James and others v. UK* (App. 8793/79), 21 February 1986, § 43, the ECtHR conceded that "public interest" and "general interest" might refer to two distinct concepts but did not provide any additional clarification to distinguish between the two. However, it seemed to favour a very broad understanding of public interest, finding that 'a taking of property effected in pursuance of legitimate social, economic or other policies may be "in the public interest", even if the community at large has no direct use or enjoyment of the property taken' (§ 45).

[15] To date, the ECtHR has not dealt with limitations of possession or property explicitly on national security grounds. However, some public interests accepted by the Court as constituting a permissible ground to interfere with the right to property have some national security connotation, for example the interest in combating drug trafficking: *John Butler v. UK* (App. 41661/98), 27 June 2002. Other accepted public interest grounds might

Furthermore, human rights courts and bodies have accepted that, in order to comply with the prohibition of discrimination, any justification for a differential treatment must be grounded in a legitimate aim,[16] including the aim of ensuring national security.[17]

Both the express and implied references to *national* security demonstrate that national security is overwhelmingly the most common form of security in IHRL. Admittedly, this is not entirely surprising. As explained in the Introduction,[18] the concept made its appearance in the US in the late 1940s, and thus around the same period in which the ECHR was drafted.[19] Subsequent international and regional treaties were all drafted in a historical period – the Cold War – during which the concept of national security was still playing an important role as a foreign policy term.[20] Even though, as discussed below, none of the *travaux préparatoires* of these treaties record a discussion of what the drafters intended by "national security",[21] presumably the concept was so popular at that time that it might have seemed an obvious choice for the drafters to employ it in the treaties.[22]

As explained in the Introduction, the realist underpinning of national security as originally conceived referred to a state-centric idea of security, understood as security from military and military-like threats of foreign origin. Arguably, this idea of security is what drafters might

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also be seen as overlapping with security *sensu lato*: see, for more details on the overlapping of legitimate aims, section 3.1 below.

[16] For example, in the ECHR context, *Posti and Rahko v Finland* (App. 27824/95), 24 September 2002, §§ 82-83.

[17] For example, in the ICCPR context, UNHRC, Communication No. 1136/2002, *Vjatseslav Borzov v Estonia*, UN Doc. CCPR/C/81/D/1136/2002 (25 August 2004) § 7.3.

[18] Introduction, section 5.1.

[19] The ECHR was drafted between 1949 and 1950 and entered into force on 3 September 1953. The Universal Declaration of Human Rights (UDHR) was proclaimed by the UN General Assembly few years earlier (1948), but it does not mention national security expressly. However, the general limitation clause contained in Art.29(2) refers to public order and general welfare in a democratic society, two grounds that might be seen as overlapping with national security: see, on the overlapping of legitimate aims, section 3.1 below.

[20] See Introduction, section 5.1.

[21] See sections below on the *travaux* of each treaty.

[22] It must be recalled that early human rights instruments, such as the UDHR and the ECHR, have influenced subsequent treaties also with regard to the word choice. On the reciprocal influence of human rights treaties, see Dinah Shelton, *Regional Protection of Human Rights* (Oxford University Press 2008) 17.

have had in mind when they chose to employ the term "national security". If so, then the scattered references to "state security" in IHRL, outlined in the table above, might be treated as synonymous with "national security".[23]

If the original concept of national security might provide us with a preliminary approximation of its meaning in IHRL, however this is not the end of the story. In fact, as also noted in the Introduction, security has undergone in more recent years profound transformations, that have brought about an expansion of the concept of security as to including any sort of threats to individuals, regardless of their provenance. Therefore, even though national security is the term repeatedly employed in human rights treaties, it would be wrong to assume at the start of this enquiry that its meaning in IHRL has remained anchored to a realist, state-centric underpinning. In fact, the meaning of human rights provisions is not immutable, but is interpreted in light of changing situations and circumstances.[24] In the European context, the metaphor of the ECHR as a "living instrument" is used to indicate that the ECtHR is influenced by the evolving consensus among states about certain issues when interpreting human rights provisions.[25] Therefore, it is possible that more recent understandings of security might have influenced the meaning of national security in IHRL, as interpreted by human rights courts and bodies.

[23] However, this would raise the question of why treaties would employ different terms. As we will see in section 3.1 below, there is a certain sloppiness in the way human rights treaties draw conceptual distinctions.

[24] Generally, on the evolutive interpretation of human rights treaties: Francisco Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties* (Brill-Nijhoff 2019).

[25] The "living instrument" doctrine was endorsed for the first time in *Tyrer v United Kingdom* (App. 5856/72), 25 April 1978, § 31: "The Court must also recall that the Convention is a living instrument which […] must be interpreted in the light of present-day conditions. […] the Court cannot but be influenced by the developments and commonly accepted standards in […] member States of the Council of Europe [...]". For more insights into the implications of this doctrine, see George Letsas, 'The ECHR as a Living Instrument: its Meaning and Legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 106-141; Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 German Law Journal 1730.

For this reason, it is also part of this enquiry to understand whether definitions of security in the human rights case law, if present, might point at a concept wider than realist-inspired security, for the simple reason that definitions usually say something about the breadth of a term.[26] Even though this enquiry is concerned with a definition of "security", its focus will be pre-eminently on the case law on *national* security, for the reason already outlined that *national* security is the term most widely used across the treaties, and as a result has generated the great majority of jurisprudence on security. However, the enquiry will also consider the less frequent security terms, in order to understand whether is there any substantial difference between them, and between them and national security.

3. The relationship between security and other security-related provisions

Before starting with the survey of the case law on security, it is useful to dwell on two more issues that are likely to have an impact on the quest for the meaning of security in IHRL. Their exposition here is also appropriate in order to carefully circumscribe and clarify the scope of this enquiry.

3.1. National security and other legitimate aims

The first issue concerns the presence of multiple legitimate aims in IHRL. National security is just one of the grounds that allows for limitations of some rights. Human rights treaties ordinarily mention, often together with national security, other legitimate aims such as public safety, public order, territorial integrity, prevention of disorder and crime, the well-being of the country, protection of health and morals, protection of the rights and freedom of others and the

[26] At this stage, this is admittedly a simplification. For more insights into (legal and non-legal) definitions, see generally Chapter 3.

like.[27] Quite evidently, these grounds overlap to a greater or lesser extent. In fact, the ECtHR has often relied upon two or more grounds together, without carefully distinguishing among them.[28]

When it comes to distinguishing national security from other grounds, however, the extent of the overlap depends on the starting position about the meaning of national security itself. If one takes the original underpinning of national security mentioned earlier (protection from external threats of military and military-like nature, such as foreign interference, war, terrorism and the like), then the overlap is minimal. At best, national security interests and the interest of territorial integrity are closely linked,[29] but arguably other grounds can be more meaningfully distinguished from national security. On the other hand, if one acknowledges that national security has currently acquired a broader meaning, encompassing the protection of individuals against a wide variety of threats, regardless of their provenance, then national security interests are likely to conceptually absorb disorder, crime, health, safety, well-being of the country and protection of the rights of others, i.e. potentially all other legitimate aims. In other words, a concept of (national, or simply) security widely understood might become, conceptually, the sole legitimate aim. Essentially, any threat to one of the general interests mentioned in human rights treaties can be seen as a security threat.

This is not to say that all the legitimate aims mentioned in human rights treaties must be treated as synonymous with security. However, as I will show in Chapter 3, the presence of many aims

[27] The wording slightly varies across treaties: see articles on national security mentioned in the table in section 2 above.

[28] For example, public safety is often relied upon by the ECtHR together with national security and the prevention of disorder: see, among many, *Rekvényi v. Hungary* (App. 25390/94), 20 May 1999, § 41.

[29] In fact, the ECtHR does not usually rely exclusively on territorial integrity, but it links this ground to national security: *Republican Party of Russia v Russia* (App. 12976/07), 12 April 2011, § 101: 'the defence of territorial integrity is closely linked with the protection of "national security"'. See also *Zana v Turkey* (App. 18954/91), 25 November 1997, § 49.

with overlapping meanings is likely to have an impact, at a linguistic level, on the efforts to understand the legal meaning of security, because it makes it more difficult to differentiate between them. For the time being, even though roughly pertinent to (or even absorbed within) a wide concept of security, a discrete analysis of the meaning of these other aims falls outside the scope of this enquiry. However, some references will be made to the case law on some other legitimate aims in so far as they might be useful in explaining the challenges faced by courts and bodies when they try to define concepts more in general.

3.2. National Security and emergency

The second aspect that must be addressed concerns the relationship between national security and emergency. While human rights treaties' provisions do not define national security, they provide more details as to what counts as "emergency". For example, Art.15(1) of the ECHR reads "in time of war or other public emergency threatening the life of the nation […]". More elaborated is Art.27(1) ACHR, that reads "in time of war, public danger, or other emergency that threatens the independence or security of a State Party […]."[30] The ECtHR has developed the concept of emergency, famously defining it 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 composed".[31]

In the *Greek* case, the former European Commission further elaborated on the conceptual elements of emergency, holding that the emergency

I. must be actual or imminent;

[30] Art.4 ICCPR is substantially similar to Art.15(1) ECHR. The ACHPR does not allow derogations on the basis of a declaration of a state of emergency. The absence of emergency provisions in the ACHPR is not entirely unproblematic: see Christof Heyns, 'The African Regional Human Rights System: The African Charter' (2003) 108 Penn State Law Review 679, 693.

[31] *Lawless v Ireland (No. 3)* (App. 332/57), 1 July 1961, § 28.

II. its effects must involve the whole nation;

III. the continuance of the organised life of the community must be threatened;

IV. the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[32]

Similar requirements are endorsed by the Human Rights Committee[33] and the Inter-American Court of Human Rights.[34] Thus, there seems to be broad definitional consensus of what an emergency is under IHRL.[35]

Conceptually, national security and emergency appear to share many features, at least from the perspective of the types of threats underpinning both, to the extent that boundaries between the two cannot be rigidly drawn.[36] War, for example, is an archetypical threat falling under the original concept of national security, and is expressly mentioned in IHRL as a threat that might justify a declaration of the state of emergency. In addition, the explicit references to the independence and the security of the state contained in the mentioned Art.27(1) ACHR confirm that emergency is closely related to national security. However, derogations made by states in the context of the ongoing Covid-19 pandemic has shown that there is ample room for the concept of emergency to encompass less realist-inspired types of threats, such as the threat to health posed by the spread of a contagious virus.[37]

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[32] *Denmark, Norway, Sweden and the Netherlands v Greece* (App.3221/67), 5 November 1969, § 113.

[33] Human Rights Committee, *General Comment No. 29. States of Emergency (Article 4)*, CCPR/C/21/Rev. 1/Add. 11 (31 August 2001).

[34] I/A Court H.R., *Habeas Corpus in Emergency Situations* (Art. 27(2), 25(1) and 7(6)). Advisory Opinion OC-8/87 of 30 January 1987.

[35] Oren Gross, Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 251-252. See, for other evidence of this consensus, the 1985 Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, stressing that an emergency is a "situation of exceptional and actual or imminent danger which threatens the life of the nation" (par.39).

[36] As we will see in Chapter 5, section 3, the concept of security is intrinsically linked to the idea of emergency broadly speaking.

[37] For a list of the states that have declared states of emergency under IHRL, see the tracker developed by the International Center for Not-for-Profit Law at www.icnl.org/covid19tracker/ (accessed 1 April 2020). There has

The key normative difference between the two, in the system devised by human rights treaties, is that emergency refers, in principle, to the existence of threats of a greater magnitude than those endangering "ordinary" national security.[38] This is why derogations allowed in time of emergency are – at least in strictly doctrinal terms[39] – more wide-ranging than limitations on national security grounds, that are allowed only for some qualified rights.

Since the object of this enquiry is security, the survey into the human rights case law will not delve more specifically into the normatively distinct concept of emergency. However, an interesting aspect should be noted in this section. Even though human rights courts and bodies have put some efforts in providing some more conceptual elements in order to clarify what an emergency is, this has not prevented expansive interpretations by states, with courts often exhibiting a great degree of deference towards the executive's assessment.[40] This tension between courts' definitional commitment and weak judicial oversight is likely explained by the fact that, as Alan Greene argues, "what constitutes an emergency may be a notionally legal question, but whether that condition actually exists is a functionally political one".[41]

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been some debate about the desirability of formally declaring a state of emergency. In favour, Alan Greene, 'States Should Declare a State of Emergency using Art.15 ECHR to confront the Coronavirus Pandemic' (*Strasbourg Observers*, 1 April 2020) < strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/ > accessed 2 April 2021. Against, Kanstantsin Dzehtsiarou, 'COVID-19 and the European Convention on Human Rights' (*Strasbourg Observers*, 27 March 2020) < strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/ > accessed 2 April 2021.

[38] Ian Cameron, *National Security and the European Convention on Human Rights* (Kluwer Law International 2000) 8-11. However, the alleged distinction between "normalcy" and "emergency" has increasingly faded due to the tendency of states of emergency to become permanent, rather than exceptional: see Alan Greene, *Permanent States of Emergency and the Rule of Law. Constitutions in an Age of Crisis* (Hart Publishing 2018).

[39] As explained in section 2, human rights courts and bodies have increasingly accepted that some rights can be limited on national security grounds even when treaty provisions do not expressly authorise it. Therefore, the possibility for states to invoke national security concerns is much greater than what *expressly* envisaged by human rights treaties.

[40] The great margin of appreciation granted to states by the ECtHR was already evident in one of its earliest decisions on emergency: see *Lawless v Ireland*, § 28-30. More recently, in the post-9/11 emergency environment, the ECtHR has accepted that terrorism constitutes an emergency threatening the life of the nation: *A. and others v United Kingdom*, § 175-181. For more discussion into the issue of judicial review of emergency, see Greene (n 38) 127-159; Gross and Ní Aoláin (n 35) 247-325.

[41] Greene (n 38) 134.

Thus, even though the legal concept of emergency has been clarified in IHRL (and arguably even defined), its meaning has remained loose enough to allow states to stretch its boundaries. The implication is that not all definitions are, by themselves, necessarily able to set limits on the state power to invoke concepts. This begs the question, which Chapter 3 will seek to answer, of what attributes a legal definition should have in order to compel the state to invoke a concept in a more legally meaningful way. For the time being, the definition of emergency should be taken as an example of a type of definition that would *not* be sufficient for the purpose of the present enquiry into a legal definition of security.

4. The case law of the European Court of Human Rights

As briefly noted in section 2, the *travaux préparatoires* of the ECHR, as well as of its Protocols, are of no assistance in shedding light on the meaning of national security in the drafters' intention.[42] The *travaux* show that its meaning was not discussed,[43] nor was the meaning of other legitimate aims. Thus, it is open to speculation whether the drafters thought that the ordinary meaning of national security was clear enough as to warrant no further elaboration.[44]

National security can be invoked before the ECtHR as a ground to restrict a broad and diverse set of rights expressly specified in the Convention, namely: right to respect for private and family life, freedom of expression, freedom of assembly and association, freedom of movement, as well as to exclude the press and the public from a trial and to expel an alien lawfully resident in the territory of a member state.[45] In addition, as noted in section 2, other rights might be

[42] The *travaux* are available at < www.echr.coe.int/Pages/home.aspx?p=library/collections&c= > (accessed 2 April 2021).
[43] On this point, see also Cameron (n 38) 49-51.
[44] In fact, as it will be explained in Chapter 3, section 2, the law does not necessarily require all terms to be defined.
[45] See table in section 2 for the relevant provisions of the ECHR.

limited on national security grounds, even when limitations are not expressly foreseen by the letter of the Convention.

To begin to understand how the ECtHR has interpreted the meaning of national security, a helpful indication is provided by the type of threats that the ECtHR has accepted as falling under the scope of the concept. Over the years, states have managed to justify the invocation of national security in the context of a quite broad range of claimed threats, ranging from espionage[46] to terrorism[47] or incitement to terrorism[48], from the existence of separatist organisations[49] to the need to maintain discipline within the armed forces.[50]

From this list of the types of threats successfully put forward by states to substantiate national security claims, it is *prima facie* apparent that the concept of national security endorsed by the ECtHR aligns approximately with the original realist idea of national security. As Kempees suggests, national security in the Convention can be broadly defined as "the safety of the State against enemies who might seek to subdue its forces in war or subvert its government by illegal means".[51] However, in some instances the Court has been willing to stretch the boundaries of national security beyond that to include issues such as the protection of "cultural traditions and historical and cultural symbols",[52] or "the maintenance of the morale of service personnel [of the armed forces] and, consequently, of the fighting power and the operational effectiveness of the armed forces".[53]

[46] *Klass and others v Germany* (App. 5029/71), 6 September 1978, § 48.
[47] *Othman v the United Kingdom* (App. 8139/09), 17 January 2012, § 184; *Szabó and Vissy v Hungary* (App. 37138/14), 12 January 2016, § 55; *Beghal v the United Kingdom* (App. 4755/16), 28 February 2019, § 95.
[48] *Zana v Turkey* (App. 69/1996/688/880), 25 November 1997, § 48-50.
[49] *United Communist Party of Turkey and others v Turkey* (App. 133/1996/752/951), 30 January 1998, § 39-41.
[50] *Grigoriades v Greece* (App. 121/1996/740/939), 25 November 1997, § 41.
[51] Peter Kempees, '"Legitimate Aims" in the Case-law of the European Court of Human Rights' in Paul Mahoney and others (eds), *Protecting Human Rights: The European Perspective: Studies in Memory of Rolv Ryssdal* (Karl Heymanns 2000), 662.
[52] *Sidiropoulos and Others v Greece* (App. 57/1997/841/1047), 10 July 1998, § 37-39.
[53] *Smith and Grady v the United Kingdom* (App. 33985/96 and 33986/96), 27 September 1999, § 74.

However, the problem of the meaning of national security in the case law of the ECtHR is far more complex. In fact, there are many situations in which the ECtHR has accepted claims by states that a limitation on certain rights pursued the legitimate aim of national security *in general*, i.e. without requiring states to specify any linkage to an identifiable threat. This has happened, to name but a few, in the context of surveillance;[54] bans on political activities and party membership imposed on members of the police;[55] or security vetting of contracting company[56] or of employees with access to confidential information.[57]

In theory, then, it is possible that the ECtHR has *implicitly* accepted a much wider notion than that of realist-inspired national security, encompassing threats that are not necessarily of military or military-like nature. However, this is hard to determine with certainty. In fact, due to the generality of some invoked national security grounds, it is impossible to know the exact breadth of the concept of national security that respondent states had in mind and which were *implicitly* validated by the Court.

Very often, the Court considers itself satisfied when adversarial proceedings before an independent body are in place at national level to provide an individual with the opportunity to challenge the executive's assertion that national security is at stake, if necessary with appropriate guarantees to limit disclosure of confidential information.[58] However, this approach has not been consistently followed. In fact, the attitude of the Court towards the breadth of its

[54] *Big Brother Watch and others v. the United Kingdom* (Apps. 58170/13, 62322/14 and 24960/15), 25 May 2021, § 365, in which the Court accepted that bulk surveillance aims at protecting national security, without requiring the UK to substantiate more in detail the nature of the threats. See also *Szabó and Vissy v. Hungary*, § 55.
[55] *Rekvényi v Hungary*, § 41.
[56] *Tinnelly and McElduff* (App. 20390/92 and 21322/93), 8 April 1997, § 76.
[57] *Regner v Czech Republic* (App. 35289/11), 19 September 2017, § 150-162. For a comment, Andrea Preziosi, 'Regner v Czech Republic: has the European Court of Human Rights Forgotten the Fair Trial Rights when National Security is at Stake?' (*Strasbourg Observers*, 23 October 2017) < strasbourgobservers.com/2017/10/23/regner-v-czech-republic-has-the-european-court-of-human-rights-forgotten-the-fair-trial-rights-when-national-security-is-at-stake/ > accessed 2 April 2021.
[58] For example, *Nolan and K v Russia* (App. 2512/04), 12 February 2009, § 71; *Al-Nashif v. Bulgaria* (App. 50963/99), 20 June 2002, § 123-124.

review of the domestic proceedings has been wavering, ranging from a more intrusive scrutiny over the substantive analysis of national security carried out by national courts,[59] to a very superficial scrutiny of the formal correctness of their decision-making process.[60]

The result of this "procedural scrutiny" of national security claims has been that the ECtHR has not attempted to provide some more definitional elements of what national security means in the treaty. The former European Commission on Human Rights only once hinted at the challenges posed by any attempt to define national security, holding that "the term 'national security' is not amenable to exhaustive definition."[61] Other than this cursory reference to the problem of definitions, there is no trace in the case law of any further attempt to engage with the issue of defining national security.

Admittedly, the absence of a definition of national security in the Court's decisions is something that national security has in common with the other legitimate aims under the Convention, and that can be explained, more broadly, by looking at the adjudication technique that the Court employs when assessing the lawfulness of the interference with qualified rights. The ECtHR usually does not spend much time assessing the legitimate aim(s) invoked by states,[62] easily accepting that a restriction to a certain right pursues a legitimate aim. The Court itself has acknowledged this, stressing that "the Court's practice is to be quite succinct when it verifies the existence of a legitimate aim within the meaning of the second paragraphs of Articles 8 to

[59] For example, *Janowiec and Others v Russia* (App. 55508/07 and 29520/09), 21 October 2013, § 214, in which the Grand Chamber lambasted Russian courts for not having analysed the reasons according to which documents had to be kept confidential on national security grounds.

[60] For example, *Regner v Czech Republic*, § 150-162, in which the Grand Chamber found itself satisfied that Czech courts had full cognition of the classified material, even though it was not disclosed, not even summarily, to the applicant whose security clearance had been revoked. As I argued, the approach followed by the Grand Chamber has resulted in a wholesale curtailment of the applicant's fair trial rights: Preziosi (n 57).

[61] *Esbester v the United Kingdom* (App. 18601/91), 2 April 1993.

[62] Laurens Lavrysen, 'Chapter 4. System of Restrictions' in Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th ed, Intersentia 2018) 314-315.

11 of the Convention".[63] Instead, the core of the Court's assessment is normally located at the necessity and proportionality stage. Even on the few occasions in which legitimate aims have been more closely scrutinised,[64] the Court has refrained from coming up with wide-ranging and abstract definitions.

This shows that the ECtHR's definitional reluctance applies to all the (overlapping) legitimate aims under the Convention. At a systemic level, this seems to align with the overall technique of interpretation of the Convention employed by the ECtHR, that is very fact-specific and focuses more on procedural limitations, rather than on definitions of abstract concepts.[65]

However, the reason why the Court focuses more on the necessity and proportionality stage than on the scrutiny of the legitimate aims invoked might be related, *indirectly*, to the inherent difficulty with defining national security[66] as well as the other listed legitimate aims. First, it is hardly possible for the ECtHR to carefully circumscribe the boundaries of interests left undefined in the treaties, which in addition overlap with each other, as noted earlier. As Janneke Gerards has observed,

> [t]he more aims and goals are formulated, or the more vaguely the legislature or decision-making body have stated their aims, the more difficult it will be for the Court to determine the precise aim that constitutes the relevant point of reference or "locus" for measuring the suitability of the chosen instrument.[67]

[63] *S.A.S. v France* (App. 43835/11), 1 July 2014, § 114
[64] Lavrysen (n 62) 315 for a helpful overview.
[65] Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 Modern Law Review 671, 673.
[66] As explained in the Introduction, section 3, scholars across many disciplines have pointed to the inherent difficulty with defining security.
[67] Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11 International Journal of Constitutional Law 466, 479.

Second, the Court's definitional reluctance might be an effect of the application of the margin of appreciation doctrine.[68] The Court has consistently held in its case law that states enjoy a wide margin of appreciation when invoking national security concerns, since they are in the best position to assess the existence of "pressing social needs."[69] Defining national security, arguably, is also indirectly defining what types of threats should be (and should not be) included within its scope. A broad definition might make it easier for a state to invoke national security in a wide set of circumstances, most likely rendering the definition unable to circumscribe the state's power to rely on the concept.[70] On the contrary, a carefully crafted definition might constrain the state's power to invoke national security concerns, by excluding some threats from the scope of the concept. For this reason, the Court might have avoided defining the legitimate aim of national security because it does not wish to be seen as openly constraining the state's assessment of what threats falls within the scope of national security, in line with the wide margin of appreciation it has afforded to states.[71] That would explain why it is usually more strategically convenient for the Court to accept the state invocation of national security, as it does in the majority of cases, and focus instead on necessity and proportionality, that form the cornerstone of the review of compatibility of the restrictions with the ECHR.[72]

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[68] On the margin of appreciation in general, see Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012); George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705; Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 European Law Journal 80.

[69] Among many, *Leander v Sweden* (App. 9248/81), 26 March 1987, § 59. As made clear in the case, states enjoy a wide margin of appreciation not only in assessing the "pressing social needs", but also "in particular in choosing the means for achieving the legitimate aim of protecting national security." On the margin of appreciation in national security cases, see Cameron (n 38) 27-31.

[70] This is what has arguably happened with the definition of emergency in IHRL: see section 3.2 above.

[71] The tendency of the ECtHR to avoid being dragged into potential clashes with states on controversial national security issues, such as counter-terrorism, has become more evident following the 2012 Brighton Declaration, that sought to enhance subsidiarity between the Court and the states: see Helen Fenwick, 'Post 9/11 UK Counter-terrorism Cases in the European Court of Human Rights: a 'Dialogic' Approach to Rights Protection or Appeasement of National Authorities?' in Fergal F. Davis and Fiona de Londras (eds), *Critical Debates on Counter-terrorism Judicial Review* (Cambridge University Press 2014) 302-323.

[72] These findings should be taken as provisional hypotheses. The examination of the case law of other human rights courts and bodies in the following sections will allow to draw more conclusive and generalisable findings, that will be analysed in section 8.

5. The views of the UN Human Rights Committee

As with the ECHR, the *travaux* of the ICCPR are largely unhelpful in trying to understand the intended meaning of national security in the text. Lengthy discussions focussed mostly on the list of legitimate aims to be included for each qualified right, without delving into their meaning.[73]

The rights that can be limited on the ground of national security in the ICCPR are the same as those in the ECHR, with a notable exception: contrary to Art.8 ECHR, Art.17 (the right to private and family life) does not contain any list of permissible grounds upon which restrictions can be imposed, confining itself to mentioning that "no one shall be subjected to arbitrary or unlawful interference" with the said right.[74] Although some commentators have argued that such a broad wording has rendered the provision "worthless",[75] others have noted that the purposes justifying a limitation of the right to private and family life are inevitably drawn from those purposes listed in other ICCPR provisions,[76] and arguably in the ECHR alike.[77] Thus, there is ample space for national security considerations to be adduced by states in order to limit the right to private and family life, in spite of the lack of an explicit reference to this ground.[78]

As with the ECtHR's case law, the type of threats accepted by the Human Rights Committee (HRCttee) as pertaining to national security provides an indication that the concept aligns,

[73] For an overview of the *travaux*, see Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (2nd rev ed, N.P. Engel 2005) 270-271.
[74] A proposal from Denmark mirroring the same limitations contained in Art.8(2) ECHR was in fact rejected: Nowak (n 73) 381.
[75] Heinz Guradze, 'Die Menschenrechtskonventionen der Vereinten Nationen vom 16' (1971) 15 German Yearbook of International Law 242, 258.
[76] Sarah Joseph and Melissa Castan, *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford University Press 2013) 1193.
[77] Nowak (n 73) 383.
[78] See, for example, UNHRC, Communication No. 1937/2010, *Mansour Leghaei and others v Australia*, UN Doc. CCPR/C/113/D/1937/2010 (15 May 2015) §§ 10.3-10.4, in which the HRCttee found that limitations on national security grounds might constitute an interference within the meaning of Art.17.

approximately, with a realist and state-centric understanding. The HRCttee has in fact accepted that belonging to a terrorist organisation,[79] and providing support to it,[80] as well as being a member of a separatist organisation[81] and attempting to violently overthrow the constitutional order,[82] constitute national security concerns that states might legitimately invoke to justify restrictions on rights. The Committee has gone as far as recognising that "considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of its citizenship, at least where a newly independent state invokes national security concerns related to its earlier status",[83] in a case concerning the rejection of the application for Estonian citizenship submitted by a USSR-born member of the army.

However, similarly to the ECtHR, the HRCttee has not engaged directly with the possibility of defining national security. Only occasionally has the HRCttee seemed more explicit in trying to set some limits on the state power to invoke national security concerns. However, this has happened not through a definition of the concept, but by requiring states to specify and substantiate the type of threats involved. In fact, with regards to freedom of expression (Art.19(2)), it has held that it is incumbent upon the states "to demonstrate in *specific* and *individualized* fashion the *precise nature* of the threat, […] in particular by establishing a *direct* and *immediate connection* between the expression and the threat (*emphasis added*)."[84]

[79] UNHRC, Communication No. 1416/2005, *Mohammed Alzery v Sweden*, UN Doc. CCPR/C/88/D/1416/2005 (10 November 2006) § 11.10; UNHRC, Communication No. 456/1991, *Celepli v Sweden*, UN Doc. CCPR/C/51/D/456/1991 (18 July 1994) § 9.2.

[80] UNHRC, Communication No. 833/1998, *Samira Karker v France*, UN Doc. CCPR/C/70/D/833/1998 (30 October 2000), § 9.2.

[81] UNHRC, Communication No. 236/1987, *V.M.R.B. v Canada*, UN Doc. CCPR/C/33/D/236/1987 (18 July 1988) § 6.3.

[82] UNHRC, Communication No. 1233/2003, *A.K. and A.R. v Uzbekistan*, UN Doc. CCPR/C/95/D/1233/2003 (31 March 2009) § 7.2.

[83] *Vjatseslav Borzov v Estonia*, § 7.3.

[84] UNHRC, *General Comment No.34. Art.19: Freedom of opinion and expression*, UN Doc. CCPR/C/GC/34 (12 September 2011) § 35. See also UNHRC, Communication No. 574/1994, *Keun-Tae Kim v Republic of Korea*, UN Doc. CCPR/C/64/D/574/1994 (4 January 1999) § 12.5.

As it appears from this finding, at least when freedom of expression is at stake, the HRCttee has seemed to impose on states a particularly stringent duty to justify in detail national security claims, with generic allegations of national security reasons being insufficient. In this respect, the position of the HRCttee might be seen, in principle, as less deferential than some stances of the ECtHR, which – as previously explained – has often satisfied itself with vague national security allegations.

Regrettably, the HRCttee has not always practiced what it preached. Even in cases of alleged breaches of freedom of expression, the HRCttee has not applied the same stringent standard mentioned earlier, at times showing great deference to the evaluation made by national courts,[85] or failing to delve into an assessment of the specific threat alleged by the state.[86] Thus, it is not always possible to know the exact breadth of the concept of national security accepted by the HRCttee whenever it failed to scrutinise in detail the state's invocation of the concept.

Much more interesting is the difference in wording between the ECHR and the ICCPR in relation to the provisions concerning the protection of aliens against arbitrary expulsion. While Art.1(2) of Protocol No.7 to the ECHR allows for an alien to be expelled before exercising his or her right to challenge the expulsion decision "on reasons of national security", the corresponding provision of the ICCPR (Art.13) refers to "compelling reasons of national security."[87] Both a textual and systematic interpretation of the provision might suggest that *compelling* reasons of national security would require a higher threshold of seriousness than

[85] *A.K. and A.R. v Uzbekistan*, § 7.2. See, for another example of deference towards the national court's assessment (in relation to expulsion of aliens) UNHCR, Communication 833/1998, *Karker v France*, UN Doc. CCPR/C/70/D/833/1998 (30 October 2000) § 9.2.

[86] UNHRC, Communication No. 117/1981, *M.A. v Italy*, UN Doc. CCPR/C/21/D/117/1981 (10 April 1984) § 13.3, in which the HRCttee did not even deemed necessary to specify the legitimate purpose for the interference (and, consequently, whether "reorganising the dissolved fascist party" is a threat to national security, public order or other aims).

[87] The text of Art.13 ICCPR was adopted literally from Art.32(2) of the 1951 Geneva Convention Relating to the Status of Refugees, that employs the same wording "compelling reasons of national security".

"simple" reasons of national security, referred elsewhere in the same ICCPR. In fact, Nowak maintains that "this exceptional provision has an especially narrow scope of application."[88] If that is the case, the ICCPR might be interpreted as establishing a ladder of seriousness, with reasons of national security at the bottom, emergency at the top and *compelling* reasons of national security set in between.

However, the HRCttee has omitted to clarify to date what distinguishes reasons of national security from *compelling* reasons. In reality, the HRCttee has not attached great weight to the adjective, accepting, for example, that suspicion of the complainant's active support for a terrorist organisation was enough for restrictions to his procedural rights to be justified on national security grounds.[89] The HRCttee has gone even further by considering itself satisfied that the respondent state "had at least plausible grounds for considering, at the time, the case in question to present national security concerns."[90] Thus, the views of the HRCttee seem to suggest that the word "compelling" means nothing more than an onus for the state to justify, at least by putting forward some "plausible grounds", the existence of reasons of national security.[91]

The "plausible grounds" standard is admittedly a loose one, that appears in strident contrast with the imposition of an onus of justification. Similarly, a finding that "it is not for the Committee to test a sovereign State's evaluation of an alien's security rating"[92] might lend itself to suggest the non-reviewability of national security claims.[93]

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[88] Novak (n 73) 300.
[89] *Karker v France*, § 9.2.
[90] *Mohammed Alzery v Sweden*, § 11.10.
[91] In fact, when the HRCttee has rejected national security claims by the respondent state, it has done so because the state failed to substantiate the claim at all, and not because the reasons adduced were not compelling enough. See, for example: UNHRC, Communication No. 155/1983, *Eric Hammel v Madagascar*, UN Doc. CCPR/C/OP/2 (3 April 1987) § 19.2.
[92] *V.M.R.B. v Canada*, § 6.3.
[93] Joseph and Castan, (n 76) 968.

However, in later cases the HRCttee made it clear that

> while the Committee cannot leave it to the unfettered discretion of a State party whether reasons related to national security existed in an individual case, it recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case and the relevant provision of the Covenant.[94]

In any event, even conceding that "compelling" means that states must justify national security reasons, it remains unclear why Art.13 is the only provision in the ICCPR employing the adjective, in light of the fact that also "non-compelling" national security reasons require justification, as the views of the HRCttee show.

In general, the overall attitude of the HRCttee towards national security does not distance itself from the jurisprudence of the ECtHR. While in what seems to be more statements of principles than substance[95] the HRCttee has declared itself prepared to conduct a more thorough enquiry into the alleged specific threat to national security, in line with the ECtHR the cornerstone of the review of the lawfulness of limitations lies with the necessity and proportionality stage.[96] In fact, the HRCttee easily accepts that a limitation falls, at least preliminarily, within one of

[94] *Vjatseslav Borzov v Estonia*, § 7.3, in which the HRCttee sought explicitly to avoid a misinterpretation of its previous statement in *V.M.R.B. v Canada* ("the Committee's decision in the particular circumstances of *V.M.R.B.* should not be understood as the Committee divesting itself of the jurisdiction to inquire, as appropriate, into the weight to be accorded to an argument of national security").

[95] One might speculate that the repeated emphasis of the HRCttee, both in its views and in the General Comments, that states must duly justify the specific threat to national security is somehow related to the fact that its "jurisdiction" encompasses states with poor democratic record. In this case, the emphasis might sound more like a warning directed to those states, rather than a substantive part of its adjudicatory technique. That might explain why, conversely, the ECtHR places less emphasis on the individualisation of specific national security threats, perhaps based on the unstated assumption that member states of the Council of Europe are less likely to raise specious national security claims because they are all supposedly democratic (though in practice some are less than others, and even supposedly democratic ones have not refrained from invoking spurious national security reasons).

[96] Among many: UNHCR, Communication No. 1128/2002, *Rafael Marques de Morais v Angola*, UN Doc. CCPR/C/83/D/1128/2002 (18 April 2005) § 6.8; UNHCR, Communication No. 1157/2003, *Patrick Coleman v. Australia*, U.N. Doc. CCPR/C/87/D/1157/2003 (17 July 2006) § 7.3.

the legitimate aims, shifting then to necessity and proportionality in order to verify the lawfulness of the limitation.[97]

Even though the HRCtee has not explicitly endorsed the margin of appreciation doctrine,[98] and in some instances it might seem that it has openly refuted it,[99] it has been convincingly demonstrated by James Crawford that the HRCttee has been "speaking silently" the language of the margin of appreciation.[100] In practice, even the HRCttee accords some form of discretion to states in determining the public interests at stake.[101]

Thus, as noted regarding the ECtHR case law, it is not a surprise that the HRCttee too has failed to clarify in more abstract terms what national security means. In a similar fashion to the ECtHR, the much more limited body of views of the HRCttee is very fact-specific and does not usually articulate the reasoning along more abstract conceptual discussions on legitimate aims amenable to wider application.

[97] *Rafael Marques de Morais v Angola*, § 6.8 provides a good illustration of this approach: "Even if it were assumed that [the defendant's] arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims". See also UNHCR, Communication No. 492/1992, *Peltonen v Finland*, UN Doc. CCPR C/51/D/492/1992 (21 July 1994) § 8.4 (in which the HRCttee conflated the analysis of the legitimate aim with the issue of necessity).

[98] For some insights on this point, see Dominic Mcgoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65 International and Comparative Law Quarterly 21.

[99] For example, in General Comment 34 (n 84) § 36, the HRCttee noted that "the scope of this freedom [of opinion and expression] is not be assessed by reference to a 'margin of appreciation'".

[100] James Crawford, Preface to Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002). See, for a similar position, Yuval Shany, 'All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee' (2018) 9 Journal of International Dispute Settlements 180.

[101] Shany (n 100) 189-198. This is true also concerning specifically national security cases: see the already cited *A.K. and A.R. v Uzbekistan*, § 7.2 and *Karker v France*, § 9.2.

6. The case law of the Inter-American human rights organs

In the American Convention on Human Rights (ACHR), national security constitutes an express ground for limitation of freedom of thought and expression (Art.13), right of assembly (Art.15), freedom of association (Art.16) and freedom of movement and residence (Art.22).

Neither of the bodies tasked with the oversight of the ACHR – the Inter-American Commission (IACHR) and the Inter-American Court (IACtHR) – has defined national security.[102] What appears clear from the case law is that terrorism falls within the concept of national security.[103] Also evident in the case law is the two bodies' concern about specious national security claims raised by states. For example, the Court has rejected the argument that compulsory licensing of journalists has something to do with national security,[104] and the claim that states can invoke national security concerns to refuse to supply information to courts and administrative authorities in charge of investigations into human rights violations.[105] Moreover, the Commission has found that ordinary crimes do not fall within the concept of national security, because "the level of ordinary crime, however high this may be, does not constitute a military threat to the sovereignty of the State."[106] This latter reference to military threats and state sovereignty seems to allude to a realist-inspired notion of national security.

In general, the case law of the Inter-American human rights bodies reflects the approach followed by other human rights courts and bodies to assess the permissibility of rights

[102]Vanessa Peidro, 'Las Cláusulas de Seguridad Nacional en el Sistema Interamericano de Protección de los Derechos Humanos' (2004) 147 Estudios Internacionales 97, 100.
[103] See, for some references to the relevant case law, IACHR, *Report on Terrorism and Human Rights* (22 October 2002).
[104] I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of 13 November 1985, § 63. However, for the Court the licensing of journalists pertains to public order and the just demand of the general welfare in a democratic society, two grounds that might overlap with the concept of national security.
[105] I/A Court H.R., *Myrna Mack Chang v. Guatemala*. Judgment of 25 November 2003, § 180.
[106] IACHR, *Report on the Situation of Human Rights in Mexico* (September 1998) § 403.

limitations. Referring often to the case law of the ECtHR and the HRCttee, the Commission and the Court ordinarily follow the three-pronged test, consisting of verifying the lawfulness of the restriction with respect to the legitimate aims invoked, and assessing its necessity and proportionality.[107] As with the case law of the other human rights courts and bodies, necessity and proportionality play key roles in the review process.[108]

However, a distinct aspect of the Inter-American case law concerns the acknowledgment by the Convention bodies of the importance of drawing some definitional boundaries of the legitimate aims. The IACHR has in fact stressed that states are not free to interpret legitimate aims such as "national security", "public safety" and "public order". Instead, these aims must be interpreted "in accordance with the Inter-American legal framework".[109] While the IACtHR has not attempted a definition of national security, it has defined the closely-related aim of "public order" as a "reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles."[110] In addition, it has defined the concept of "general welfare" under Art.32(2) as "referring to the conditions of social life that allow members of society to reach the highest level of personal development

[107] Among many: *Compulsory Membership*, § 46; I/A Court H.R., *Herrera-Ulloa v Costa Rica*. Judgment of 2 July 2004 § 120-23; I/A Court H. R., *Tristán Donoso v Panama*. Judgment of 27 January 2009, § 116-119; I/A Court H.R., *Claude Reyes et al. v Chile.* Judgment of 19 September 2006, § 88-91. See, for some comments, Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights. Case Law and Commentary* (Oxford University Press 2011) 552-558.

[108] The pre-eminence of proportionality is further demonstrated by the development in the case law of some distinctive elements of the proportionality review, such as that restrictions must be "closely tailored to the accomplishment of the legitimate governmental objective necessitating it": *Compulsory Membership*, § 46. See also I/A Court H.R., *Kimel v Argentina*. Judgment of 2 May 2008, § 83. It is not fully clear whether this requirement is part of the overall proportionality assessment, or a distinct prong of the review process. The Court has specified further that it will scrutinise "i) the degree of impairment of one of the rights at stake, establishing whether the extent of such impairment was serious, limited, or moderate; ii) the relevance of the satisfaction of the opposing right, and iii) whether the satisfaction of the latter justifies the restriction of the former" (*Kimel v Argentina*, § 84).

[109] IACHR, Office of the Special Rapporteur for Freedom of Expression, Protest and Human Rights. *Standards on the Rights Involved in Social Protest and the Obligations to Guide the Response of the State* (September 2019) § 37.

[110] *Compulsory Membership*, § 64.

and the optimum achievement of democratic values."[111] By looking at these definitions, it is arguable that at least some conceptual elements might be applicable also to a (wide) concept of national security, raising the issue of the unclear overlapping between legitimate aims already noted in section 3.1.

Evidently, those definitional attempts, though praiseworthy, leave the meaning of the two concepts still quite open-ended. By failing to specify what those "conditions" underlying public order and general welfare are, the IACtHR is in fact leaving states with the quite broad power to determine them. The Court itself has been mindful of recognising "the difficulty inherent in the attempt of defining with precision the concepts of "public order" and "general welfare."[112] Arguably, the Court would face the same difficulty should it attempt to define national security in the future.[113] This raises the broader question, again,[114] of what features legal definitions should have in order to serve as a means to compel states to invoke legitimate aims in a more legally meaningful way.[115]

In any event, the propensity of the Inter-American bodies to define at least some of the legitimate aims might be explained through the troubled history of the American continent. Especially in Latin and Central America, many illiberal regimes in power throughout the 20th century have greatly exploited concepts such as public order and national security to justify repressive measures resulting in a wide curtailment of rights.[116] Both the IACHR and the

[111] Ibid § 66. The quote continues: "In that sense, it is possible to conceive of the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual as an imperative of the general welfare".

[112] Ibid § 67.

[113] Peidro (n 102) 102.

[114] See the remarks made with respect to the definition of emergency in section 3.2 above.

[115] Chapter 3 will deal specifically with this question.

[116] For example, the US-sponsored "National Security Doctrine" was developed to contain the spread of communism in Latin American countries. There is a large volume of literature on this matter. See, among many: Daniel Feierstein, 'National Security Doctrine in Latin America. The Genocide Question' in Donald Bloxham and A. Dirk Moses (eds), *The Oxford Handbook of Genocide Studies* (Oxford University Press 2010) 489-508; Luis Roniger, Mario Sznajder, *The Legacy of Human Rights Violations in the Southern Cone* (Oxford University

IACtHR have played a significant role in exposing human rights violations throughout the region, contributing to the establishment of historical truth in many landmark decisions. [117]

Against this historical background, a statement of the Inter-American organs stressing that public order and general welfare "must be subjected to an interpretation that is strictly limited to the 'just demands' of "a democratic society""[118] can be read as an attempt to firmly entrench these concepts in those principles of democratic societies too often neglected in the Americas. Similarly, the Court has highlighted the "double nature" of these general interests:

> both concepts can be used as much to affirm the rights of the individual against the exercise of governmental power as to justify the imposition of limitations on the exercise of those rights in the name of collective interests. In this respect, the Court wishes to emphasize that "public order" or "general welfare" may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content.[119]

In any event, as already highlighted, definitions such as the ones proposed by the Inter-American bodies, due to their still open-ended character, can hardly be seen as sufficient tools to circumscribe the states' power to invoke legitimate aims. Necessity and proportionality seem to remain essential in the process of scrutinising the overall permissibility of restrictions also under the Inter-American human rights framework. In addition, like the HRCttee, Inter-American bodies have not wholeheartedly espoused the doctrine of margin of appreciation,[120]

Press 1999); Ariel Armony, *Argentina, the United States and the Anti-Communist Crusade in Central America, 1977-1984* (Ohio University Press 1997).

[117] That the Inter-American bodies have played this significant role has been amply documented: Robert K. Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Quarterly 856; Richard J. Wilson and Pat Paterson, 'The Most Important Cases of the Inter-American Commission on Human Rights' (2014) 15 Security and Defense Studies Review 139; Tom Farer, 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox' (1997) 19 Human Rights Quarterly 510.

[118] *Compulsory Membership*, § 67.

[119] Ibid § 67.

[120] Nasiruddeen Muhammad, 'A Comparative Approach to Margin of Appreciation in International Law' (2019) 7 The Chinese Journal of Comparative Law 212, 221-223.

out of fear that an unconditional application of such a doctrine would allow some states to come up with specious interpretations of what is in the public interest.[121] However, in spite of this reluctance, both the Commission and the Court have increasingly recognised that the margin of appreciation doctrine informs the Inter-American human rights supervision system,[122] and the doctrine has been applied also in relation to national security.[123]

A final mention should be made to "security of all", featured in Art.32(2) as one of the grounds allowing for rights limitations in general, together with "general welfare" and "the rights of others."[124] Neither the Commission nor the Court have had the opportunity to provide a definition of these terms. The IACtHR has simply clarified that general limitations under Art.32(2) do not automatically apply to all rights in the Convention, and especially do not apply to those rights which already contain specific limitation clauses.[125] This interpretation would, in theory, prevent a situation in which a state might invoke both national security and security of all as cumulative grounds for restrictions. However, it remains conceptually unclear what differentiates national security from the security of all. One can only speculate that "security of all" might refer to the security of individuals, as opposed to national security that arguably refers to the security of the state.

[121] This seems in line with the IACtHR's definitional zeal of some legitimate aims noted above.
[122] IACHR, *Vásquez Vejarano v Peru*. Decision of 13 April 2000, § 55; I/A Court H.R., *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of 19 January 1984, § 62.
[123] I/A Court H.R., *Habeas Corpus In Emergency Situations*, § 24. For a discussion of the margin of appreciation in national security cases, see Peidro (n 102) 108-111.
[124] Art.32(2): "The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society". A corresponding provision can be found in Art.27(2) of the African Charter of Human and Peoples' Rights, which refers to the even more ambiguous concept of "collective security": see next section.
[125] *Compulsory Membership*, § 65. See the different approach taken by the African bodies in the following section.

7. The case law of the African human and peoples' rights organs

The African Charter on Human and Peoples' Rights (ACHPR) is the youngest regional human rights treaty, having been adopted by the former Organization of African Unity in 1981.[126] As with the Inter-American system, two distinct bodies are charged with the task of overseeing compliance with the Charter: the African Commission on Human and Peoples' Rights (ACoHPR) and the African Court on Human and Peoples' Rights (ACtHPR). Due to their young age in comparison with their equivalent bodies within other international and regional human rights systems,[127] the jurisprudence of the African Commission and African Court is much more limited.[128] Nonetheless, in comparison with the other human rights treaties examined so far, the ACHPR is peculiar in that it employs the widest variety of security-related terms,[129] making the Charter an interesting object of enquiry.

In common with other human rights treaties, the ACHPR allows limitations of some rights on the ground of national security. Under the Charter, only freedom of assembly (Art.11) and the right to leave and to return to one's country (Art.12(2)) contain an express national security limitation.[130]

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[126] It came into force on 21 October 1986. To date, 54 states have ratified the Charter. The Organization of African Unit was disbanded in 2002 and replaced by the African Union.

[127] While the African Commission has been part of the original architecture set up by the ACHPR, the African Court was established by the 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The Protocol entered into force on 25 January 2004.

[128] In about thirty years of activity, the African Commission has issued 291 decisions: < www.achpr.org/statistics > (accessed 3 April 2021). As of September 2019, the African Court has received 238 applications and decided 62 cases, with 172 pending applications: < en.african-court.org/index.php/cases#statistical-summary > (accessed 3 April 2021).

[129] As the table in section 2 shows, the ACHPR employs the terms "national security", "security of the state", "collective security" and "international peace and security."

[130] There are, however, other "security-related" limitations, such as, for example, the one contained in Art.8: "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, *subject to law and order*, be submitted to measures restricting the exercise of these freedoms" (emphasis added). Other limitations are so broad as to allowing security interests to be included. For example, Art.14: "The right to property shall be guaranteed. It may only be encroached upon in the *interest of public need or in the general interest of the community* and in accordance with the provisions of appropriate laws" (emphasis added).

The case law on limitations under Art.11 and Art.12(2) is very scarce, thus it can hardly provide guidance on the concept of national security in the African system. The African Commission has only reiterated that restrictions must be grounded in the permissible limitations, finding a violation when states failed to provide any sort of justification.[131] On the basis of this approach, the Commission found that respondent states had not come up with sufficient elements to show, for example, that unauthorised meetings organised by members of a minority,[132] or the defendants' human rights work and cooperation with the International Criminal Court,[133] constitute threats to national security. However, these are issues of evidence, rather than substance: in fact, the Commission did not rule out *a priori* that these facts fall outside the concept of national security, leaving instead the door open for the possibility that they might be.[134]

Much more interesting is the case law on Art.27 of the Charter, that introduces the section on the duties of individuals. The detailed list of duties set out by the ACHPR reveals the uniqueness of the African human rights system, which is deeply embedded in the role of various social organisations in the African traditions and that are interposed between the individual and the state.[135] The provision bears some importance for the purpose of understanding the meaning of security in the African human rights system.

[131] See, for example, Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98, *Malawi African Association and others v Mauritania*, 11 May 2000, § 111; Communication 379/09, *Monim Elgak, Osman Hummeida and Amir Suliman v Sudan*, 10 March 2015, § 124-126; Communication 212/98, *Amnesty International v Zambia*, 5 May 1999, § 50.

[132] *Malawi African Association and others v Mauritania*, § 111.

[133] *Monim Elgak, Osman Hummeida and Amir Suliman v Sudan*, § 120-126.

[134] In fact, in *Monim Elgak, Osman Hummeida and Amir Suliman v Sudan*, § 126, the Commission held that the defendants "have a right of return to their country except if it can be shown that their return will be a danger to national security, law and order or public health or morality."

[135] For an overview on the concept of duties under the ACHPR (and more generally), see Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff 2003) 377-421. As the author reminds, the concept of duty is also present in other human rights treaties, such as the UNDHR (Art.29).

Art.27 reads:

> 1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
>
> 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

While paragraph 1 has been mostly ignored by the African Commission and Court, paragraph 2 has generated much more relevant jurisprudence.[136] At textual level, paragraph 2 appears to deal with the duty of individuals to refrain from the abusive exercise of rights.[137] Ouguergouz has expressed concerns that the broad wording of public interests might carry the risk of them being used to unduly restrict the exercise of rights.[138]

However, even though Art.27(2) is placed under the section on individual duties, the case law of the African Commission and Court has interpreted the provision as a general limitation clause. In fact, the African bodies have used Art.27(2) to build into the ACHPR those guarantees well-known to other international and regional human rights systems,[139] such as that limitations must serve a general purpose, be necessary in a democratic society and proportional to the aim sought.[140] In this respect, the case law of the African human rights organs does not substantially differ from the case law of other human rights courts and bodies. The general

[136] Rachel Murray, *The African Charter on Human and Peoples' Rights. A Commentary* (Oxford University Press 2019) 582-583.
[137] Ibid.
[138] See Ouguergouz (n 135) 402. It is useful to compare Art.27(2) with the much more narrowly drafted text of Art.17 ECHR (Prohibition of abuse of rights): "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."
[139] Murray (n 135) 582.
[140] For example: Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Others v. Nigeria*, 31 October 1998, § 69; African Court (App. 004/2013), *In the Matter of Lohé Issa Konaté v Burkina Faso*, 5 December 2014, § 132-138; African Court (App. 009/2011 and 011/2011), *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania*, 14 June 2013, § 106.1 and 107.1-107.2.

approach followed by the Court and the Commission is to preliminarily accept that a limitation might fall within the scope of one of the legitimate aims, and to focus pre-eminently on necessity and proportionality of the limitations.[141] The African organs also recognise that "the margin of appreciation doctrine informs the African Charter",[142] although references to the doctrine are more on ad hoc basis than consistent.[143]

It is important to note that, in contrast with the Inter-American case law, the general limitation clause of Art.27(2) has been deemed applicable to all rights, including those which already contain their own legitimate aims[144] (for example, the mentioned Art.11 and Art.12(2)).

This interpretation, admittedly, leaves many questions unanswered. In fact, it has not been clarified to date how this general limitation clause would interact with specific limitations set out in some provisions. If states were able to invoke legitimate grounds under Art.27(2) in addition to grounds under, for example, Art.11, then the power to restrict rights might be far greater than under other human rights treaties. Such a scenario would pose complicated conceptual problems in relation to security. Art.27(2) refers to "collective security", whereas Art.11 and Art.12(2) mention "national security". In the absence of any clarification about the meaning of "collective security",[145] one might wonder whether the term refers to the specific concept of collective security under general international law,[146] or simply to the security of

[141] Clear examples of this approach are, among many, African Court (App. 003/2014), *Umuhoza v Rwanda*, 24 November 2017, § 162; *Tanganyika Law Society and others v Tanzania*, § 107.2.
[142] Communication 255/02, *Garreth Anver Prince v South Africa*, 7 December 2004, § 51.
[143] Murray (n 136) 583.
[144] Ibid 583. However, the African bodies' case law has aligned with an established tenet of IHRL, finding that some rights cannot be subjected to limitation, such as the prohibition of torture. Among many, Communication 368/09, *Abdel Hadi, Ali Radi and Others v Republic of Sudan*, 5 November 2013, § 69.
[145] The *travaux* are, as usual, quite unhelpful to make sense of its meaning: see Frans Viljoen, 'The African Charter on Human and Peoples' Rights: The *Travaux Préparatoires* in The Light of Subsequent Practice' (2004) 25 Human Rights Law Journal 313.
[146] In International Law, collective security can be understood in essence as the "collective action in response to a collectively identified threat": Alexander Orakhelashvili, *Collective Security* (Oxford University Press 2011) 4.

individuals and groups ("the collectivity").[147] The Court has not provided a clear interpretation of the meaning of collective security, but has instead generated more confusion. In the only case related to collective security under Art.27(2), it has first reiterated that freedom of expression can be limited on the ground of collective security, and then that restrictions imposed upon the applicant's freedom of expression served the legitimate aim of protecting *national* security.[148] For the Court, the crimes for which the defendant was convicted (terrorism-related crimes and the propagation of the ideology of genocide) were in principle serious enough as to potentially having grave repercussions on Rwanda's national security.[149] Eventually, the Court dismissed, on the basis of the facts of the case, that the defendant's conducts were likely to have such repercussions, highlighting that "the legitimate exercise of rights and freedoms by individuals is as important as the existence and proper application of such laws [criminalising terrorism and genocidal conducts] and is of paramount significance to achieve the purposes of maintaining national security […]".[150] Interestingly, then, for the Court the exercise of rights falls within the notion of national security. It remains, however, unclear the relationship between national and collective security under the ACHPR, that are in practice treated as synonymous by the Court.

This conceptual confusion is further exacerbated by an additional mention of security in the ACHPR. Art.29, which specifies the duties of individuals, states that individuals shall have the duty, among others, "not to compromise the security of the State whose national or resident he

[147] This interpretation might be supported by comparing "collective security" with the term "security of all" found in Art.32(2) of the ACHR.
[148] *Umuhoza v Rwanda*, § 139-141.
[149] Ibid § 141.
[150] Ibid § 148.

is" (paragraph 3).[151] Here, "security of the state" might well be synonymous with "national security",[152] although it remains unclear why the ACHPR employs, again, another term.

The negative formulation of the duty as a duty "not to compromise" instead of a positive formulation such as, for example, "to participate in the maintenance" leads to the interpretation that individuals should refrain from any act or omission likely to endanger the security of the state. This duty overlaps to a great extent with another one, namely the duty "to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his defence in accordance with the law"[153] (paragraph 5), which is instead formulated in positive terms.[154]

In brief, what is striking about the ACHPR is the different terminology employed to refer to security. In addition to "national security", "collective security" and "security of the state", a fourth term appears: "international security", which is mentioned in Art.23 in the context of the *right to* national and international peace and security. For systematic reasons, this right – which has no equivalent in other human rights treaties – will be discussed in Chapter 4, section 4.[155]

[151]Ouguergouz (n 135) 410, maintains that the provision is particularly significant for political refugees resident in the State's territory, who are more likely to engage in subversive activities against the host state.

[152]In fact, both the African Commission and some states reporting periodically to the Commission have referred to the "security of the state" in matters that might well concern "national security", such as the disclosure of secret information and terrorism. For an overview, see Murray (n 136) 588-589.

[153]As noted in section 3.1, interests such as "national independence" and "territorial integrity" are so closely tied with national security as to making their conceptual dissociation hardly possible.

[154]In addition, since collective security also appears in the opening provision on duties (the mentioned Art.27), the question remains of why the ACHPR does not provide also for a duty not to compromise the collective security (whatever it means).

[155]Chapter 2, section 3, will instead examine the meaning of "international peace and security" under the UN Charter.

8. Some trends emerging from the human rights case law on security provisions

Even though the case law analysed in the previous sections tends to be quite fact-specific, some common trends can be derived from the human rights courts and bodies' decisions on security provisions that might help understand how they tackle the concept of security in IHRL.[156]

The most evident aspect is that none of the courts and bodies have come up with a definition of national security, nor have they clarified what differentiates national security from other security-related terms that sporadically appear throughout human rights treaties (such as "security of all" or "collective security"). The reason for this definitional avoidance can arguably be found in the adjudication technique adopted by courts and bodies, that derives from the function of security provisions in IHRL. As noted above, security provisions in the treaties usually serve the purpose of providing states with a ground (explicit or implicit) to try to justify limitations of (some) rights.[157] The review of the compatibility of limitations, firmly established in IHRL, consists of three prongs: verifying the existence of a legitimate aim justifying the limitation, and scrutinising the necessity and proportionality of the limitation. The tendency of human rights courts and bodies is to avoid questioning the substance of the invoked legitimate aim(s), and to focus on necessity and proportionality. To do so, they tend to easily accept that a limitation pursues a legitimate aim, so that they can shift to the necessity and proportionality

[156] Since this section deals with "trends" across the case law, a certain level of abstraction from the particularities of each case is needed. For the same reason, it is also not the intention of this section to downplay the nuances existing between different courts and bodies in relation to the way they have developed their respective case law.

[157] This function is evident with respect to "national security" and "security of all". It is less obvious with respect to "collective security" under Art.27(2) of the ACHPR. However, African human rights bodies have interpreted the provision as a general limitation clause: see discussion in section 7. I am not taking into account here the formulation "security of the State" under Art.29 of the ACHPR, that is not a ground for limitations, but an individual duty. As noted in section 7, the exact meaning of the provision has not been clarified to date.

assessment.[158] Stavros Tsakyrakis has called this approach "definitional generosity",[159] that allows judges[160] to keep an open mind on what sort of claims might *prima facie* falls within the ambit of a legitimate aim.

There are, however, instances in which courts and bodies have exhibited less generosity, for example by ruling out from the start that certain issues would fall within the legitimate aim of national security.[161] Likewise, there are some attempts in the case law to define (at least some) legitimate aims, albeit quite generically.[162] However, these instances appear to be the exception, rather than the rule. The overall approach of human rights courts and bodies is to focus on necessity and proportionality, that seem to form the cornerstone of the review of the compatibility of limitations with the human rights system.

If the limited review of the legitimate aims appears to have prevented the emergence of a legal definition of national security (as well as other security-related terms) in the case law, there are some indications, as noted throughout previous sections, that national security might refer to the realist-inspired concept of state security against military and military-like threats. This can be inferred by the type of threats that are routinely accepted as falling within the scope of the concept, such as, for example, terrorism, espionage, secession and attempts to overthrow the government.[163] However, there are also some indications that the concept is wider than that, as

[158]Admittedly, even the analytical distinction between necessity and proportionality is contested, since human rights courts and bodies often examine the two prongs together, with necessity often being subsumed within proportionality: see Marisa Iglesias Vila, 'Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights' (2017) 15 International Journal of Constitutional Law 393, 408.

[159]Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468, 488.

[160] And independent experts of the HRCttee.

[161] See, for example, some decisions of the Inter-American bodies (section 6) and of the African bodies (section 7).

[162] See the definitions of public order and general welfare provided by the IACtHR (section 6).

[163] See previous sections on this matter.

it encompasses also, for example, the protection of human rights.[164] Nonetheless, due to the tendency of courts and bodies to often accept national security claims generically invoked by states, it cannot be determined with precision what are the exact confines of the concept.[165]

In any event, if the limited review of the legitimate aim with the consequent shift towards necessity and proportionality might explain why a definition of national security (and other security provisions) has not emerged in the case law, it is not by itself sufficient to explain why human rights courts and bodies tend to sidestep the substantive enquiry into the scope of the legitimate aims, that is still an integral part of the overall process of reviewing restrictions of rights.

An explanation can be attempted by referring to two interrelated challenges encountered by human rights courts and bodies that might justify their definitional aversion.[166]

The first is a *conceptual challenge*: human rights courts and bodies might seek to avoid defining national security because legitimate aims are inherently difficult to define. This difficulty is exacerbated by the proliferation of many security-related terms, as well as other overlapping aims (such as public order, safety and the like) in the treaties that makes it nearly impossible to draw clear conceptual boundaries between each other.[167] Since treaties constitute the basis of the courts and bodies' interpretative activity, the conceptual challenge has its root causes in the vagueness of some of their provisions (revealing an accumulation of formally different, though substantially similar, terms not carefully thought through by the drafters). In the case law analysed, there are some explicit, albeit rare, allusions to the conceptual challenges encountered

[164] As noted by the ACtHPR: see section 7.
[165] This is particularly true whenever courts and bodies defer to national courts the scrutiny of the existence of national security reasons: see, on this point, the remarks made in section 4.
[166] Some of these challenges have been already outlined in section 4 in relation to the case law of the ECtHR. Here, those findings are extended in relation also to the case law of other human rights courts and bodies.
[167] The problem of drawing conceptual distinctions between similar concepts has a great impact on the search for the meaning of security in ordinary language and in law, as Chapter 3, section 3, will demonstrate.

by human rights courts and bodies.[168] Another indication can be found in the fact that, in the few occasions in which they have attempted to define some legitimate aims (namely, public order and general welfare), the resulting definitions have remained rather generic.[169]

The second is a *legitimacy challenge*: human rights courts and bodies might implicitly acknowledge that defining security is also defining what types of threats states can legitimately include within the scope of the concept, and, conversely, what types of threats should be excluded. This aspect is never explicitly recognised in the case law, but can be inferred from the discretion human rights courts and bodies afford to national authorities and, in turn, from the subsidiary nature of the proceedings before them. The margin of discretion, accepted in some form by all human rights courts and bodies,[170] has been developed for the precise purpose of avoiding judges substituting states' determinations of what is in the public interest ("the pressing social needs") with their own determinations. Lying behind such a discretion is the assumption that judges lack the legitimacy to second-guess states' decisions on issues that are highly politically-charged.[171] In addition to that, the discretion is premised on the subsidiary nature of the proceedings before supra-national human rights courts and bodies, according to which the primary responsibility for the implementation of the rights set forth in a treaty and for the remedy of their violations lies with (non-judicial and judicial) national authorities.[172]

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[168] See, for example, *Esbester v UK*, in which the former European Commission held that "the term 'national security' is not amenable to exhaustive definition" (discussed in section 4); *Compulsory Membership*, § 67, in which the IACtHR highlighted "the difficulty inherent in the attempt of defining with precision the concepts of "public order" and "general welfare." (discussed in section 6).

[169] *Compulsory Membership*, § 64 and 66 (see the discussion of these definitions in section 6). A similar genericity affects the definition of emergency, as noted in section 3.2.

[170] As noted in previous sections, human rights courts and bodies subscribe to the general idea that states enjoy some form of discretion in assessing public interests, although the degree of acceptance of what in the European context is usually known as "doctrine of margin of appreciation" varies, with the HRCttee and the Inter-American bodies showing more reluctance to apply the doctrine than the ECtHR.

[171] On the issue of legitimacy, see Legg (n 68) 69-102.

[172] It is not possible here to delve more into the different ways the principle of subsidiarity operates in practice with respect of each court and body considered in this Chapter. For the purpose of the argument pursued here, it is sufficient to say that proceedings before all these human rights courts and bodies can begin only after the exhaustion of domestic remedies. From this perspective, "the principle of subsidiarity thus refers to

Since defining the concept of security and assessing threats are dependent upon each other, the lack of legitimacy of judges sitting in supra-national courts and bodies to decide what constitutes a threat to security translates into a lack of legitimacy *to define* security. Or, put it differently, the discretion granted to states in relation to the determination of threats to national security translates into a discretion in relation to the state power to fill the concept with meaning. Since the relationship between, on the one hand, international and regional human rights courts and bodies and, on the other hand, national authorities, is governed by subsidiarity, supra-national judicial and quasi-judicial organs tend to defer to national (judicial and non-judicial) authorities the task of interpreting security provisions, exhibiting some reluctance to make more definite determinations on the meaning of concepts.[173]

In this context, a subtle paradox should be pinpointed: even if human rights courts and bodies are the ultimate interpreters of the treaties, and thus have full legitimacy to interpret the meaning of legal concepts, in practice they tend to shy away from the task when the interpretation of some concepts, such as security, cannot be easily disentangled from the much more politically-sensitive issue of what constitutes a threat to security. For supra-national judges, such an issue is better tackled at the national level.[174]

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a *chronological* or *procedural* priority of domestic control over international control": Letsas (n 68) 722 (italics in the original).

[173] In fact, a common critique of the margin of appreciation and of subsidiarity is that, when used as hermeneutic devices, they have prevented the emergence of generalisable legal answers and provoked some structural incoherence: Marisa Iglesias Vila, 'Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights' (2017) 15 International Journal of Constitutional Law 393, 406; Jeffrey A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2005) 11 Columbia Journal of European Law 113, 125-147.

[174] In the European context, this is symptomatic of the ECtHR's recent tendency to use subsidiarity to avoid clashing with states over politically-sensitive issues. On the issue, see Janneke Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"' in Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law* (Intersentia 2014) 13; Oddný Mjöll Arnardóttir, 'The Brighton Aftermath and the Changing Role of the European Court of Human Rights' (2018) 9 Journal of International Dispute Settlement 223. See also footnote 71 on this issue in relation to national security.

This explain the human rights courts and bodies' tendency to be generous in relation to what falls within the boundaries of a legitimate aim, and to shift to necessity and proportionality. By employing this strategy, if courts and bodies have doubts as to whether a given situation falls within the ambit of security, they can challenge states *not* by dismissing their determinations as such, but through the necessity and proportionality assessment.[175] This way, the combined operation of the three-pronged review allows judges to eventually decide cases while bypassing the interpretation of security provisions.

9. Conclusion

The chapter has shown that human rights courts and bodies have to date refrained from defining the meaning of security terms contained in international and regional human rights treaties. As the survey of the case law has demonstrated, courts and bodies usually tend to sidestep the substantive analysis of the meaning of security provisions that constitute legitimate aims to restrict rights, shifting the core of their review of the lawfulness of restrictions to necessity and proportionality. It was argued that the reason for this shift, that in practice translates into a definitional avoidance, lies with the conceptual and legitimacy challenges encountered by human rights courts and bodies.

The following Chapter will look outside IHRL to enquire into whether similar challenges are encountered only by human rights courts and bodies or, on the contrary, are faced also by those non-human rights courts and bodies that are tasked with the interpretation of security provisions under some treaties.

[175] This is, again, a *trend*, because there are instances, albeit rare, in which courts and bodies have dismissed states' claims that some situations constitute security threats (see, for some examples, section 4 above).

Chapter 3 will then draw from these findings in order to investigate more closely the issue of why defining security in law appears such a difficult endeavour, that in turn will require a more wide-ranging enquiry into the process of defining concepts in law.

The overall review strategy adopted by human rights courts and bodies raises more complex problems that will require a deeper scrutiny of the reasons for which, at a more general level, it seems to be much easier to answer the question “is security compatible with rights?”, rather than “what does security mean?”. Chapter 5 will deal with this problem from a much broader perspective.

CHAPTER 2

SECURITY PROVISIONS BEYOND INTERNATIONAL HUMAN RIGHTS LAW

1. Introduction

The previous Chapter established that human rights courts and bodies have to date failed to clarify the conceptual boundaries of national security and other security-related terms appearing in human rights treaties. The reason for that was found in the judicial and quasi-judicial bodies' reluctance to review the substance of security, and their tendency to turn the main focus of the review of the lawfulness of restrictions of rights to the necessity and the proportionality of the security measures.

The present Chapter will broaden the scope of the enquiry into the legal meaning of security, by looking at how other international courts, as well as EU courts, have faced the task of reviewing security provisions under the treaties that they are asked to interpret. The purpose of this investigation is twofold: on the one hand, I will try to understand whether non-human rights courts have managed to devise a legal definition of security; on the other hand, I will try to understand whether these courts have encountered the same types of challenges that human rights courts and bodies have faced with regard to defining security and, if so, how they have tried to overcome them. As with the human rights case law, the expectation is that international and EU courts called upon to adjudicate states' security claims might have clarified the scope of security provisions, giving some content to the meaning of security-related terms.

As this Chapter will show, the question of whether these courts have attempted to define security is linked to the type of review that they usually carry out when security provisions are engaged. It will be shown that the breadth of the review of security provisions varies according to the court involved in the review process, as well as the security provision that they are called upon to interpret. While in some instances courts have carried out a very weak scrutiny of the substantive concept(s) of security, or at times even declared that they are not reviewable, other courts have not refrained from discussing at length the meaning of security terms, sometimes going as far as providing some sort of definitions. In the latter case, even when necessity and proportionality play some role in the reviewing process, some courts behave differently from human rights courts and bodies, because they do not necessarily turn to necessity and proportionality assessments to bypass the challenge of defining substantive security terms.

The Chapter will show that, when such definitions are present, the meaning of security provisions have remained quite open-ended, and usually different security terms are not clearly distinguishable from each other.

2. "Self-judging" security exceptions in international law

Outside IHRL, security provisions appear frequently in other branches of international law. Schloemann and Ohlhoff have observed that these provisions are normally devised as "exceptions" from the general obligations established by a treaty:

> [n]ational security is the Achilles' heel of international law. Wherever international law is created, the issue of national security gives rise to some sort of loophole, often in the form of an explicit national security exception. The right of any nation-state to protect itself in times of serious crisis by employing otherwise unavailable means has been a bedrock feature of the international legal system. As long as the notion of sovereignty

> exerts power within this evolving system, national security will be an element of, as an exception to, the applicable international law.[1]

Understood as exceptions from a treaty regime, security provisions in international law are not so different from those provisions on (mostly national) security found in IHRL, that are also conceived as allowing states to deviate from the ordinary treaty regime mandating them to protect human rights.[2]

Security exceptions in international treaties belong to the category of so-called "self-judging clauses".[3] The purpose of self-judging clauses is to allow states to enter international agreements while at the same time retaining the power to escape their legal obligations by invoking interests of security, public policy or, more generally, essential interests, without incurring liability for a breach of the treaty.[4] Their self-judging nature stems from the fact that the determination of the essential interest at stake is unilaterally and discretionally made by the invoking state.[5] The term "self-judging" is somewhat misleading, because it seems to imply that their invocation can shield states from review by an international court. As this Chapter will show, while in some instances it might be the case, in other circumstances international courts have not refrained from reviewing more closely the state's reliance on self-judging clauses.

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[1] Hannes L. Schloemann and Stefan Ohlhoff, '"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence' (1999) 93 The American Journal of International Law 424, 426. The authors refer to "national security", although treaties often use different security terminology, as we will see throughout this Chapter.

[2] Arguably, the issue is much more complex than this, because it can be said that rights limitations on national security grounds serve the purpose of enhancing the overall level of human rights protection for the people at large. I will discuss this issue in Chapter 4, section 2, where I will examine the problem of trading off rights and security.

[3] Stephan Schill and Robyn Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) 13 Max Planck Yearbook of United Nations Law 62. On self-judging clauses on security, see more in detail Diane Desierto, *Necessity and National Emergency Clauses. Sovereignty in Modern Treaty Interpretation* (Martinus Nijhoff 2012).

[4] Schill and Briese (n 3) 67.

[5] Ibid 68.

If one accepts that these clauses are self-judging in that states are empowered to determine the substantial conditions warranting their invocation, then it might be said that little difference exists, in principle, between them and national security provisions under human rights treaties.[6] However, as we shall see, the review process of self-judging clauses adopted by international courts has not much in common with the way human rights courts and bodies deal with security provisions under human rights treaties.

Self-judging clauses on security can be found, to name but a few, in International Trade Law treaties,[7] International Criminal Law treaties[8], investment treaties,[9] as well as in bilateral or multilateral agreements on different matters.[10]

In the next two sub-sections, I will first focus on self-judging clauses on security in international trade law and, second, on the case law of the International Court of Justice (ICJ) concerning the interpretation of some security provisions in bilateral treaties.

2.1. Security exceptions in International Trade Law

A well-known example of a self-judging clause is Art. XXI of the 1947 General Agreement on Tariffs and Trade (GATT)[11], that reads:

> Security Exceptions
>
> Nothing in this Agreement shall be construed
>
> *(a)* to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential

[6] However, human rights scholarship does not normally refer to these provisions as "self-judging".
[7] Such as the 1947 General Agreement on Tariffs and Trade and the 1994 General Agreement on Trade in Services: see next section.
[8] Such as the 1998 Rome Statute establishing the International Criminal Court (Art.72, allowing states to intervene in the International Criminal Court's proceedings to protect national security information).
[9] Such as the 1992 North American Free Trade Agreement (Art.2102, authorising states to take a broad set of actions to protect their essential security interests).
[10] See section 2.2 for some examples.
[11] Currently in force under the World Trade Organisation (WTO) framework, entered into force in January 1995.

security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential
security interests

i. relating to fissionable materials or the materials from which they are derived;

ii. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

iii. taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter
for the maintenance of international peace and security.

The *travaux* show that during the negotiation states were concerned about the potential for abuse inherent in the vague wording of "essential security interests", therefore agreeing on a list of specified security interests (listed under (i), (ii) and (iii)).[12] As evident from the references to weapons, war and emergency, these listed interests broadly correspond to some areas covered by the original notion of national security. Thus, it is clear from the GATT/WTO system that not everything that a state might consider to be an "essential security interest" can be invoked to escape their obligations under international trade rules.

[12] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, pp. 20-21. In a response to the Dutch delegate asking what was meant for "essential security interests", the US delegate stated: ""We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: 'by any Member of measures relating to a Member's security interests,' because that would permit anything under the sun. Therefore, we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance. … there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose".

Already before the establishment of the WTO Dispute Settlement Body (DSB), panels operating under the GATT seemed to suggest that some form of review of the state's reliance on Art. XXI was possible, if not desirable.[13] However, it was not until the recent DSB report in *Russia – Measures Concerning Traffic in Transit*[14] – to date the only case on security exceptions decided by the DSB – that the issue was more thoroughly dealt with.

The panel was convened to adjudicate the compliance with WTO rules of measures imposed by Russia to block trade between Ukraine, Kazakhstan and the Kyrgyz Republic transiting through Russia. In a lengthy analysis, the panel dismissed the claim put forward by Russia – supported by other intervening states – that the invocation of security interests under Art. XXI was self-judging and thus the WTO panel had no jurisdiction to review it.[15] After having retraced the negotiating history of the GATT/WTO and applying the interpretative canon entrenched in the Vienna Convention on the Law of Treaties,[16] the panel firmly rejected what Desierto has called Russia's invocation of a Schmittian concept of exception.[17] In fact, it held that what is an "emergency in international relations" (under Art.XXI (b) (iii)) is amenable to objective determination, although its confines are less clear than those security interests listed under (i) and (ii)).[18]

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[13] Panel Report, *US – Export Restrictions (Czechoslovakia)* (8 June 194), GATT/CP.3/SR.22, page 3; Panel Report, *US – Trade Measures Affecting Nicaragua* (13 October 1986), L/6053, § 5.17, where the Panel rhetorically asked "If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the CONTRACTING PARTIES ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision?" (capital letters in the original text).

[14] *Panel Report, Russia – Measures Concerning Traffic in Transit* (5 April 2019), WT/DS512/R.

[15] § 7.102-7.104.

[16] Art.31 and Art.32.

[17] So Diane Desierto, 'Protean 'National Security' in Global Trade Wars, Investment Walls, and Regulatory Controls: Can 'National Security' Ever Be Unreviewable in International Economic Law?' (*EJIL:Talk!*, 2 April 2018) < www.ejiltalk.org/national-security-defenses-in-trade-wars-and-investment-walls-us-v-china-and-eu-v-us/ > accessed 8 April 2021. See also, for a critique of the decision, Jay Manoj Sanklecha, 'The limitations on the invocation of self-judging clauses in the context of WTO dispute settlement' (2019) 59 Indian Journal of International Law 77.

[18] *Russia – Measures Concerning Traffic in Transit*, § 7.71 and 7.77.

The panel can be praised for attempting some definitional efforts. First, it stressed that

> [“e]ssential security interests", which is evidently a narrower concept than "security interests", may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.[19]

On this interpretation, the concept of “essential security interests” seems to be synonymous with (realist-inspired) national security.

Second, it attempted to give some content to the term “emergency in international relations”, holding that

> [a]n emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.[20]

Third, the panel took care to specify what an emergency *is not*:

> political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii). Indeed, it is normal to expect that Members will, from time to time, encounter political or economic conflicts with other Members or states. While such conflicts could sometimes be considered urgent or serious in a political sense, they will not be "emergencies in international relations" within the meaning of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests.[21]

[19] Ibid § 7.130.
[20] Ibid § 7.76.
[21] Ibid § 7.75.

Finally, and most importantly, the panel recognised that states' discretion to invoke essential security interests is limited by their obligation to interpret GATT provisions in good faith, as generally required by the VCLT.[22] According to the Panel, the good faith obligation demands that the essential interests of security meet "a minimum requirement of plausibility".[23] Moreover, the panel specified that the level of substantiation of the essential security interests maintained by the state is not always the same, because

> the less characteristic is the "emergency in international relations" invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict.[24]

In setting out a variable onus of justification, the panel in effect seemed to be cognizant of the potential for abuse when specious security claims falling short of more traditional military threats are raised.[25]

Some observations can be drawn about the reviewability of security in the GATT/WTO system. First, emergency is not a category distinct from (national) security, as in IHRL, but it is part of the concept of security. The implication is that in international trade law there is no emergency regime underpinning the allegedly greater gravity of emergency as opposed to "ordinary"

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[22] Ibid § 7.131-7.133.

[23] Ibid § 7.138. The formulation is very similar to that of "plausible grounds" adopted in some instances by the HRCtee: see Chapter 1, section 5.

[24] Ibid § 7.135.

[25] It has been suggested that the Panel's strong stance was also meant to send a firm message against former President Trump's hostile trade policy: William Alan Reinsch, Jack Caporal, 'The WTO's First Ruling on National Security: What Does It Mean for the United States?' (*Center for Strategic and International Studies*, 5 April 2019) < www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states > accessed 8 April 2021.

(national) security. On the contrary, emergency and security go hand in hand. In contrast with emergency in IHRL, the DSB has made it clear that emergency is "very close to the 'hard core' of war and armed conflict"[26] and any interpretation by states that seeks to expand the concept must be more convincingly justified.

Second, Art. XXI is sharply different from national security exceptions set out in human rights treaties. While there is the requirement that measures taken in the interest of security be "necessary",[27] the provision does not make any reference to proportionality.[28] As a result, the structure of Art. XXI has likely influenced the structure of the review of security carried out by the DSB. It can be argued, in fact, that the absence of proportionality has forced the DSB in its first decision on security exceptions to focus carefully on the substantive requirement, rather than muddling pre-eminently with proportionality, as human rights courts tend to do. In other words, what "essential security interests" mean seems to be the key question under the GATT/WTO regime. Such question cannot be easily sidestepped in the judicial review, as there is no proportionality requirement on which a panel would be able to divert its attention to. This might explain why the Panel engages head-on and at length in defining concepts.

2.2. Security exceptions before the International Court of Justice

The ICJ has had the opportunity to adjudicate on the interpretation of so-called self-judging clauses on security in only a handful of cases.

[26] *Russia – Measures Concerning Traffic in Transit,* § 7.136.

[27] "Necessary", in the panel's interpretation, seems to mean that there must be some causal connection between the interest invoked and the measures taken: see the analysis in § 7.5.6. Eventually, the Panel found that Russia had satisfied the requirements set out in Art.XXI (b)(iii) because there was an emergency in the relations between Russia and Ukraine, and measures taken were necessary.

[28] Before the DSB's decision, some authors have maintained that a proportionality requirement is inherent in Art.XXI: Schloemann and Ohlhoff (n 1) 444-445. The DSB's report does not mention proportionality, though an implicit rejection of proportionality test might be derived from the finding that the panel does not need to examine whether less restrictive measures were possible (§ 7.108).

In *Military and Paramilitary Activities in and Against Nicaragua*[29] the ICJ was called upon to interpret a clause on the states' "essential security interests" in the 1956 Treaty of Friendship, Commerce and Navigation between the US and Nicaragua.[30]

In dismissing the argument that it had no jurisdiction to review the existence of essential security interests, the ICJ placed emphasis on the wording of the provision, finding that it differs from Art. XXI of the GATT:

> [t]his provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such.[31]

In drawing this admittedly very fine distinction,[32] in fact, the ICJ ruled *obiter* against the justiciability of security exceptions in the GATT, a position contrasted by the doctrine and dismissed, more than thirty years later, by the DSB, as seen in the previous sub-section.

Trying to give some content to the security exception, the ICJ took the rather uncontroversial position that measures taken in self-defence against an armed attack fall within the concept of "essential security interests", "but the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past".[33] However, the ICJ did not offer any further elaboration on the matter, instead moving

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[29] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment (27 June 1986), ICJ Reports 1986, p. 14.

[30] The relevant provision, Art.XXI, reads "The present Treaty shall not preclude the application of measures: […] (d) necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests".

[31] *Nicaragua v. United States of America*, § 222.

[32] The ICJ reiterated (§ 282) that "[…] by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized […], purely a question for the subjective judgment of the party; the text does not refer to what the party "considers necessary" for that purpose".

[33] § 224.

on to find that there was insufficient evidence to consider Nicaraguan policies a threat to the US essential security interests, and therefore holding that the embargo imposed by the US, as well as the attacks against Nicaraguan ports, were not "necessary" to protect those interests.[34]

The ICJ took a more explicit stance on the matter in the *Oil Platforms* decision, ruling that recourse to armed force not qualifying as self-defence under international law does not fall within the category of "essential security interests".[35] The ICJ based its conclusion on a lengthy examination of issues of self-defence under the UN Charter. In particular, the ICJ reviewed the necessity and proportionality of the actions taken by the US against Iran, finding that they were neither necessary nor proportional.[36] In fact, the ICJ linked the question of what "essential security interests" mean to the conditions justifying self-defence,[37] effectively making necessity and proportionality (of self-defence) the main focus of its review in order to eventually answer the question of whether "essential security interests" were at stake.

It was only in *Djibouti v France*[38] that the ICJ attempted to clarify the breadth of its review of a state's invocation of security interests. The ICJ was called upon to adjudicate, among other things, whether France's refusal to execute a rogatory requested by Djibouti's judicial authority

[34] § 282. The "necessary" requirement was explicitly required by the letter of Art.XXI of the Treaty (see footnote 30). The ICJ based this conclusion on the analysis of whether the US had breached international law rules on self-defence, finding in favour of Nicaragua. For a comment on the judgment, see Fred L. Morrison, 'Legal Issues in the Nicaragua Opinion' (1987) 81 American Journal of International Law 160.

[35] *Oil Platforms (Islamic Republic of Iran v. United States of America)*. Judgment (6 November 2003), ICJ Reports 2003, p. 16, § 78. The object of the review was the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran, whose Art.XX (1)(d) is identical to the corresponding provision of the Treaty between the US and Nicaragua (see text in footnote 30).

[36] *Oil Platforms*, § 76-77. The ICJ recalled its previous case law to reiterate that the conditions of necessity and proportionality with respect to the legality of self-defence are established in customary international law.

[37] The ICJ linked the two by stressing that the question of the "necessity" of measures taken to protect essential security interests "overlaps with the question of their validity as acts of self-defence" (§ 43). Thus, the ICJ continued, "a question of whether certain action is "necessary" arises both as an element of international law relating to self-defence and on the basis of the actual terms of Article XX, paragraph 1 (d), of the 1955 Treaty" (§ 73).

[38] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. Judgment (4 June 2008), ICJ Reports 2008, p. 177.

complied with the treaty on mutual assistance in criminal matters between the two countries.[39] French judges had refused cooperation on the basis that the transmission of the file to Djibouti would have jeopardised France's security interests.[40]

In asserting its jurisdiction to review the matter, the ICJ seemed to concede that only a very limited review of the security interests put forward by France was possible. In fact, the Court accepted that – under the terms of the treaty – France enjoyed "a very considerable discretion",[41] but this discretion was "still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties".[42] The Court failed to articulate in detail the test to review the claim of good faith. In the Court's opinion, it was sufficient for France to show that the reasons for the refusal fell within the ambit of the security exception set out in the treaty. In practice, the ICJ showed great deference to the evaluation made by the French judiciary, ultimately finding that "it is not for this Court to do other than accept the findings of the Paris Court of Appeal on this point".[43] As Cryer and Kalpouzos have noticed,

> [a] more sophisticated discussion of "good faith" and a more transparent application of that principle in assessing the French judiciary's actions would fend off accusations that the Court chose to interpret good faith as a toothless concept in order to fully defer to the French judge's decisions.[44]

[39] 1986 Convention on Mutual Assistance between Djibouti and France, whose Art.2(c) provides that cooperation in criminal matters "may be refused […] if the requested State considers that the execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests".

[40] The dispute concerned the investigations by both French and Djibouti into the death of French Judge Bernard Borrel, who died under mysterious circumstanced in Djibouti in 1995.

[41] *Djibouti v France*, § 145.

[42] Ibid.

[43] § 146.

[44] Robert Cryer, Ioannis Kalpouzos, 'International Court of Justice, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* Judgment of 4 June 2008' (2010) 59 International and Comparative Law Quarterly 193, 200. For a similar criticism, see Robyn Briese, Stephan Schill, 'Djibouti v France: Self-judging Clauses before the International Court of Justice' (2009) 10 Melbourne Journal of International Law 308.

Moreover, the ICJ stressed that the treaty obligation to notify the other party about the reasons for non-compliance on the basis of security interests is part of the good faith requirement, as it allows the notifying state to substantiate its good faith in refusing cooperation.[45]

In his declaration appended to the judgment,[46] Judge Keith tried to specify the breadth of the review of the good faith invocation. While agreeing with the majority that the security clause allowed only for a very limited review,[47] he nevertheless recalled the concepts of abuse of rights and misuse of power to stress that the principle of good faith requires states to refrain from any act that might frustrate the object and purpose of the treaty.[48]

Though very limited, the ICJ case law on self-judging security clauses reveals some analogies with the way human rights courts and bodies deal with national security provisions. In *Military and Paramilitary Activities in and Against Nicaragua* and *Oil Platforms*, essential security interests were connected to the existence of armed attacks, thus making it unnecessary for the ICJ to dwell further into conceptual discussions. The discussion shifted, instead, to necessity and proportionality *not* of the invocation of the security interests, but of self-defence. This is an interesting move, because it allowed the ICJ to rely on necessity and proportionality in relation to another issue in order to review, indirectly, the conditions for the invocation of security interests. As a result, the only conceptual element emerging from the two ICJ decisions is that

[45] *Djibouti v France*, § 152. On this point, the ICJ lambasted French authority for failing to give sufficient reasons in its notification to Djibouti about the refusal to cooperate, though eventually it did not consider this failure a decisive factor in order to infer bad faith (§ 156).

[46] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. Declaration of Judge Keith (4 June 2008), ICJ Reports 2008, p. 177.

[47] § 4.

[48] § 5-6. As Briese and Schill observe with respect to Judge Keith's reliance on abuse of rights and misuse of power "[a]rguably, drawing analogies between the standard of review applied by domestic courts in reviewing discretionary acts by domestic administrations and the standard of review applied by international courts and tribunals in reviewing whether a state has relied on a self-judging clause in an international treaty in good faith is an appropriate way of resolving the tension between a state's discretion under a self-judging clause with the other contracting parties' interests in international cooperation" (Briese and Schill (n 44) 327).

security interests have something to do with self-defence under international law, but they might encompass broader issues.

In *Djibouti v France*, the ICJ could not follow the same approach, because the security interests were not linked to the existence of armed attacks, but more generically invoked. In this case, the ICJ was confronted with the substantive question of the meaning of security interests, without being able to rely on necessity and proportionality.[49] Similarly to what human rights courts and bodies tend to do, the ICJ avoided defining the concept, and showed great deference to the national court's assessment on the existence of essential security interests. Arguably, the only outer constraint to this deference is the requirement of good faith, though the ICJ refrained from further clarifying how it would have intended to appraise the existence of good (or bad) faith in the invocation of security interests. Such a weak review seems to show that security exceptions are much more "self-judging" for the ICJ than they are in the interpretation given by the WTO DSB examined in the previous section.

3. International peace and security under the UN Charter

In this section, I will move away from self-judging security clauses[50] and discuss the issue of the reviewability by the ICJ of the decisions taken by the United Nations Security Council (UNSC) in discharging its "primary responsibility for the maintenance of international peace

[49] In fact, the wording of Art.2 (c) of the 1986 Convention between France and Djibouti does not mention "necessity" (see footnote 39). For this reason, there is no mention of necessity and proportionality throughout the decision. See, in contrast, the relevant provisions of the treaties at issue in the two other mentioned ICJ's decision, that instead refer to "necessity".

[50] It is in theory possible to deem the security provisions at issue here as being somehow "self-judging". However, since scholarship usually does not include them in the self-judging category, neither will I in this section.

and security".[51] The focus of this section, then, turns from security/national security of the previous sections to "international security".[52]

In keeping with the aims of this Chapter, I will focus on the issue of whether the ICJ has reviewed the substantive grounds triggering the UNSC's intervention under Chapter VII of the UN Charter[53], and therefore on Art.39, which reads:

> [t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Before delving into the main issue of reviewability, some conceptual remarks are necessary. As it appears from the wording of the provision, the UNSC has the power to decide measures to maintain or restore "international peace and security".[54] The phrase "international peace and security" occurs frequently in the Charter,[55] having also influenced the text of many later regional treaties, such as the Treaty on the European Union,[56] the Organization of American

[51] Art.24(1) of the UN Charter.

[52] Although this section is concerned with international security, it cannot be disregarded that national and international security cannot be meaningfully dissociated from each other. National security policies and priorities influence international security, and vice versa. For a discussion, see Barry Buzan, *People, States and Fear. An Agenda for International Security Studies in the Post-Cold War Era* (2nd ed, Harvester Wheatsheaf 1991) 328-360; Ole Waever, 'Security, the Speech Act: Analysing the Politics of a Word' (Centre of Peace and Conflict Research Training Seminar, Jerusalem-Tel Aviv, June 1989) 1, 34-36.

[53] It is not the purpose of this section to discuss the many other aspects concerning the use of force under the UN Charter and in international law more in general, unless some of these issues are relevant to the discussion about the substantive meaning of international peace and security.

[54] It is open to speculation whether the provision means "international peace and international security", or just "international peace" and "security". This section will proceed by endorsing the first interpretation.

[55] See Recital 6, Arts. 2-11-12-15-18-23-24-26-33-34-37-39-42-43-47-48-51-52-54-73-76-84-99-106. The expression was likely adopted from the preamble of the 1919 Covenant of the League of Nations (opening line). The combined use of the two concepts appears to be far older, since trace can be found already in the New Testament (1 Thessalonians, 5:3: 'For when they shall say, Peace and security; then sudden destruction cometh upon them, as travail upon a woman with child; and they shall not escape').

[56] Recital 11, Arts.3-21. See also TFEU, Arts.347. These treaties will be discussed in the following section.

States Charter,[57] the African Union Charter,[58] the NATO Charter,[59] the Helsinki Final Act constitutive of the OSCE,[60] as well as the International Criminal Court Statute.[61] Hence, it can be said that the expression "international peace and security" has become a recurring combo in the international legal jargon.

Drawing the definitional line between peace and security is not an easy task.[62] Security studies scholars have noted their "stereophonic conceptual history",[63] illustrating how – in particular from the second half of the Twentieth Century – peace and security have had alternate luck as concepts on the international stage, often brandished as part of different ideologies especially during the Western/East divide typical of the Cold War.[64]

It is also the case that – just as security has evolved from the 1980s as to include a broad range of non-military threats[65] – peace has mutated into a much broader notion that has challenged over time the narrower understanding of the concept as simply the opposite of war.[66] Well before the emergence of human security on the international stage, in fact, one of the founding

[57] Arts.2-23-30-110.
[58] Recital 8, Arts. 3-4. It is worth recalling that one of the main organs of the AU is in fact called "Peace and Security Council".
[59] Recital 3, Arts.1-12.
[60] Recital 6, Art. V and elsewhere throughout the Act.
[61] Recital 3.
[62] As I will explain in Chapter 3, section 3, definitions are also a matter of drawing lines between one concept and another. Thus, if a legal instrument employs different terms, they should, at least in principle, mean different things. See also the observations made in Chapter 1, section 3.1., concerning the overlapping meaning of legitimate aims in IHRL.
[63] See, in particular, Ole Waever, 'Peace and Security: Two Evolving Concepts and Their Changing Relationship' in Hans Günter Brauch et al. (eds), *Globalization and Environmental Challenges: Reconceptualising Security in the 21st Century* (Springer 2008) 99-100.
[64] Ibid. This divide has dominated also the study of peace and security, respectively, within international relations. In fact, security emerged at some point as a more useful paradigm than the war-prone realist approach to power and the idealist vision of peace. In the 1970s peace idealism sought to revolt against realist orthodoxy: see Buzan (n 52) 2-3 and 8-9.
[65] See Introduction, section 5.
[66] The Oxford Dictionary basic definition of "peace" reads: "freedom from civil unrest or disorder; public order and security". Here, security is even listed as a synonym for peace. A more elaborated definition in the same Dictionary reads: "freedom from, absence of, or cessation of war or hostilities; the condition or state of a nation or community in which it is not at war with another; peacetime": 'peace, n', (OED Online, Oxford University Press March 2021) < www-oed-com.ezproxye.bham.ac.uk/view/Entry/139215 > accessed 9 April 2021.

fathers of peace research, Johan Galtung, made a crucial contribution in disseminating the idea that peace consists of two dimensions: negative peace (the absence of violence, including war) and positive peace (absence of the structural causes of violence, such as social injustice).[67] As Galtung put it clearly, "an extended concept of violence leads to an extended concept of peace".[68]

The UN Charter promotes this dual conception of peace:

> [t]he Law of Peace within the UN is narrow in the sense that it pursues realistic peace which recognizes exceptions permitting the use of force, i.e. self-defence (Art. 51) or Chapter VII operations, but it is also expansive because it combines negative and positive dimensions and preconditions of peace both in its normative instruments and in its institutional implementation of peace. The comprehensive normative language includes elements of a broad conception of peaceful coexistence, including the prohibition of aggression, promotion of peaceful dispute resolution mechanisms, respect of human rights, development, and correction of structural inequality among states.[69]

Admittedly, it is hard to disagree with those who believe that "peace and security" is just a "typical UN pleonasm".[70] In fact, the symmetrical broadening of the scope of peace (positive peace) and security (human security) has brought about some welding of these two concepts, to the point they have become virtually indistinguishable.[71]

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[67] Among many: Johan Galtung, 'An Editorial' (1964) 1 Journal of Peace Research 1; Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 Journal of Peace Research 167; Johan Galtung, 'What is meant by peace and security? Some options for the 1990s', in Johan Galtung (ed), *Transarmament and the Cold War: Peace Research and the Peace Movement. Essays in Peace Research* (Vol.6, Christian Ejlers 1988) 61-71.

[68] Galtung, 'Violence, Peace, and Peace Research' (n 67)183.

[69] Cecilia Marcela Bailliet, 'Normative Foundation of the International Law of Peace' in Cecilia Marcela Bailliet and Kjetil Mujezinović Larsen (eds), *Promoting Peace Through International Law* (Oxford University Press 2015) 52-53.

[70] The expression is of Waever (n 63) 99, who however does not fully agree that the two concepts are pleonastic.

[71] As noted by an authoritative commentator, "Both [peace and security] address different, although interrelated or even overlapping, concepts. The degree of overlap, however, depends very much upon whether the term "peace" is narrowly or broadly defined. If 'peace' is narrowly defined as the mere absence of a threat or use of force against the territorial integrity or political independence of any states (Art. 2(4)) ('negative peace'), the term 'security' will contain parts of what is usually referred to as the notion of 'positive peace'. This latter notion is generally understood as encompassing the activity which is necessary for maintaining the conditions of peace. The preamble and Art.1(1), (2), and (3) indicate that peace is more than the absence of war. These provisions

In any event, while it is true that "peace and security" can hardly be distinguished in and outside the UN Charter, it is likewise true that peace seems to play a preeminent normative role in the framework of collective security devised by the UN Charter. As Wolfrum observes,[72] in the Charter the term "international security" appears only alongside security in the phrase "international peace and security", whereas "peace" can be found either alone,[73] or as "universal peace".[74] The text of Art.39 – termed "the single most important provision of the Charter"[75] – is revealing in this regard. As the article makes clear, in order to maintain international peace *and security*, the Security Council is empowered to find that a certain situation constitutes a threat to peace, breach of the peace or aggression.[76] That is, the provision does not mention any "threat to security" or "breach security" as something independent of the endangerment of peace, and this in spite of the fact that the UNSC action is premised on the maintenance of both peace and security.

The practice of the UNSC does not help to shed light on the exact boundaries of terms such as "peace", "threat to peace", "breach of the peace" or "international security". In fact, it confirms that the UNSC rarely determines the existence of a breach of the peace or aggression, preferring to refer broadly to a threat to peace.[77] The *travaux* of the Charter indicate that the drafters left

refer to an evolutionary development in the state of international relations which is meant to lead to the diminution of those issues likely to cause war": Rüdiger Wolfrum, 'Art.1' in Bruno Simma et al (eds), *The Charter of the United Nations. A Commentary. Volume 1* (3rd ed, Oxford University Press 2012) 49-56.

[72] Ibid 52.

[73] Recital 5, Art.1 (1)-39.

[74] Art.1 (2).

[75] U.S. Secretary of State, Report to the President on the Results of the San Francisco Conference (1945) 90–91.

[76] Acts of aggression are traditionally seen as armed attacks, hence pertaining to the concept of (negative) peace. See Art.8-bis (1) of the International Criminal Court Statute, that reads "'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations", and then goes on listing acts that qualify as aggression, all of them of clear military nature.

[77] See Nico Krisch, 'Art.39' in Simma et al (n 71) 1293.

the terms undefined, endowing as a result the UNSC with greater discretion in interpreting the concepts.[78]

Some concrete indications about the possible meaning of threats to peace and, by implication, international peace and security, can at least be inferred from the types of threats that have prompted the UNSC's action (even when not formally making determinations under Art.39). Over the years, the UNSC has considered threats to international peace and security not only those military-like threats more ascribable to a realist understanding of security (such as armed attacks, aggression, proliferation of nuclear weapons, terrorism and the like), but also other types of threats underpinning a wider concept of security (such as humanitarian emergencies, repression of civilian populations, cross-border refugee flows, failure to hold perpetrators of international crimes accountable, trafficking in small arms, to name but a few).[79] Arguably, the most expansive understanding of international peace and security has taken place with the inclusion in some resolutions of threats to health, such as the HIV/AIDS pandemic[80] and, very recently, the Covid-19 pandemic.[81] The list would be even longer if one looks at other threats that have been discussed in recent years by the UNSC, although not made the object of express resolutions, such as, for example, poverty, lack of democracy, underdevelopment and climate

[78] Ruth B. Russel, *A History of the United Nations Charter: The Role of the United States. 1940-1945* (Brookings Institution 1958) 669-672.

[79] The best source to keep track of these developments is the Repertoire of the Practice of the UNSC, in particular in regard to Art.39: < www.un.org/securitycouncil/content/repertoire/actions#rel1 > accessed 10 April 2021. See also Erika de Wet, 'Peace, Threat to', Max Planck Encyclopedias of International Law (June 2009); Karel Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future' (2003) 8 Journal of Conflict and Security Law 15.

[80] UNSC Res 1308 (17 July 2000) UN Doc S/RES/1308: *"[s]tressing* that the HIV/AIDS pandemic, if unchecked, may pose a risk to stability and security" (recital 11). It is admittedly unclear whether "risk to stability and security" has approximately the same meaning of "threat to international peace and security".

[81] UNSC Res 2532 (1 July 2020) UN Doc S/RES/2532: "*[c]onsidering* that the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security" (recital 11). For a comment, Erin Pobjie, 'Covid-19 as a Threat to International Peace and Security: The Role of UN Security Council in Addressing the Pandemic' (*EJIL:Talk!*, 27 July 2020) < www.ejiltalk.org/covid-19-as-a-threat-to-international-peace-and-security-the-role-of-the-un-security-council-in-addressing-the-pandemic > accessed 10 April 2021.

change.[82] Basically, any adverse event, actual or potential, can be considered by the UNSC as a structural cause likely to threaten international peace and security, in line with the recent expansive understandings of (positive) peace and (human) security referred to earlier. As Robert Cryer has observed, the practice of the UNSC shows that often "the reasons given for action are becoming increasingly tenuously linked to the requirement of the threat being to international peace".[83]

Against this complex conceptual background, the question of whether the ICJ has attempted to give some substance to the meaning of these concepts is intimately connected to the question of whether the ICJ can review the UNSC's determination that a situation constitutes a breach of the peace or threat to peace, as well as what the "international peace and security" formula means.

Many commentators share the view that the UNSC's determinations under Art. 39 are not reviewable by the ICJ.[84] As Akehurst has noted, in fact "a threat to peace is whatever the Security Council says is a threat to peace".[85] Others have suggested that, while the UNSC enjoys discretion under Art.39, some limitations on its power must exist, such as the limit of not acting arbitrarily[86], or not in contrast with the purposes and principles of the UN.[87] Both the

[82] For an overview, see UNGA 'A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change' UNGAOR 59th Session A/59/565 (2004). See also Wellens (n 79) 28-29.
[83] Robert Cryer, 'The Security Council and Article 39: A Threat to Coherence?' (1996) 1 Journal of Armed Conflict Law 161, 188.
[84] *Ex multis*: Benedetto Conforti, *The Law and Practice of the United Nations* (3rd ed, Nijhoff 2005) 172-173; Terry D. Gill, 'Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter' (1995) 26 Netherlands Yearbook of International Law 33, 42; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 133.
[85] Michael Akehurst, *A Modern Introduction to International Law* (6th rev ed, Routledge 1987) 219.
[86] Giorgio Gaja, 'Réflexions sur le rôle du Conseil de Sécurité dans le Nouvel Ordre Mondial: à Propos des Rapports entre Maintien de la Paix et Crimes Internationaux des Etats' (1993) 97 Revue générale de droit international public 297, 315; Myres S. McDougal, W. Michael Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern' (1968) 62 American Journal of International Law 1, 9.
[87] Vera Gowland-Debas, *Collective Responses to Illegal Acts in International Law: United Nations action in the question of Southern Rhodesia* (Kluwer 1990) 451-452.

European Court of Justice[88] and the ECtHR[89] have endorsed the view that UNSC resolutions should be interpreted as not intending to impose obligations upon states that would be incompatible with fundamental rights. Thus, there is some support for the idea that the action of the UNSC should encounter some sort of outer limitation.

To date, the ICJ has not directly tackled the issue of the review of the UNSC's decisions about what constitutes a threat to or a breach of the peace. However, some decisions show that ICJ judges would refrain from carrying out a scrutiny over the existence of the substantive requirements triggering the UNSC's power to maintain or restore international peace and security.[90] On the other hand, some judges have showed preoccupation for the possibility of an unrestrained power of the UNSC to determine what constitutes a threat to peace. In the *Namibia* case, Judge Gros noted that

> to assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government […] There is not a single example of a matter laid before the Security Council in which some member State could not have claimed that the continuance of a given situation represented an immediate or remote threat to the maintenance of peace.[91]

Judge Sir Gerald Fitzmaurice, in a strong dissent, held that the UNSC retains broad powers, "provided that the threat said to be involved is not a mere figment or pretext".[92] As he argued,

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[88] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the EU and European Commission* [2008] ECLI:EU:C:2008:461, para 228-229.

[89] *Al-Jedda v United Kingdom* (App. 27021/08), 7 July 2011, § 102.

[90] See, for example: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970). Advisory Opinion (21 June 1971), ICJ Reports 1971, p. 16, § 89; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)*. Separate Opinion of Judge Lauterpacht (13 September 1993), ICJ Reports 1993, p. 407, § 99.

[91] *Namibia*, Dissenting Opinion of Judge Gros, ICJ Reports 1971, p. 311, § 34-35. Judge Gros disagreed with the majority, finding that UN member states were not under a legal obligation to recognise the illegality of the continuing presence of South Africa in Namibia, following a 1966 General Assembly's resolution terminating the South African mandate.

[92] *Namibia*, Dissention Opinion of Judge Sir Fitzmaurice, ICJ Reports 1971, p. 208, § 112.

> limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended […].[93]

Eventually, he went as far as far as recognising that in the situation before the ICJ there was "no threat to peace and security other than such as might be artificially created as a pretext for the realization of ulterior purposes".[94]

In the well-known *Lockerbie* case[95] some judges shared similar preoccupations. Judge Shahabuddeen asked

> whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences [overriding States' legal rights]. Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?[96]

In their separate and dissenting opinions, other judges voiced similar concerns.[97] However, they all stopped short of arrogating the power to scrutinise more intrusively the UNSC's decisions.

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[93] Ibid § 116.

[94] Ibid § 116. Judge Sir Fitzmaurice contended that, under international law, the UNSC had no power to terminate the South African mandate on Namibia, taking issue with the UNSC's qualification of the situation as a threat to peace.

[95] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*. Preliminary Objections, Judgment (27 February 1998), ICJ Reports 1998, p. 115. The issue concerned the indictment of two Libyan nationals in the US and the UK for the aerial incident in Lockerbie, Scotland, in 1988.

[96] *Lockerbie*, Provisional Measures, Separate Opinion of Judge Shahabuddeen (14 April 1992), ICJ Reports 1992, p. 140, 142. Judge Shahabuddeen eventually found that these issues "cannot be examined now", eventually concurring with the majority that there was no reason to grant the provisional measures asked by Libya against the UK.

[97] For an overview of other judges' opinions and some comments on the case, see: Bernd Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' (1999) 10

Judge Weeramantry, for example, concluded that, although the ICJ can review any legal matter arising under Chapter VI,

> […] once we enter the sphere of Chapter VII, the matter takes on a different complexion, for the determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion given to it by Article 39. […] Thus, any matter which is the subject of a valid Security Council decision under Chapter VII does not appear, prima facie, to be one with which the Court can properly deal.[98]

Thus, the unwillingness of the ICJ to draw some conceptual boundaries to concepts such as "threat to peace" or "breach of the peace" and how they pertain to the broader aims of maintaining or restoring "international peace and security" can be explained by reference to its reluctance to close the discretionary spaces of UNSC action. International peace and security, in the ICJ's view, are better delineated in the political forum constituted by the UNSC, rather than being legally construed through a judicial review of its determinations. As best summarised by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Tadić*,[99] a "threat to the peace is more of a political concept. But the determination that there exists such a threat

European Journal of International Law 517. For more insights into the reviewability by the ICJ of the UNSC's decisions following *Lockerbie*, see Ken Roberts, 'Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review' (1995) 7 Pace International Law Review 281; Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 The International and Comparative Law Quarterly 309.

[98] *Lockerbie*, Provisional Measures, Dissenting Opinion of Judge Weeramantry (14 April 1992), ICJ Reports 1992, p. 160, 176. Judge Weeramantry concluded that he would have granted provisional measures against both parties to prevent an aggravation of tension.

[99] ICTY, *The Prosecutor v Duško Tadić* (Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) par.29.

is not a totally unfettered discretion, as it has to remain, at the very least, within the Purposes and Principles of the Charter".

In sum, it appears that, just as security (generally) has expanded in recent years, so has "international peace and security". The practice of the UNSC reflects this expansive understanding. Even if some ICJ judges have expressed concern that such an expansive understanding might in practice entail an unfettered power of the UNSC to qualify anything as pertaining to "international peace and security", the ICJ has not be willing to provide some indications about the meaning of the concepts. Thus, the question remains of whether there is any occurrence that would fall outside the scope of "international peace and security". If there is an answer to this question, however it is unlikely it will ever be given by the ICJ in the near future.

4. Security provisions in the European Union law

In this final section, I will turn to security provisions in EU law, and in particular to the issue of their review by the Court of Justice of the EU (CJEU).[100]

4.1. EU Treaties

Before delving into the case law, I shall recall very briefly the security architecture set up by EU Treaties. The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) contain multiple references to security, reflecting the extensive range of competences of the EU with respect to policy areas concerning "security" in a broad sense.

[100] I will refer throughout this section to the case law of the European Court of Justice (ECJ) and the General Court (EGC), that make up the Court of Justice of the European Union (CJEU).

The two main security-related competences of the EU are those concerning the Area of Freedom, Security and Justice (AFSJ)[101] and the Common Foreign and Security Policy (CFSP).[102] The word "security" in these areas is not defined anywhere in the treaties, although different provisions specify their respective objectives.

Art.67 TFEU sets out the objectives of AFSJ, among which

> The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

Even though security is specifically mentioned with reference to criminal matters, it pertains more broadly to all the other objectives mentioned in Art.67, such as the protection of fundamental rights, abolition of internal border controls for persons, common policy on asylum, immigration and external borders, cooperation in civil matters and access to justice. Thus, in the AFSJ security appears to form a unique conceptual entity with freedom of circulation of persons and justice.[103]

According to Art.21 TEU, the objectives of the CFSP are: to safeguard the EU's values, interests, security, independence and integrity; to support democracy, the rule of law, human rights and international law; to preserve peace, prevent conflicts and strengthen international security in accordance with the UN Charter and the OSCE Charter; to foster sustainable

[101] Art.3(2) TEU and Title V (Art.67 to 89) TFEU (which contain specific provisions on the areas covered by the AFSJ).

[102] Title V (Art.21 to 46) TEU is devoted to the CFSP.

[103] Generally, on the AFSJ, see Maria Fletcher, Ester Herlin-Karnell, Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2019). On the specific competences, see Steven Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (4th ed, Oxford University Press 2016); Steven Peers, *EU Justice and Home Affairs Law: Volume II: EU Criminal Law, Policing, and Civil Law* (4th ed, Oxford University Press 2016).

development; to encourage integration of all countries into the world economy; to improve the quality of natural environment; to assist populations and countries affecting by disasters; to promote multilateral cooperation. In sum, security is a foreign policy objective that the Union is enabled to pursue as part of its external action.[104] As such, a broad range of areas falls under the CFSP, including international security[105] and the Common Security and Defence Policy (CSDP).[106]

If the distinction between security-related competences under the AFSJ and the CFSP seems *prima facie* sharp, however it does not really shed light on the meaning of security itself within the treaties. Conceptually, this distinction is often more artificial than real, since the AFSJ and the CFSP interact with each other on numerous issues. For example, the promotion of fundamental rights is an objective of the AFSJ, but it is also an objective that should be pursued through the CFSP.[107] Counter-terrorism is another field where both criminal cooperation between EU Member States (AFSJ) and the EU action on the international stage (CFSP) are required.[108] In fact, as much as the globalization of threats has blurred the lines between states' internal and external security, so has it challenged the dichotomy between EU internal and

[104]On the External Action of the EU, see Sieglinde Gstöhl, Simon Schunz (eds), *The External Action of the European Union. Concepts, Approaches, Theories* (Red Globe Press 2021). On the CFSP competences, see Steven Blockmans, Panos Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar 2018).

[105] Art.21(2)(c) TEU: "preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter […]. See also Art.42(1) TEU.

[106] Art.42 to 46 TEU. As Art.42 makes clear, "The common security and defence policy shall be an integral part of the common foreign and security policy". For an overview of the CSDP, see Michael E. Smith, *Europe's Common Security and Defence Policy. Capacity-building, Experimental Learning and Institutional Change* (Cambridge University Press 2017).

[107] Art.21(2)(b) TEU expressly mentions supporting human rights among the CFSP's objectives. The incorporation of human rights into the EU CFSP strategy is firmly established. See European Union External Action Service, *The European Union's Global Strategy: Three Years On, Moving Forward* (2019) < eeas.europa.eu/topics/common-foreign-security-policy-cfsp/64045/european-unions-global-strategy-three-years-moving-forward_en > accessed 12 April 2021.

[108] Art.43 TEU and Art.215 TFEU confer specific competences on the EU to fight terrorism through the CFSP. See Christophe Hillion, 'Fighting Terrorism Through the Common Foreign and Security Policy' in Inge Govaere and Sara Poli (eds), *EU Management of Global Emergencies. Legal Framework for Combating Threats and Crisis* (Brill – Nijhoff 2014) 75-95.

external security.[109] Thus, the distinction between AFSJ and CFSP, arguably, has less to do with different concepts of security and more to do with different distribution of competences between the EU and its member states and the involvement of different actors in the decision-making process.[110]

The EU security architecture is further complicated by the presence of other security provisions whose function is to delineate the competences between EU and its member states. However, as we shall see, these provisions have been often invoked by states to try to escape their obligations under EU treaties.[111] As we shall also see, with regard to these provisions the proliferation of different security-related terms employed across the EU treaties is staggering.

The first relevant provision is Art.4(2) TEU, which provides that the EU "shall respect the […] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State". The wording of the provision implies that ensuring the territorial integrity of the state is a function different from that of safeguarding national security, a distinction found also in many human rights treaties' provisions and that human rights courts have found difficult to justify.[112]

Art.72 TFEU reiterates this point, though employing a different security term: in fact, EU actions taken in the context of the AFSJ "shall not affect the exercise of the responsibilities

[109] See Alistair J. K. Shepherd, *The EU Security Continuum. Blurring Internal and External Security* (Routledge 2021). The author argues that internal and external security are nowadays integrated along three axes: geographic, bureaucratic and functional. See also Simon Duke, 'Bridging Internal and External Security: Lessons from the European Security and Defence Policy' (2007) 28 Journal of European Integration 477.

[110] Notably, decisions in the area of CFSP require, in most cases, unanimous action by the European Council and the Council of the EU, with very little involvement of the European Parliament: Stephan Marquardt, 'The Institutional Framework, Legal Instruments and Decision-making Procedures' in Blockmans and Koutrakos (n 104) 22-43. On decision-making in the AFSJ, see Peers (n 103) 4-67.

[111] Therefore, these security provisions can also be considered, not formally but in practice, as "exceptions", in that they allow states to try to escape obligations under EU treaties.

[112] See Chapter 1, section 3.1.

incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". In spite of the different wording, it is difficult to distinguish "internal security" from "national security" mentioned in Art.4(2) TEU.

The purpose of Art.4(2) TEU and Art.72 TFEU is evidently to take matters traditionally seen as pertaining to the nucleus of state sovereignty away from the EU competences. This is not to say, however, that the preservation of member states' competence on matters of national security has completely barred any EU action in that respect. In fact, security measures undertaken in the context of the AFSJ and CFSP have a major impact on the (national and/or internal) security of member states,[113] to the extent that (national and/or internal) security is often virtually indistinguishable from the security of the EU within and outside its borders.[114]

In spite of the clear correlation between European security and security of member states, both Art.4(2) TEU and Art.72 TFEU give leeway for states to try to justify derogations from the EU legal regime on the basis of national and internal security, or to try to reject altogether the EU competence to legislate on matters that states claim fall under their exclusive competence to ensure national and internal security.[115] For this reason, Mary Dobbs notes that Art.4(2) TEU can "pose significant challenges to the primacy and uniformity of EU law".[116]

In fact, in a small number of instances the European Court of Justice (ECJ) has had to neutralise specious attempts by states to rely on these articles in order to justify non-compliance with EU

[113] Inge Govaere, Sara Poli, 'Introduction to EU Governance of (Global) Emergencies, Threats and Crises' in Govaere and Poli (n 108) 1-9.

[114] Counter-terrorism is a typical area in which the EU competences within the AFSJ and CFSP intersect with member states' competences in matters of national (or internal) security. The 2020 EU Counter-Terrorism Agenda captures this complex intersection: European Commission, 'A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond' (Communication) COM(2020) 795 final < ec.europa.eu/home-affairs/what-we-do/policies/counter-terrorism_en > accessed 12 April 2021.

[115] With reference to the pre-Lisbon framework that contained similar provisions, see Steve Peers, 'National Security and European Law' (1996) 16(1) Yearbook of European Law 363.

[116] Mary Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' (2014) 33 Yearbook of European Law 298, 301.

law.[117] More recently, the Court ruled against Poland, Hungary and the Czech Republic which sought to invoke their sole responsibility to maintain public order and internal security in order to justify the failure to comply with their obligations to relocate migrants during the sudden influx of third-country nationals towards Italy and Greece in 2015-2016.[118] The ECJ held that

> although it is for the Member States to adopt appropriate measures to ensure law and order on their territory and their internal and external security, it does not follow that such measures fall entirely outside the scope of European Union law. […] It cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of European Union law and its uniform application.[119]

Closer scrutiny shows that the Court did not deny the exclusive competence of states to ensure public order and national (or 'internal') security. Instead, it interpreted security exceptions under the EU treaties narrowly, clarifying that a generic invocation of security reasons is not *per se* sufficient for states to escape their obligations under EU law.[120] In doing so, it seemed to acknowledge the tension inherent in the EU institutional structure that, on the one hand, recognises the interconnection between EU and member states' security and, on the other hand, leaves to states the responsibility to maintain national (and/or internal) security.

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[117] For example: Case C-461/05 *European Commission v Denmark* [2009] ECLI:EU:C:2009:783 para 51; Case C-38/06 *European Commission v Portugal* [2010] ECLI:EU:C:2010:108 para 62.

[118] Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Poland, Hungary and Czech Republic* [2020] ECLI:EU:C:2020:257.

[119] Ibid para 143.

[120] Ibid paras 144-145. The ECJ went on finding that the complaining states should have carried out a case-by-case assessment of each third-country national to be relocated in order to try to justify the existence of any threat to public order or national (internal) security able to trigger the invocation of Art.72 TFEU (paras 154-160). As shown in Chapter 1, section 5, the HRCttee has similarly demanded states to identify in a more specific way the existence of a threat to national security, with generic reasons being insufficient. However, as it was argued, the HRCttee has often not followed this approach in its case law.

Only very recently the ECJ has clarified in more abstract terms the concept of national security, again concerned that states might interpret the concept too widely to try to escape obligations under EU law. In *La Quadrature du Net*, it acknowledged again the sole responsibility of member states in national security matters, specifying that

> [t]hat responsibility corresponds to the primary interest in protecting the essential functions of the State and the fundamental interests of society and encompasses the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic or social structures of a country and, in particular, of directly threatening society, the population or the State itself, such as terrorist activities.[121]

It added that

> [t]he importance of the objective of safeguarding national security, read in the light of Article 4(2) TEU, goes beyond that of the other objectives referred to in Article 15(1) of Directive 2002/58, inter alia the objectives of combating crime in general, even serious crime, and of safeguarding public security. Threats such as those referred to in the preceding paragraph can be distinguished, by their nature and particular seriousness, from the general risk that tensions or disturbances, even of a serious nature, affecting public security will arise. […] the objective of safeguarding national security is therefore capable of justifying measures entailing more serious interferences with fundamental rights than those which might be justified by those other objectives.[122]

Arguably, to date this is the most clear-cut effort to clarify the meaning of *national* security ever attempted by the international courts reviewed in this chapter, as well as in Chapter 1. In the ECJ's view, the concept of national security seems wider than the realist one, as

[121]Case C-511/18 *La Quadrature du Net and Others* [2020] ECLI:EU:C:2020:791 par 135. The legislation concerned is Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37.

[122] *La Quadrature du Net and Others* par 136. See also Case C-623/17 *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* [2020] ECLI:EU:C:2020:790 paras 74-75. Directive 2002/58/EC was again at issue.

demonstrated by the references not only to the state's security interests, but also to the security of the society and the people, which includes the protection of economic and societal interests. In addition, for the Court threats to national security are more serious than threats to public security, public order and other similar grounds. On the other hand, the concept appears still wide enough to include, potentially, any event that a state might consider as a threat.

Such a concept of national security should be read in light of earlier case law on security provisions. In fact, the ECJ also attempted to clarify the meaning of other security exceptions contained in other TFEU provisions, namely those allowing states to restrict the four fundamental freedoms.[123] There, the language employed by the TFEU complicates further the attempt to make sense of the word "security" in the EU architecture. Restrictions to the four freedoms can be justified on the basis, among other grounds, of "public security"[124]. In the absence of any indication in the treaties, it is hard to speculate on whether and how national security and internal security differ from public security.

In fact, the ECJ too has struggled to draw conceptual distinctions when it attempted to give some content to the concept of public security. The leading case is *Campus Oil*,[125] in which Ireland sought to justify restrictions to the import of petroleum products on the basis of public security under Art.36 TFEU.[126] Ireland claimed that these restrictions aimed at ensuring the country's sufficient provision of petroleum products, by obliging traders to purchase a certain

[123] Arts. 36 (free movement of goods), Art.45(3) and Art.52(1) (persons), Art.62 (services), and Art.65(1)(b) TFEU (capital).

[124] See, for example, Art.36 TFEU: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; [...]. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

[125] Case 72/83 *Campus Oil* [1984] ECR 1984 -2727.

[126] See footnote 124 for the text of the provision.

percentage from the Irish National Petroleum Corporation. The arguments put forward by the parties are worth mentioning. The plaintiffs (traders in petroleum products based in Ireland) pleaded in favor of a restrictive interpretation of public security, maintaining that

> [p]ublic security denotes the internal security of the State rather than national security in the context of inter-State relations. Even if the concept of public security were deemed to incorporate an element of external security, it would still not encompass the system established [by the contested legislation on oil supply].[127]

The concept of public security endorsed by the plaintiffs is not clearly distinguishable from that of national security, and seems synonymous with public order. As they argued, "'[p]ublic security' involves the maintenance of law and order within the State. In certain extreme circumstances, the assistance of the national army may be necessary to enforce security".[128]

In contrast, Ireland argued that states must be given a wide margin of appreciation in determining the scope of the concept and that, due to Ireland's geographical position, the absence of any domestic source of oil and its dependence on the UK for oil products, a certain degree of independence concerning the refining of oil products was in fact a matter of public security, and not a purely economic measure.[129]

The European Commission, siding with the plaintiffs, maintained that ""public security" should be restricted to such matters as national defence and the maintenance of civil peace […]".[130]

Finally, the UK, intervening against Ireland, stressed that

> measures can be considered under the head of "public security" if they are designed to secure a fundamental interest of the State which can properly be protected on that ground, including, for example, the maintenance of essential public services, or if they are

[127] *Campus Oil* 2735-2736.
[128] Ibid.
[129] 2737.
[130] 2740.

> designed to enable the life of the State to function safely and effectively. A Member State cannot invoke the grounds of public policy' or public security if the measures in question are designed predominantly to attain economic objectives.[131]

The ECJ espoused the broader concept of public security supported by Ireland, finding that

> petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article 36 allows States to protect.[132]

Interestingly, the ECJ's interpretation of public security has many features in common with the realist concept of national security (such as the references to state's existence and survival of its inhabitants), but is also broader than that because it includes threats other than those of military-like nature (such as threats to the state's economic and energetic interests).

In subsequent cases, the ECJ has broadened even more its interpretation of public security under Art.36 TFEU, holding that the concept encompasses both internal and external security.[133] As the ECJ put it,

> [I]t is difficult to draw a hard and fast distinction between foreign-policy and security-policy considerations. Moreover […] it is becoming increasingly less possible to look at the security of a State in isolation, since it is closely linked to the security of the international community at large, and of its various components. […] So, the risk of a

[131] 2741-2742.
[132] 2751.
[133] Case C-367/89 *Criminal Proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC* [1991] ECR I-4621 par 22; Case C-83/94 *Criminal Proceedings against Peter Leifer and Others* [1995] ECR I-03231 par 26; Case C-70/94 *Fritz Werner Industrie-Ausrustungen GmbH v Federal Republic of Germany* [1995] ECR I-03189 par 25.

serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State.[134]

4.2. Secondary legislation

In addition to the Treaties, extensive references to public security can be found in secondary legislation across a wide spectrum of EU competences, ranging (to name but a few) from legislation on freedom of movement of EU citizens[135] to data protection,[136] to asylum and immigration.[137] Public security appears often together with national security,[138] although there are instances in which pieces of secondary legislation refer only to public security.[139]

One of these instances is the Citizens' Rights Directive (CRD), which is noteworthy in so far as it establishes, in principle, a "grading scale of intensity of public security".[140] Under the Directive, EU citizens and their family members can be expelled on grounds of public security.[141] However, if EU citizens and their family members have the right of permanent residence on a host state's territory (having been resident there for at least five years), they can be only expelled on "serious grounds of public security".[142] Finally, the expulsion of an EU

[134] *Criminal Proceedings against Peter Leifer and Others* paras 27-28.
[135] For example, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 [hereinafter: the Citizens' Rights Directive].
[136] For example, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 [hereinafter: the GDPR].
[137] For example, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 [hereinafter: the Return Directive].
[138] See, for example, Art.23(1) and 45(2)(a) of the GDPR. See also Art.7(4), 11(2) and (3), 12(1) of the Return Directive.
[139] Another ground that is often found together in the mentioned provisions is "public policy", that seems to be the English translation of the French term "ordre public" in EU legislative instruments. In IHRL, it is instead translated in English as "public order".
[140] Panos Koutrakos, 'Public Security Exceptions and EU Free Movement Law' in Panos Koutrakos and others (eds), *Exceptions from EU Free Movement Law. Derogations, Justifications and Proportionality* (Hart Publishing 2016) 200.
[141] Art.27(1). The other grounds are public policy and public health.
[142] Art.28(2). The other ground is public policy. Public health is not mentioned.

citizens who have resided in the host state for ten years can only be justified on "imperative grounds of public security".[143] Even though the rationale of the provisions is clearly premised on the necessity of requiring different thresholds of justification to sever the link between an integrated EU citizen and the host state,[144] "the different categories of public security in the CRD add further layers of complexity to the definition of a concept the content of which is already difficult to pinpoint".[145]

The ECJ has adopted a very extensive interpretation of "serious" and "imperative" grounds of public security. Even though it has held that "[t]he concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative reasons'",[146] the ECJ has nonetheless ruled that it is open to national courts to find that the fight against crime in connection with dealing in narcotics as part of an organised group qualifies as either a serious or imperative ground of public security.[147]

For the ECJ, even a conviction for sexual offences against a minor might be covered by the concept of imperative grounds of public security, since it constitutes "a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population".[148]

[143] Art.28(3). There is no other ground. This applies to minor as well, unless expulsion is necessary for the best interests of the child.
[144] As clearly stated in the same CRD: see recitals 23 and 24.
[145] Koutrakos (n 140) 200.
[146] Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis* [2010] ECR I-11979 par 41.
[147] Ibid paras 55-56.
[148] Case C-348/09 *P. I. v Oberbürgermeisterin der Stadt Remscheid* [2012] ECLI:EU:C:2012:300 par 28.

The ECJ's case law does not seem to attach great weight to the subtle degrees of intensity of public security threats set out in the CRD.[149] Moreover, the connection between crimes and public security threats identified by the ECJ, although arguably plausible, raises the question, at a conceptual level, of whether public security under the CRD means something more than the simple fight against crime. Otherwise, public security would seem synonymous with some other grounds found in human rights treaties mentioned in Chapter 1, such as the "prevention of disorder or crime"[150] or the "protection of public order"[151].

The ECJ itself seemed to have implicitly accepted that public order and public security are not sharply distinguishable. In the *J.N.* case[152], the Court was called to interpret the concept of public order under the Reception Conditions Directive.[153] According to Art.8(3)(e), public order, together with national security, constitutes a ground for the detention of an asylum seeker. Recalling its previous case law,[154] the ECJ reiterated that "the concept of 'public order' entails […] the existence — in addition to the disturbance of the social order which any infringement of the law involves — of a genuine, present and sufficiently serious threat

[149] An approach that is admittedly open to criticism: see Dimitry Kochenov and Benedikt Pirker, 'Deporting the Citizens within the European Union: A Counter-Intuitive Trend in Case C-348/09, P.I. v. Overbürgemeisterin der Stadt Remscheid' (2013) 19 Columbia Journal of European Law 369.

[150] For example, Art.8 ECHR.

[151] For example, Art.9 ECHR.

[152] Case C-601/15 PPU *J.N. v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84.

[153] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

[154] Among many: Case C-373/13 *H.T. v Land Baden-Württemberg* [2015] ECLI:EU:C:2015:413 para 79 (with reference to the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12); Case C-554/13 *Z.Zh. v Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie I. O.* [2015] ECLI:EU:C:2015:377 para 60. The "risk to public policy" in the judgment refers to Art.7(4) of the Return Directive. The French version of the Directive uses the term "ordre public" instead of "public policy". Thus, the reference in the judgment to public order is most certainly a bad example of translation facilitated by the discrepancy in terminology in the English and French version of the Directive.

affecting one of the fundamental interests of society".[155] Evidently, this definition of public order is dramatically similar to that of public security outlined above.

What is even more striking in *J.N.* is that the ECJ did not seem to attach any significance to the difference between national security and public security alike. First, the ECJ ruled that

> […] the strict circumscription of the power of the competent national authorities to detain an applicant on the basis of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 is also ensured by the interpretation which the case-law of the Court of Justice gives to the concepts of 'national security' and 'public order' found in other directives and which also applies in the case of Directive 2013/33.[156]

Then, having stressed the definition of public order mentioned above, it recalled its case law not on *national* security but on *public* security,[157] eventually returning to discussing public order and national security under the contested Directive. The Court might have thought that national security (mentioned in the Directive) and public security (not mentioned anywhere in the Directive) are, after all, the same concept.[158] Arguably, they are not, since there are many other EU secondary sources mentioning both national and public security as two separate grounds.[159]

Admittedly, the approach adopted by the ECJ in *J.N.* as well as in the similar cases previously cited concerning immigration and asylum appears to pay little attention to distinguish between concepts such as public security, national security and public order. The ECJ appears to be

[155] *J.N. v Staatssecretaris voor Veiligheid en Justitie* para 65.
[156] Ibid para 64.
[157] Ibid para 66. It is worth highlighting that the French text of the judgment does not differ in the use of terminology.
[158] This cannot be seen as a simple inaccuracy by the ECJ in *J.N.* Other cases mix up national and public security in the same manner. For example, *H.T. v Land Baden-Württemberg* paras 77-80. These cases, however, precede the more recent cases that have defined national security mentioned above, so arguably the ECJ did not have much to refer to with regard to national security. In any event, the reference to the case law on *public* security in order to interpret *national* security remains a conceptual mix-up.
[159] See the discussion of the cases above for some examples.

satisfied as long as a state is able to justify its actions by reference, approximately, to any of these grounds (as roughly defined in the case law).[160]

In a similar fashion to its recent case law on national security reviewed above, sometimes the ECJ has shown an increasing preoccupation with avoiding the invocation by states of generic and unsubstantiated public security claims to attempt to derogate from the obligations imposed by EU law. For instance, the Court ruled that member states can issue a return decision to a third-country national present on their territory for a short stay under the Schengen Borders Code[161] only if they have "consistent, objective and specific evidence" to support their suspicions that he or she might constitute a threat to public security and public order.[162] In another instance, moved by the same preoccupation, the ECJ sought to circumscribe the notion of national and public security by excluding civil proceedings from the scope of the concept.[163] To arrive at this conclusion, it recognised that "national security, defence and public security […] constitute activities of the State or of State authorities unrelated to the fields of activity of individuals".[164]

In all the mentioned cases, the ECJ did not limit its analysis to the interpretation of substantive concepts. In fact, it also employed necessity and proportionality in order to verify whether states have deviated from the EU legal framework more than required.[165] Sometimes, the Court

[160] As it seems clear, for example, in *J.N. v Staatssecretaris voor Veiligheid en Justitie* para 67.

[161] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

[162] Case C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* [2019] ECLI:EU:C:2019:1071 para 49-51; See also, on internal security under At.72 TFEU, the cited *European Commission v Poland, Hungary and Czech Republic* para 159.

[163] Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-00271 para 50-51 (with reference to the cited Art.15(1) of Directive 2002/58/EC, according to which public security, national security (as well as other interests) are grounds that might justify derogations from the states' obligation to ensure the confidentiality of personal data.

[164] Ibid para 51. Similarly, Case C-101/01 *Bodil Lindqvist* [2003] ECR I-12971 para 43 and Joined Cases C-C-203/15 and C-698/15 *Tele2 Sverige AB v Post- och telestyrelsen, and Secretary of State for the Home Department v Tom Watson, Peter Brice, Geoffrey Lewis* [2016] ECLI:EU:C:2016:970 para 72.

[165] It is not the place here to review how necessity and proportionality are concretely employed in regard to the specificities of each case. However, it is worth recalling that when interpretative issues arise in the context of a

applies necessity and proportionality as general principles of EU law when the relevant provision does not make any reference to them.[166] More often, it is a specific provision in secondary legislation that expressly mandates that measures adopted to safeguard national and public security be necessary and proportional. This is the case, especially, with security exceptions that have an impact on fundamental rights (for example, detention of asylum seekers, right to privacy and the like).[167] In these circumstances, the ECJ is guided explicitly by the ECtHR's case law on necessity and proportionality of interferences with rights, relying also on Art.52(1) of the EU Charter of fundamental rights (that provides that any restriction of rights be necessary and proportional).[168]

However, in contrast to the human rights courts and bodies' case law reviewed in Chapter 1, the ECJ case law does not employ necessity and proportionality to sidestep the review of the meaning of substantive security provisions. On the contrary, the ECJ usually does not shy away from attempting to define security terms, even though necessity and proportionality still play important roles in the overall scrutiny of the lawfulness of security measures. In addition, the ECJ's acknowledgment that national authorities retain a certain discretion in adopting measures that they consider necessary to ensure (national or internal) security is not seen as an obstacle

preliminary ruling, the proportionality assessment is usually precluded to the ECJ. Thus, the ECJ often provides guidelines to national courts on how they should conduct the proportionality assessment.

[166] As it is the case with treaty provisions such as Art.36 TFEU. For the discussion on proportionality, see *Campus Oil* para 37.

[167] See *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* paras 68-82; *La Quadrature du Net* paras 129-133; *J.N. v Staatssecretaris voor Veiligheid en Justitie* paras 73; *Productores de Música de España (Promusicae)* para 70; *Land Baden-Württemberg v Panagiotis Tsakouridis* paras 53.

[168] Art.52(1): "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". It is worth recalling that the EU Charter applies to EU institutions, bodies and agencies, as well as to member states when they are implementing EU law (Art.52(5)). On the dialogue between the ECtHR and the ECJ, see Guy Harpaz, 'The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy' (2009) 46 Common Market Law Review 105; Elizabeth F. Defeis, 'Human Rights and the European Court of Justice: An Appraisal' (2008) 31 Fordham International Law Journal 1104.

to the clarification of the substantive meaning of security provisions.[169] This shows that it is possible for an international court to try to give some content to security provisions, and sometimes to try to circumscribe their scope, even when necessity and proportionality are still part of the reviewing process.

Admittedly, the ECJ's definitional commitment is most likely related to the particular constitutional system of the EU architecture, within which the Court is called to operate.[170] In fact, when the ECJ defines security terms, it is not only defining concepts, but also defining the limits of the security competences of the EU and of its member states. As explained, the EU security competences can hardly be disentangled from member states' competences on (national and internal) security, and states have often attempted to rely on the latter to derogate from the EU legal regime, or to reject the EU competences outright. Thus, defining security terms is, for the ECJ, a way to clarify the relationship between EU and states' competences, and often to push back on states' attempts to escape their obligations under EU law.[171]

At a conceptual level, however, the definitions proposed by the ECJ remain still quite vague and seem to disregard to a great extent the different security-related terminology employed by primary and secondary legislation. Admittedly, the ECJ cannot be fully blamed. As Panos Koutrakos aptly noted, "[t]o distinguish between 'public security', 'serious grounds of public security', 'imperative grounds of public security', 'the essential interests of [national] security'

[169] The ECJ has recognised the existence of this discretionality, for example, in *Criminal Proceedings against Peter Leifer and Others*, para 35.

[170] On the EU constitutional order, among many, Anthony Arnull, Catherine Barnard, Michael Dougan, Eleanor Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011).

[171] This shows a certain malleability of the process of defining legal concepts, that cannot be understood only as a process aiming at discovering their meaning, but must be understood against the broader purposes of definitions. Explaining this process is one of the main objectives of next chapter.

[and one might add "internal security" and "public order"] would challenge even the subtlest and most discerning of judges".[172]

5. Conclusion

This Chapter has showed that the issue of whether non-human rights courts and bodies have tried to define security or, on the contrary, have tried to avoid defining security, is linked to the type of review of security provisions they carry out. A rough categorisation of the ways these courts and bodies ordinarily review security provisions can be attempted, in order to explain how such a review has influenced their efforts to define security terms.

First, there is the non-reviewability of international peace and security. Since the ICJ has consistently held that it is not empowered to review the UNSC's determination of what constitutes a threat to peace, breach of the peace and, generally, threats to international peace and security, it is not surprising that these security-related concepts have not been defined in the case law.

Second, there is what I will call "unstructured review", typical of the ICJ case law on security exceptions under some treaties, as well as of the WTO DSB's only decision on security under the GATT. In these cases, there is no clear test in place to scrutinise the legality of security invocations under the relevant treaties. Sometimes the ICJ has resorted to external criteria (such as the reviewing of the conditions justifying self-defence in order to assess the legality of security claims); in other cases, the ICJ, as well as the DSB, have resorted to the general good

[172] Koutrakos (n 140) 215.

faith obligation under the VCLT as the only outer constraint.[173] Arguably, the latter is not really a review in the ordinary sense, but rather a presumption of good faith invocation of security claims by states. With regard to the definitions of concepts, the ICJ and the DSB's behaviour greatly differ. In fact, the former has fully deferred to national authorities the assessment of the lawfulness of security invocations, without providing conceptual elements; the latter has instead conducted a stronger review of the scope of security exceptions, trying to clarify at length the meaning of security terms.

Finally, the most interesting model is the review carried out by the ECJ, that I will call "structured review". This model often employs a three-pronged structure (scrutiny of the security ground, necessity and proportionality)[174] that is, in its essence, very similar to the structure existing in IHRL when courts and bodies assess the lawfulness of interferences with rights. In fact, this structure is expressly borrowed from the human rights case law when EU legislation has an impact on human rights. However, the ECJ has been much more active in defining security terms than human rights courts and bodies that, as explained in Chapter 1, tend to avoid definitional challenges and focus pre-eminently on necessity and proportionality. As observed above, this has to do mostly with the need, for the ECJ, to define concepts in order to demarcate the EU security competences and the (national and/or internal) security competences of its member states within the EU constitutional order, and to push back states' attempts to escape obligations under EU law.

[173] As noted in section 3, some scholars as well as ICJ's dissenting judges have proposed that this model based on good faith should also be applicable to the review of the UNSC's determinations on threats to international peace and security.

[174] As observed in section 4, necessity and proportionality are sometimes recalled by the ECJ as general principles of EU Law, whereas in other cases certain provisions in secondary legislation expressly require security measures to be necessary and proportionate.

Aside from the review models, the few definitions or conceptual elements of security terms crafted by some international courts as well as EU courts remain rather open-ended and as such afford states a quite great leeway to invoke security concerns in an overly-broad set of circumstances. It seems nearly impossible for courts and bodies to define security without using expressions such as "essential interests of the state", "survival of the country", "functioning of institutions" and the like. In addition, the proliferation of security terms (mostly evident in the EU context), such as "public security", "national security" and "internal security", has complicated the courts' attempts to draw conceptual boundaries between them, with definitions overlapping very often with each other. Thus, even when the scope of security terms appears a little more specific, they remain empty vessels that states can easily try to fill with more claimed security threats or interests. This demonstrates that the conceptual challenge of defining security is not peculiar to human rights adjudication but is generally faced also by other courts.

At this point, the answer to the question of what features a legal definition should have in order to circumscribe more meaningfully the state power to invoke security provisions cannot be postponed any longer. I will tackle this issue in the following Chapter.

CHAPTER 3

THE CHALLENGES OF DEFINING SECURITY

1. Introduction

Chapter 1 and Chapter 2 have established that international and regional courts and bodies usually prefer not to engage with defining security, leaving states with the power to determine the substantive content of the concept. On the few occasions in which they have attempted to circumscribe more carefully the meaning of security provisions, the resulting definitions have remained quite open-ended, granting states a still broad power to fill security with content.

This Chapter will try to answer the question of whether it is possible to devise a legal definition of security that might act as brake on the unrestrained power of states to invoke the concept. First, I will explain what legal definitions are and whether they are generally suitable instruments to function as constraints to state power. Second, I will dissect the supposed 'ordinary' meaning of security, illustrating the different linguistic and extra-linguistic factors that complicate its possible understanding. This section will show not only that the 'ordinary' meaning of security can hardly be determined with precision, but also that what security seems to mean in everyday language lends itself to expansive interpretations of the concept more likely to enhance power, rather than to constrain it. Third, I will investigate more broadly the challenges posed by what I will call 'the process of defining', that is the ensemble of intellectual activities that are processed when a preliminarily rough understanding of a concept takes shape in the form of a definition. This will show that the process of defining, far from being a process of discovering supposed essential characteristics of a concept, is instead a persuasive process

that must be understood against the aims that defining actors try to achieve. Fourth, I will untangle the relationship between persuasive definitions and power, arguing that any legal definition of security is not likely to succeed in effectively acting as brake on the state power to invoke security. As I will show, states not only have generally no interest in defining security, but might also be able to exploit a legal definition of security for the construction of their security narratives. Along these lines, I will argue that states would in any event be able to manipulate a well-established legal definition of security when it would be convenient for them to do so in order to achieve their aims.

The Chapter will draw from fundamental insights from disciplines such as linguistic, semiotics and critical language study that have sought to shed light on the complex factors that influence the search for a meaning through the process of defining. As will be shown throughout this analysis, the complexity of definitions lies in the intricate, and often puzzling jungle hidden behind them, in which language, persuasion, power, and many other factors shape, often in a concealed fashion, the construction of meaning through a definition.

2. Legal definitions as constraints to state power

In the Introduction, we saw that both security studies and legal scholars have consistently underlined the inherent difficulty with defining security, at the same time stressing how an undefined notion of security is convenient for states because it allows them to activate their security powers without any need to justify their invocation of security.[1]

[1] See Introduction, section 3.

At this stage, then, it is fundamental to enquire into whether a definition of security in law might be able to perform a power-constraining function, by driving states towards a more legally meaningful invocation of security.[2] Before answering this question with respect to security, the enquiry should start with asking whether legal definitions *in general* are suitable to impose constraints on state power. In fact, if legal definitions are not *per se* able to perform this function, then the search for a legal definition of security is arguably a fool's errand based on a misplaced trust in the ability of definitions to set limits on power.

I shall begin with some remarks about the meaning of legal definitions, and how they differ from non-legal definitions.[3] At the most basic level, a definition is 'legal' when it is found in a piece of law. When a legal definition is present, it "determines the way in which a term must be understood for that law, be it in a similar or dissimilar way from the way it is commonly understood. It can also give a term a broader or narrower meaning than its acceptable meaning".[4] Therefore, a legal definition may assign a meaning to a term that departs (with certain degrees) from its meaning in the ordinary language. Definitions of this kind belong to the category of 'stipulative definitions', i.e. those definitions whose purpose is to assign a meaning to a term, with no pledge that the assigned meaning will be compliant with its prior usage.[5] In these instances, the legislator acts as a lexicographer.[6] At least in principle, stipulative definitions are different from 'lexical definitions' found in dictionaries, the purpose of which is

[2] I set out what I mean for "legally meaningful invocation" of security in the Introduction, section 4.

[3] Legal definitions have attracted some interest because of their relationship with legal language in general, their function in relation to the rule of law and their philosophical underpinning in relation to more wide-ranging considerations about the nature of the law. For some insights specifically on legal definitions, see Roy Harris and Christopher Hutton, *Definition in Theory and Practice: Language, Lexicography and the Law* (Bloomsbury 2007); Yaniv Roznai, ''A Bird is Known by its Feathers': On the Importance and Complexities of Definitions in Legislation' (2014) 2 The Theory and Practice of Legislation 145; Fabrizio Macagno, 'Definitions in Law' (2010) 2 Bulletin Suisse de Linguistique Appliquée 199; Michael D. Bayles, 'Definitions in Law' in James H. Fetzer et al (eds), *Definitions and Definability: Philosophical Perspectives* (Kluwer Academic Publishers, 1991) 253-274.

[4] Roznai 149.

[5] Richard Robinson, *Definition* (Clarendon Press 1950) 59-92.

[6] Jerome Hall, 'Analytic Philosophy and Jurisprudence' (1966) 77 Ethics 14, 15.

to explain the actual usage of a term within a linguistic community.[7] In reality, this distinction is not so sharp. In fact, the makers of dictionaries often employ stipulative definitions – acting as legislators, rather than historians – whenever a dictionary definition establishes how a word should be used, rather than how it is used.[8] Therefore, the similarity between legal definitions and (at least some) dictionary definitions shows that there is often a divide between the way a term is defined (in law and in general) and the way the term is used within a community of speakers.[9]

In any event, there is some correlation between legal language and ordinary language. In fact, the meaning of the majority of the terms employed in legal language usually does not differ from their ordinary meaning.[10] This proposition is acknowledged, at a normative level, in the golden rule on the interpretation of international law provisions, enshrined in Art.31(1) of the 1969 VCLT: "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[11]

However, this correlation should not be overstated. In fact, as H.L.A. Hart observed, legal language "silently assumes a special and very complicated setting, namely the existence of a legal system".[12] The legal system projects, from the background, its sets of rules and assumptions on the meaning of the terms found in the law. For this reason, legal language often needs to use 'technical' words that might depart – with different degrees – from ordinary

[7] Robinson (n 5) 35.
[8] Ibid 59.
[9] This is due to the complex relationship between definitions and ordinary language, that will be explained in section 3.
[10] Heikki E. S. Mattila, 'Legal Vocabulary' in Peter M. Tiersma and Lawrence M. Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 27.
[11] This interpretative canon is routinely recalled by human rights courts. Ex multis, *Golder v United Kingdom* (App. 4451/70), 21 February 1975, § 29. The issue of the extent to which the ECtHR refers to ordinary meaning and the Vienna Convention is a contentious one. See George Letsas, *A Theory of Interpretation of the European Convention of Human Rights* (Oxford University Press 2007).
[12] H.L.A. Hart, 'Definition and Theory in Jurisprudence' in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) 21, 27.

language.[13] Even in these cases, however, a word characteristic of the legal jargon cannot take up a meaning so disconnected from ordinary language as to be totally incomprehensible by a member of a community of speakers. Legal ('technical') language and ordinary language are intimately connected, because "technical language is always an adjunct of ordinary language",[14] and the former is somehow parasitic on the latter.[15] Therefore, the existence of a correlation between legal language and ordinary language should not be understood as an exact correspondence, but simply as a proposition that legal language must be grounded, to a certain extent, in the ordinary language, for it to make sense.

The functions of legal definitions explain why sometimes legal definitions need to depart from ordinary language. A legal definition is a tool to reduce ambiguity and vagueness in law.[16] To do so, legal language must be more concise and precise than ordinary language.[17] By making a law simpler and clearer, definitions contribute to upholding the rule of law, which requires laws to be accessible and foreseeable in order to guide human behaviour.[18] Reducing ambiguity and vagueness does not equate to annulling them. A definition alone is not able to clarify once and for all, on the one hand, the uncertainty of meaning and, on the other hand, the boundaries of a concept in borderline cases. In that respect, even a definition does not eradicate the need

[13] Mattila (n 10) 27.

[14] Charles Edwin Caton, *Philosophy and Ordinary Language* (University of Illinois Press 1963) viii. Hart's view differs from the one of Cato, as the former believes that technical language is cut off from ordinary language. For a criticism over Hart's view (and why Cato's view should be preferred), see Mary Jane Morrison, 'Excursions into the Nature of Legal Language' (1989) 37 Cleveland State Law Review 271, 301-302.

[15] Frederick Schauer, 'Precedent' (1987) 39 Stanford Law Review 571, 586.

[16] Roznai (n 3) 151. On the difference between ambiguity and vagueness, see Ralf Poscher, 'Ambiguity and Vagueness in Legal Interpretation' in Peter M. Tiersma and Lawrence M. Solan (eds), *The Oxford Handbook of Language and Law* (OUP 2012) 128.

[17] Roznai (n 3) 160.

[18] Tom Bingham, *The Rule of Law* (Penguin 2011). The requirements of accessibility and foreseeability of laws are expressly recognised by the ECtHR in order to evaluate the "quality of law" when interferences with qualified rights are involved. The leading case in this respect is *Sunday Times v United Kingdom* (App.6538/74), 26 April 1979, § 49.

for judicial interpretation.[19] As noted by the ECtHR, "however clearly drafted a legal provision may be, in any system of law […] there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances".[20] However, the presence of definitions in the law arguably facilitates the task of interpreting norms by judges. In this respect, legal definitions try to constrain, or to at least guide, the judicial interpretation of some concepts.

Legal definitions not only constrain judicial interpretation, but also the interpretation by any other norm-applying actors, including the government and its branches. Legal definitions are tools employed to try to oblige those in charge of applying the law to stick to the legal meaning as established in the law, trying to reduce, as far as possible, the discretionary space within which those actors operate. The criminal law provides a useful illustration of the importance of legal definitions in this respect. Due to the impact that criminal legislation may have on liberty, crimes must be clearly defined in order to draw the line between lawful behaviours and behaviours that the law considers criminal. The principle of clarity has indeed a special significance in criminal law and is considered as one of its general principles,[21] as also recognised by the ECtHR.[22] If criminal legislation does not define with clarity the elements constituting an offence, not only individuals would be unsure about the lawfulness of their conduct, but it would also be easier for a state to exercise as it pleases its power to subject an individual to criminal sanctions. The ECtHR has expressly recognised that an offence too vaguely defined heightens the risk of an abusive exercise of power, finding that the guarantees

[19] For a sceptic view about the possibility for judicial interpretation to remedy vagueness, see Timothy A. O. Endicott, 'The Impossibility of the Rule of Law' (1999) 19(1) Oxford Journal of Legal Studies 1, 4-6.

[20] *CR v United Kingdom* (App. 20190/92), 22 November 1995, § 34.

[21] Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th ed, Oxford University Press, 2016) 85. Horder refers to clarity in the context of criminal law as "maximum certainty".

[22] Ex multis, *Kokkinakis v. Greece* (App. 14307/88), 25 May 1993, § 52. The 'quality of law' test employed by the ECtHR in the context of Art.7 is the same as the one applied to the limitations of qualified rights (see Chapter 1, section 4).

provided by Art.7 of the ECHR "should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment".[23]

The consideration that undefined concepts in the law might enhance the state's coercive power can be generalised beyond the criminal law to other branches of law that also empower states to greatly interfere with the lives of their citizens, such as tax law. For example, in examining the definition of 'taxable person' under Romanian legislation, the ECJ stressed that "legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them".[24] The ECJ further clarified that accessibility and foreseeability do not concern only formal requirements, such as the publication of the law, but also more substantive ones, such as the manner in which legislation is drafted:

> the principles of legal certainty and the protection of individuals require, in areas covered by Community law, that the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed.[25]

As Ahmetaj observes, in order to uphold the principle of legal certainty "the law must provide its subjects with the ability to regulate their conduct inasmuch to protect themselves from the arbitrary use of the state power."[26] To try to extrapolate a more general principle, arguably the

[23] *Liivik v Estonia* (App. 12157/05), 25 June 2009, § 92. See also *S.W. v United Kingdom* (App. 20116/92), 22 November 1995, § 34; *C.R. v United Kingdom*, § 32.
[24] Case C-183/14, *Radu Florin Salomie and Nicolae Vasile Oltean v Direcția Generală a Finanțelor Publice Cluj* [2015] ECLI:EU:C:2015:454 § 31. See also Case C-239/86, *Ireland v Commission* [1987] ECLI:EU:C:1987:554 § 17.
[25] Case 257/86, *Commission v Italy* [1988] ECLI:EU:C:1988:324 § 12. See also *Radu Florin Salomie* § 32.
[26] Hysni Ahmetaj, "Legal Certainty and Legitimate Expectation in the EU Law" (2014) 2 Interdisciplinary Journal of Research and Development 20, 21.

greater is the power conferred upon states by the law, the greater is the necessity to define carefully legal concepts to set limits on this power.

Thus, the function of legal definitions to guide individual actions and that of narrowing down the discretional margin of norm-applying actors are two sides of the same coin. This shows another important feature of legal definitions, that is their being prescriptive, and not merely descriptive.[27] The prescriptive nature of legal definitions stems from their incorporation into legal texts that have normative force. While a definition proposed by a dictionary can be rejected by a reader without consequences, a legal definition "is the coercive determination of the exclusive manner by which a term must be understood and used in a set of certain factual circumstances".[28] It follows that those who are subject to the law (individuals and norm-applying actors), even if they disagree with the way something is defined in the law, must nevertheless adhere to the concept as defined in that law.[29] However, judicial and non-judicial interpretation of norms is still possible (and generally required) within the limits set out by a definition.

States are all too often well-aware of the power-constraining function of legal definitions, as demonstrated by the fact that they show often no interest in defining concepts, in particular in highly politically sensitive areas. Security, as we have seen in the Introduction, is a clear example of this kind. A vague concept of security allows the state to invoke the concept to trigger its security powers with more flexibility. Another telling example is the lack of an internationally binding definition of terrorism.[30] It is amply documented that an undefined notion of terrorism is a powerful tool for states to attach the label 'terrorist' to organisations

[27] Robinson (n 5) 44.
[28] Roznai (n 3) 147.
[29] I will return to the issue of the prescriptive nature of legal definitions in section 4 and 5 below.
[30] See, on this issue, the Introduction, section 3.

and individuals with easiness.[31] For states, undefined terms in practice translate into a stronger power grip.

Therefore, if it is true that definitions in law are part of prescriptive language employed as a means of social control through the normative force of a legal text,[32] the contrary is likewise true: vague definitions, or no definition at all, also constitute a means of social control by strengthening states' power grip. In other words, what states do not say when they leave terms undefined actually says a great deal about what states are trying to achieve, namely avoiding constraints on their power.

Admittedly, some vagueness in law might be beneficial in so far as it acts as a 'safety valve' that allows concepts to adapt to multi-faceted scenarios and their constant evolution through various historical contingencies.[33] Nonetheless, there are some possible challenges with this position. First, vagueness and absence of a legal definition are not the same thing. An undefined concept is the most extreme form of vagueness, because its meaning can be more elastically stretched than the meaning of a vague definition.

Second, as Chapter 1 has demonstrated with regard to security, leaving the task of defining legal concepts from scratch to courts raises the problem of their legitimacy, putting them in the uncomfortable position of being called to give meaning to terms that lawmakers have left undefined. In that respect, Lon Fuller observed that

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[31] UNHRC 'Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders', Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (1 March 2019) UN Doc A/HRC/40/52, paras 19-20. See also Mary Lawlor and Fionnuala Ní Aoláin, 'Defending Human Rights Is Not Terrorism: The Egypt Arrests as a Case in Point' (*Just Security*, 30 November 2020) at < www.justsecurity.org/73606/defending-human-rights-is-not-terrorism-the-egypt-arrests-as-a-case-in-point/ > accessed 11 May 2021.

[32] Glanville Williams, 'Language and the Law' (1945-1946) 62 Law Quarterly Review 387, 388.

[33] Timothy Endicott, 'The Value of Vagueness' in Vijay K. Bhatia, Jan Engberg, Maurizio Gotti and Dorothee Heller (eds), *Vagueness in Normative Texts* (Peter Lang, 2005) 27–48.

> it is a serious mistake – and a mistake made constantly – to assume that, though the busy legislative draftsman can find no way of converting his objective into clearly stated rules, he can always safely delegate this task to the courts […]. In fact, however, this depends on the nature of the problem with which the delegation is concerned.[34]

Arguably, states might have some claim to vagueness in relation to security. Because threats are constantly evolving, states normally oppose definitions of security in fear that they might hamper their operational ability to counter threats.[35] Even conceding that these claims are entirely legitimate, the problem remains on how to define security in such a way as to forestall the risk that some seemingly necessary vagueness would transform into the type of vagueness that leads to unfettered expansion of state power.

Nonetheless, and more fundamentally, talking about vagueness in relation to undefined concepts reveals some circular reasoning. In fact, Jeremy Waldron warns that

> unless the problem of meaning is solved, the issue of vagueness cannot even arise. We cannot know that a word is vague, unless we know something about its use. So although vagueness is a problem for the theory of meaning, the very postulation of the problem assumes that the basic question – of what it is for a word to have meaning – has in some way or another been settled.[36]

Let us then try to say something more about the supposed 'ordinary' meaning of security, and whether and how it can help shape the legal meaning of security.

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[34] Lon L. Fuller, *The Morality of Law* (Rev. ed, Yale University Press 1969) 64.

[35] A clear example is the debate in the House of Lords about the need to define security in the Investigatory Powers Bill (see Introduction). To briefly recall the key part of this debate, the government opposed an amendment seeking to define national security on the basis of the argument that threats are constantly evolving, and thus a definition of national security would have undermined the possibility for the government to tackle new threats.

[36] Jeremy Waldron, 'Vagueness in Law and Language: Some Philosophical Issues' (1994) 82 California Law Review 509, 511.

3. Chasing the 'ordinary' meaning of security

Since legal language is grounded to a certain extent in ordinary language, the meaning of an undefined term in the law should be inferred from its ordinary meaning. Arguably, if the ordinary meaning of security is clear enough, it might compensate for the lack of a legal definition, in such a way as to operate as a sufficient safeguard against potential misappropriation of the concept by state power.

The starting point to discover the ordinary meaning of security is to look at its definition in a dictionary.[37] However, as noted earlier, dictionary definitions should be approached with due circumspection, because they might not necessarily explain the actual usage of a term, but rather stipulate how a term should be used.

We saw in the Introduction that the most basic definition of security reads "the state or condition of being or feeling secure. Freedom from danger or threat".[38] This definition is arguably compliant with the way the word 'security' is commonly understood.[39]

The dictionary definition confirms that the meaning of security is twofold: it is an objective ('being secure') and subjective ('feeling secure') state or condition. In addition, security denotes absence of ('freedom from') dangers or threats. Evidently, such a definition is very broad. It says nothing about what threats or dangers affect people's feeling, and objective condition, of security. In practice, the definition implies that whenever there is a threat or danger of any kind, subjective and objective security are jeopardised. That a dictionary defines a term broadly does not necessarily imply that the definition is flawed. On the contrary, brevity is a characteristic

[37] Lawrence M. Solan and Tammy Gales, 'Finding Ordinary Meaning in Law: The Judge, the Dictionary or the Corpus?' (2016) 1 International Journal of Legal Discourse 253.
[38] See Introduction, section 3.
[39] However, as we will see in this section, different people might understand the term 'security' differently, because there are many factors that influence the way security is understood.

of dictionary definitions, which has advantages and disadvantages: "it tends to give speed and to increase one's grasp, but also to lose details and accuracy and richness of insight".[40]

In any event, this definition does not seem suitable to replace an undefined concept of security in law, because it does not contribute to achieving the aim of legal language to reduce indeterminacy of meaning. Even less would such a definition be able to constrain the state power to invoke security. On the contrary, its vagueness supports states in qualifying any potentially dangerous situation as 'threat to security'. In fact, the dictionary definition of security underscores, at linguistic level, what security scholarship has consistently observed: that the meaning of security, without 'threats', cannot be understood, because security makes sense only as 'security from what?'.[41]

However, understanding the meaning of a word is a much more complex activity than simply opening a dictionary and looking into a definition. Even those who endorse plain meaning in statutory interpretation admit that "the assistance of a dictionary may prove historically and culturally insensitive".[42] In fact, there are many more factors that continuously shape and re-shape the supposed 'ordinary' meaning of terms, and its constant evolution through everyday usage.

Since the foundational work of Ferdinand de Saussure on semiotics, it is now established that the connection between the signifier (the physical part) and the signified (the concept evoked in the mind) is an arbitrary one.[43] In reality, as de Saussure showed, the signification, i.e. the process of generating meaning through signs, involves a "psychological imprint of the sound,

[40] Robinson (n 5) 52. For more discussion about the features of dictionary definitions, see Robinson 53 -58.
[41] See Introduction, section 5.4
[42] Neil Duxbury, *Elements of Legislation* (Cambridge University Press 2013) 141.
[43] Ferdinand de Saussure, *Course in General Linguistics* (Perry Meisel and Haun Saussy eds, Wade Baskin trs, Columbia University Press 2011) 67. On de Saussure's work and generally on semiotics, see Daniel Chandler, *Semiotics: The Basics* (3rd ed, Routledge 2017).

the impression that it makes on our senses".[44] Definitions, whose *definiens* is a combination of different signs employed to explain another sign (the *definiendum*)[45], are also tied to this psychological process through which the sum of the signifiers evokes the meaning of a concept in people's mind. To take the example of security, 'security' is the word that is conventionally used (signifier) to evoke in people's mind what they mean by security (signified). However, what people understand by security is far more complex than what a dictionary definition tries to capture.

Jeremy Bentham had already observed the existence of a psychological connection between words and the evocation of meaning. In *The Book of Fallacies*, he acknowledged that words by themselves trigger feelings of approbation (he calls these words 'eulogistic', for example 'gratitude'), or disapprobation ('dyslogistic', for example 'avarice'), while some are neutral (for example, 'habit').[46] It was Charles Leslie Stevenson, a century later, who developed the topic, noting in his work that signs have both a descriptive and an emotive meaning.[47] With emotive meaning, he intended that particular disposition that connects a sign to a diverse set of attitudes.[48] While the emotive meaning of a word is relatively stable, disposition might vary, depending on the person, the context or other circumstances.[49] To illustrate this dynamic, Stevenson provides the following example:

> [s]uppose, for example, that a group of people should come to disapprove of certain aspects of democracy, but continue to approve of other aspects of it. They might leave

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[44] de Saussure 66.
[45] On the structure of definitions, see Anil Gupta, 'Definitions', *The Stanford Encyclopedia of Philosophy* (Winter ed, 2019) < plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=definitions > accessed 5 May 2021.
[46] Jeremy Bentham, 'The Book of Fallacies' in Mary Peter Mack (ed), *A Bentham Reader* (Pegasus 1969) 337-339.
[47] Charles Leslie Stevenson, *Ethics and Language* (Yale University Press 1944). For a more detailed overview of the work of Stevenson, see Daniel R. Boisvert, 'Charles Leslie Stevenson', *The Stanford Encyclopaedia of Philosophy* (Winter ed, 2016) < plato.stanford.edu/entries/stevenson/#EmoDesMea > accessed 30 April 2021.
[48] Stevenson (n 47) 60.
[49] Ibid.

> the descriptive meaning of 'democracy' unchanged, and gradually let it acquire, for their usage, a much less laudatory emotive meaning. On the other hand, they might keep the strong laudatory meaning unchanged, and let 'democracy' acquire a descriptive sense which made reference only to those aspects of democracy (in the older sense) which they favored.[50]

Bentham and Stevenson's works provide fundamental insights into the complexity of meaning that can be applied in order to grapple with the elusive meaning of security. Defined as freedom from threat, and as the condition of being or feeling secure, security arguably has a positive emotive meaning ('eulogistic'). However, those who might think of security in the context of abuses made in the name of it (say, detention of alleged terrorists in Guantánamo Bay, or mass and bulk surveillance), might consider the term as having a negative emotive meaning ('dyslogistic'). How does this (positive or negative) emotive meaning interact with the descriptive meaning of security? Let us take, for example, migration as an archetypical event that in recent years has polarised the opinions as to whether it constitutes a threat to security.[51] Those who think that migration flows threaten security would include, more or less consciously, the issue of migration within the meaning of security, in such a way as the former contributes to delimit the way they understand the latter. Conversely, those who believe that migration is not a security problem would not make such a connection, and would most likely narrow down their understanding of the term 'security' to other threats or dangers. To employ Stevenson's example on democracy, it is possible to say that those people who disapprove the characterisation of migration as security threat will either: (a) leave the descriptive meaning of security unchanged, that will then acquire a less positive emotive meaning; or (b) keep the

[50] Ibid 72.

[51] Polls carried out in the US and in the EU seems to show that opinions about the threat posed by immigration are in fact quite polarised. In the EU: <www.pewglobal.org/2016/07/11/europeans-fear-wave-of-refugees-will-mean-more-terrorism-fewer-jobs/> accessed 30 April 2021. In the US: <www.pewresearch.org/fact-tank/2019/01/16/how-americans-see-illegal-immigration-the-border-wall-and-political-compromise/> accessed 30 April 2021.

positive emotive meaning of security, while letting acquire to the term a descriptive meaning which does not include the aspect that they will not approve (the inclusion of migration).

To this dynamic, it should be added that descriptive and emotive meanings are in turn influenced by a chain of other related terms, also bearing their own descriptive and emotive meanings. In fact, de Saussure explained that the meaning of signs depends on the meaning of other signs within a system of interconnected signs.[52] Post-structuralism has convincingly explained this relationship. As Jacques Derrida observed, "the signified concept is never present in and of itself, in a sufficient presence that would refer only to itself. Essentially and lawfully, every concept is inscribed in a chain or in a system within which it refers to the other, to other concepts, by means of the systematic play of differences".[53] Meaning, for Derrida, is relational, since it is produced through a complex system of association with other signs, as well as by difference with other signs.[54] Due to this endless chain of signifiers, meaning (signified) is always deferred or postponed, and therefore evasive.[55]

The process through which meaning is shaped by other terms is also well-known in cognitive psychology by the name of "associative activation", that is "ideas that have been evoked trigger many other ideas, in a spreading cascade of activity in [the] brain".[56] Through this process of associative activation, words evoke emotions and memories that in turn strengthen other similar ideas.[57]

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[52] Chandler (n 43) 18.
[53] Jacques Derrida, 'Différance', in *Margins of Philosophy* (University of Chicago Press 1982) 11.
[54] Jacques Derrida, *Writing and Difference* (Routledge 2002) 354.
[55] Ibid 357.
[56] Daniel Kahneman, *Thinking Fast and Slow* (Penguin Books 2011) 51. On the process of associative activation in more detail, see Carey K. Morewedge and Daniel Kahneman, 'Associative Processes in Intuitive Judgment' (2010) 14 Trends in Cognitive Sciences 435.
[57] Kahneman 51.

The meaning of security thus is also influenced by the meaning of other words that are often evoked in connection with it, for example 'emergency', 'surveillance', 'privacy' and the like. Because of the seemingly necessary connection between security and threats, the meaning of security also evokes, and is also shaped by, words such as 'terrorism', 'war', 'espionage', 'migration', but also 'environment', 'climate change' and so on.

This chain of meaning that influences the meaning of security does not exist only in ordinary language, but also in legal language. In fact, when it comes to trying to understand the meaning of a legal concept such as security, there is an additional complication generated by the presence of other concepts, normally also undefined, that appear in the law in connection with security. As we saw in the previous Chapters, security is often mentioned together with concepts such as public order, safety, defence, territorial integrity and the like.[58] Sometimes, the same piece of law even employs different qualifications of security, such as national security, public security, state security, internal security.[59] Any interpreter who tries to make sense of the meaning of security in law is arguably influenced not only by the chain of associated concepts in ordinary language, but also by concepts that have been associated in a piece of law. Not only do those concepts influence the meaning of security, but they also complicate efforts to distinguish between them. As Hart observed, definitions are (also) "a matter of drawing lines or distinguishing between one kind of thing and another, which language marks off by a separate word".[60] Similarly, for Martti Koskenniemi legal rules rest on a "system of conceptual differentiations" that is necessary to justify international legal arguments.[61]

[58] See Chapter 1, section 3.1 and Chapter 2, section 4.
[59] We have seen many examples in Chapter 1 and Chapter 2. As noted in Chapter 2, section 4, the proliferation of security terms is very common in EU primary and secondary legislation.
[60] H.L.A. Hart, *The Concept of Law* (2nd ed, Oxford University Press 1994) 13.
[61] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Reissue with epilogue, Cambridge University Press 2005) 10.

As seen in Chapter 1 and Chapter 2, international and regional courts and bodies have failed to convincingly explain the difference between security and other concepts, sometimes even treating them as somewhat synonymous. Perhaps they cannot be blamed. Even at the simplest level of linguistic intuition, it is hardly possible to understand with precision what differentiates security from, say, public order or safety. Is there a threat to security that is not also a threat to public order or safety? Hart again explains that "the need for such a drawing of lines is often felt by those who are perfectly at home with the day-to-day use of the word in question, but cannot state or explain the distinctions which, they sense, divide one kind of a thing from another."[62]

Admittedly, the difficulty with making sense of expressions such as "safety and security" and "peace and security" might give the impression that legal texts often incorporate tautologies widely employed in common parlance. A tautology, being a repetition of two words or expressions with nearly the same meaning, denotes a fault in style, although it is commonly used "not to amplify the thought, but to modify our feelings concerning it".[63] Repetitions of similar words are frequent in passionate speeches, because "intense passion is, from its very nature, tautological; it clings to the object of contemplation".[64] However, one might wonder whether the passion of spoken language should have ever found a place in legal language.

So far, the analysis of the ordinary meaning of security has explicitly assumed that the meaning of concepts is influenced, to a great extent, by these psycho-linguistic factors that project their impact on the meaning-making process. However, these factors alone are insufficient insofar as they do not fully explain how the ordinary meaning of (at least some) concepts is shaped and

[62] Hart (n 60) 13-14.
[63] John Bascom, *Philosophy of Rhetoric* (Crosby and Ainsworth, 1866) 241. On tautology, see also Johannes Bulhof and Steven Gimbel, 'A Tautology is a Tautology (or Is It?)' (2004) 36 Journal of Pragmatics 1003.
[64] Bascom 241.

continuously transformed by extra-linguistic causes capable of altering the comprehension of words.

A concept such as security does not live only in the imaginary realm of ordinary meaning and its relational interlinkage with other concepts. Instead, it is a concept that permeates the realm of politics, its vocabulary and rhetoric. As Foucault observed,

> the fact that man lives in a conceptually structured environment does not prove that he has turned away from life, or that a historical drama has separated him from it. […] Forming concepts is a way of living and not a way to immobilise life; it is a way to live in a relative mobility and not a way to immobilise life.[65]

As the transformations of security that have occurred in the last decades have shown,[66] security is far from an immutable concept. On the contrary, there are arguably many understandings of security, such as national security and human security, that underscore different conceptions of security since their genesis and that attest the evolution of security throughout different historical periods. These concepts of security populate our lives, they are embedded in the social environment we all live in. Politicians, traditional media, social networks, all contribute to ceaselessly shape what we mean for 'security', modifying our perceptions and sensibilities.

It would be simplistic to dismiss the powerful force exerted by those phenomena as extraneous to our linguistic understanding of security. Rather, the meaning of concepts is continuously conditioned by these forces, not least because language is the product of social life, and in Koskenniemi's words, "the concepts and categories with which we orient ourselves in the world are internalised in a process of socialization."[67]

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[65] Michel Foucault, 'Life: Experience and Science' in James Faubion (ed), *Aesthetics, Method, and Epistemology. Essential Works of Foucault 1954-1984. Vol II* (R. Hurley and others trs, The New Press 1998) 475.
[66] See the overview of the history of security in the Introduction, section 5. For more insights into human security, see Chapter 4, section 3.
[67] Koskenniemi (n 61) 11-12.

The connection between security and threats clearly illustrates how extra-linguistic phenomena influence the meaning of security. In fact, as noted earlier threats seem to be determinants of the meaning of security, that can only be understood as security *from threats*. However, the qualification of a potentially hazardous occurrence as 'threat to security' is not immanent, but is a process that is carefully manufactured by political actors to purse a specific agenda.[68] As the securitization theory has explained, threats to security are construed by political actors, that are able to present anything they want as an existential threat.[69] Not only states manufacture threats to security, but they can also magnify, or downplay, their actual intensity.[70]

Importantly, this process of identification of security threats has a great impact on the ordinary meaning of security itself. In fact, whenever something is identified as a threat, the ordinary meaning of security ('freedom from dangers or threats') is engaged. The greater the number of hazardous events identified as threats to security, the more the understanding of the meaning of security is subject to continuous transformations and expansions. This seems unavoidable due to the ordinary meaning of security being parasitic on the idea of threats. At a cognitive level, for example, linking 'immigration' and 'security' creates an associative activation in the brain that will likely prompt people to connect the two words in a causal story, in such a way as they will treat the association of these two words as representing fragments of reality.[71] For instance, 'immigration is a threat to security'. The choice to associate some words, as noted, is not accidental, but the product of political strategy. In other words, political discourse has the power

[68] See Introduction, section 5.4 on the manufacturing of threats.

[69] Barry Buzan, Ole Wæver and Jaap de Wilde J, *Security. A New Framework for Analysis* (Lynne Rienner Publishers 1998) 25.

[70] Barry Buzan, *People, States and Fear. An Agenda for International Security Studies in the Post-Cold War Era* (2nd ed, Harvester Wheatsheaf 1991) 119, explaining that "the question of when a threat becomes a national security issue depends not just on what type of threat it is, and how the recipient state perceives it, but also on the intensity with which the threat operates. The main factors affecting the intensity of a threat are the specificity of its identity, its nearness in space and time, the probability of its occurring, the weight of its consequences and whether or not perceptions of the threat are amplified by historical circumstances".

[71] Kahneman (n 56) 51.

to continuously insinuate new words in order to shape, or alter, people's comprehension of a term such as security.

This process happens without a person being able to define rationally what they understand by 'security'. As shown, the issue of meaning is much more complicated, because it has more to do with the perception of the meaning. Hart famously said "I can recognise an elephant when I see one, but I cannot define it".[72] Arguably, the same is true with security: any person will likely understand what security means, but defining it with precision might prove much more complicated.

What has been said shows that talking about the 'ordinary' meaning of security is an insufficient approximation, even more when what is 'ordinary' is inferred from dictionary definitions, because there are many more factors, both linguistic and extra-linguistic, that influence the way the meaning of the concept is structured in everyday life. More problematic is the fact that the 'ordinary' meaning of security does not seem to be self-sufficient, but is shaped by the concept of threats. And because states are able to manufacture threats to security, in practice the 'ordinary' meaning of security provides ammunition for states to continuously shape and reshape the way security is ordinarily understood.

Even conceding that some vagueness in law is unavoidable and perhaps beneficial, as previously explained, the problem remains that the 'ordinary' meaning of security does not provide safeguards against the type of vagueness that might translate into arbitrary exercise of state power. In fact, it is quite the contrary. It is in the cracks left open by this overly broad

[72] Hart (n 60) 14. Another famous example of "I know it when I see it" logic is provided by Justice Potter Stewart of the US Supreme Court to explain his view that the material object of the trial was not obscene: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that" (*Jacobellis v. Ohio*, 378 U.S. 187 (1964) § 197.

meaning of security, as disclosed by ordinary language, that there is plenty of room for an arbitrary exercise of the state power to crawl. Because state power can easily control those linguistic and psychological dynamics that contribute to shaping meaning, the 'ordinary' meaning of security is too elusive and unreliable a tool to act as a brake on the state power to invoke security.

4. The persuasive process of defining

Because the supposed 'ordinary' meaning of security is not only unsuited to setting limits on the state power to invoke the term, but actually seems to facilitate the expansion of this power, I shall now enquire into the possibility of building up a legal definition that would be suitable to act as a constraint on the state's endless possibility to invoke security.

Before doing so, I shall recall two important points that have emerged from previous discussions. First, definitions in law must be concise and carefully constructed, if their function is to minimise indeterminacy of meaning. In fact, it would be a pointless exercise to define security in such broad terms as to allow states to stretch its legal meaning in the same way as it was argued the 'ordinary' meaning would permit. For this reason, the few definitions devised by human rights courts and bodies, that employ generic expressions such as protecting 'the essential function of the state', or the 'fundamental interests of the society' and so on cannot be considered sufficient to fulfil the aim of circumscribing state power.[73] Second, the 'ordinary' meaning of security, albeit rather ineffable, cannot be fully discarded, because legal definitions

[73] See the conclusions of Chapter 1 and Chapter 2.

need anyway to be anchored to a certain extent in the way terms are ordinarily understood, or they will not make sense at all.

The starting point to try to understand whether and how security can be defined in law is to explain what I have called 'the process of defining', that can be loosely understood as the ensemble of intellectual activities that are processed when a preliminary rough understanding of a concept takes shape in the form of a definition. This process can be illustrated by comparing two different (though not necessarily competing) understandings of definitions.

At the most basic level, the first step that any person ordinarily takes when she or he tries to define something is, simply, to find a combination of words that identify the essential characteristics of the *definiendum*. The search for the essential characteristics of a thing is an attempt to answer the question 'what is X?'.[74] Definitions purporting to answer this sort of questions are called 'real definitions'.[75] Socrates and Plato, who are credited to have invented the idea of definition, had in mind real definitions when they referred to the definition of *res* (things).[76] Real definitions can arguably be traced back to Aristotle, who famously defined a definition as 'a phrase signifying a thing's essence'.[77] Enquiries into real definitions have had a long and notable pedigree. In the seventeenth century, for example, Benedict de Spinoza wrote that "the true definition of any one thing neither involves nor expresses anything except the nature of the thing defined".[78] In the twentieth century, G.E. Moore observed that definitions

[74] Edward Schiappa, *Defining Reality: Definitions and the Politics of Meaning* (Southern Illinois University Press, 2003) 6.
[75] Ibid. See also Robinson (n 5) 157.
[76] Robinson 7-8. For an overview of the positions of other philosophers, including John Locke and John Stuart Mill, see Robinson 8-11.
[77] Aristotle, *Topics* (W. A. Pickard-Cambridge trs., Kessinger Publishing 2004) 4.
[78] Benedict de Spinoza, *Ethics* (W.H. White and A.K. Stirling trs, Wordsworth 2001) 8.

"describe the real nature of the object or notion denoted by a word"[79], while real definitions also informed the work of Bertrand Russell on the "ultimate constituents of reality".[80]

However, more modern approaches to definitions have heavily criticised the doctrine of essentialism because of the difficulties with finding immutable characteristics ('a thing's essence') shared by each fragment of reality.[81] To find the essence of a thing "is not a unitary kind of activity".[82] As Edward Schiappa explains, the search for real definitions is fallacious, since people have no access to things in themselves and definitional propositions are necessarily historically contingent.[83] Thus, critics of real definitions reject the metaphysical absolutism centred on the possibility of discovering a thing's essence, which fails to recognise the social and historical features of defining.[84] As a result, the belief in the existence of real definitions has gradually faded away.

These approaches have moved towards an understanding of the persuasiveness of definitions in argumentation.[85] This shift implies that definitions are strictly dependent upon the role that they play in public life, which includes the social and legal aspects of defining.[86] This change of paradigm brings about a transformation of the question 'what is X?' into the more pragmatic and socio-political question of 'how ought we use the word X?'.[87] This different perspective has important implications for the way definitions are understood, insofar as it discloses the rhetorical connotations inherent in any act of defining. Rhetoric, as put by David Zarefsky,

[79] G.E. Moore, *Principia Ethica* (Thomas Baldwin ed, Revised ed, Cambridge University Press 1993) 59.
[80] Bertrand Russell, *The Analysis of Mind* (George Allen & Unwin 1921).
[81] Macagno (n 3) 199.
[82] Gupta (n 45).
[83] Schiappa (n 74) 168.
[84] Ibid.
[85] Douglas Walton, 'Deceptive Arguments Containing Persuasive Language and Persuasive Definitions' (2005) 19 Argumentation 159.
[86] Ibid 179.
[87] Schiappa (n 74) 45.

> may be taken to be the study of the process of public persuasion. It is the study of how symbols influence people. It encompasses a concern for the terms in which issues are defined, since a definition will highlight some aspects of an issue while diminishing others, and the choice of what is highlighted will make the issue more or less persuasive. Rhetoric involves the selection of symbols which will represent ideas, since those symbols evoke support or opposition by virtue of their association with an audience's prior experience and belief. Rhetoric includes the choice among possible appeals and arguments, since these choices influence whether audiences will be convinced that a proposal is in their interest. And rhetoric includes decisions about how to explain ambiguous situations, so that they may be taken as evidence for one's point of view rather than the opposite.[88]

Due to the role played by definitions in rhetoric, proposing a definition is more a matter of choosing arguments by highlighting some issues and downplaying others. In other words, it is a matter of persuasion, rather than a discovery of the essence of a thing *in se*. Influencing an audience through persuasion, by its nature, relies heavily on appeals to the emotions evoked by words. Bentham had already understood in the nineteenth century that the tactic of selecting a term with a positive (eulogistic) or negative (dyslogistic) emotive meaning plays a fundamental role in persuasive argumentation, for it immediately influences the predisposition of an audience over a certain topic.[89]

The idea of 'persuasive definitions' was first elaborated by Charles Leslie Stevenson as part of his theory on emotive meaning illustrated in the previous section.[90] He observed that "a 'persuasive' definition is one which gives a new conceptual meaning to a familiar word without substantially changing its emotive meaning, and which is used with the conscious or

[88] David Zarefsky, *President Johnson's War on Poverty: Rhetoric and History* (The University of Alabama Press 1986) 5.
[89] Bentham (n 46) 337.
[90] Charles Leslie Stevenson, 'Persuasive Definitions' (1938) 47 Mind 331, 331.

unconscious purpose of changing, by this means, the direction of people's interests".[91] For Stevenson, persuasive definitions are a powerful instrument of deceptive argumentation, since a persuasive definition of a term attempts to modify its descriptive meaning, but its emotive meaning tends to cling on.[92] Through this process, an audience may rationally accept the definition of a term, yet unconsciously hold on to the positive or negative meaning in the emotional sphere. The acknowledgment that persuasive definitions are deceptive in the way they attempt to manipulate an audience has prompted criticism by those who believe that "a persuasive definition masquerades as an honest assignment of meaning to a term while condemning or blessing with approval the subject matter of a definiendum".[93] Put differently, the main problem with accepting that all definitions are inherently persuasive is that "any kind of persuasion tends to be seen as rhetorical, or even as subjective, and therefore the notion of persuasive definition is already seen in a negative light".[94]

Nonetheless, less radical views have suggested not to be so dismissive of persuasive definitions. As Douglas Walton notes,

> There is nothing wrong with proposing a persuasive redefinition, as long as it is recognized that it is a persuasive move in argumentation that is open to discussion, and to opposing views that might define the term in a different way. The persuasive definition becomes problematic when such avenues for further discussion are blocked off.[95]

As he explains, in order to understand the role of definitions in argumentation, a broader and flexible approach is needed, whereby attempts to put forward a definition must be evaluated in

[91] Ibid, 331.
[92] Ibid. The theory had been further elaborated in Stevenson, *Ethics and Language* (n 47).
[93] Patrick J. Hurley, *A Concise Introduction to Logic* (11th ed, Wadsworth 2010) 99. Hurley provides the example of two different persuasive definitions of abortion: "'Abortion' means the ruthless murdering of innocent human beings" and "'Abortion' means a safe and established surgical procedure whereby a woman is relieved of an unwanted burden".
[94] Walton (n 85) 177.
[95] Ibid 183.

light of the purpose the definition is trying to reach.[96] Thus, the standard through which a definition should be evaluated is the contribution it makes to the argumentation. Such an approach has the merit of clarifying that definitions are not immutable monoliths – as the doctrine of essentialism seemed to believe – but are tangled with the context in which they are used and with the purpose they serve. As such, definitions should not be blind to the possibility of contestations, as long as alternative definitions are put forward by respecting the dialectical rules that require any disagreement to be substantiated within the frame of an alternative argumentation.[97] Seen from this perspective, definitions can be understood as commonly accepted opinions, valid in an argumentation until challenged by alternative definitions.[98]

At this point, the question remains of whether the role played by persuasion in relation to definitions has dealt a fatal blow to the idea of real definitions: should those be radically dismissed or is there anything useful left about them? While, as noted earlier, real definitions have been highly criticised for being "at best a mistake and at worst a lie",[99] more nuanced positions concede that there is nothing inherently wrong in distinguishing between the more central and the less central attributes attached to a term, and hence some form of essentialism is still useful.[100] The problem arises with the more absolute form of essentialism, which leads adherents to quickly and dogmatically dismiss competing definitions as being 'unreal', blocking off the avenues for further discussion and alternative argumentations.[101] It follows that distinguishing between central and less central characteristics of a term is in itself an act of persuasion, that must still be understood against the purpose served by a definition.[102] In other

[96] Ibid 179-180. Walton (at 180-184) suggests ten questions that might help carry out this evaluation.
[97] Ibid 182.
[98] Macagno (n 3) 199.
[99] Robinson (n 5) 170.
[100] Walton (n 85) 174-176.
[101] Ibid.
[102] Ibid.

words, there is always an element of persuasiveness that informs any process of defining and that is likely to lead to disagreement over proposed definitions. Persuasion and disagreement are therefore inherent components of the process of defining.

The relationship between definitions and persuasion poses two challenges in relation to the construction of a legal definition of security. First, it shows that the attempts of dictionary definitions of security to capture supposed central features of the concept (such as the absence of threats and dangers) are attempts *to persuade* an audience (for example, readers of the dictionary) that those are central features. In fact, there is nothing inherently 'essential' or 'less essential' in the concept of security. Even the concept of 'threats', that seems to be a critical component of the definition of security, is by no means an 'essential' feature in the sense that any alternative definition that would not use the concept of threat should be discarded *a priori*.

Second, and more importantly, any effort to define security in law should grapple with the fact that proposed legal definitions too are persuasive definitions, and therefore should not be seen as legally sanctioned statements of what security means in essence. Similarly, the few definitions of security proposed by some international and regional courts and bodies analysed in the previous Chapters are put forward to *persuade* an audience (for example, parties to a case, or legal professionals in general) that security is understood in law in that way, and not to conclude that the definition captures any supposed 'essential' characteristic of security. From this perspective, all those definitions are, more or less, valid, in so far as they underscore different persuasive attempts to define the term. One might argue which one is 'the best legal definition' or try to come forward with an alternative one. But this process will only demonstrate that any disagreement is based on the failure to persuade another person that the proposed definition is 'the best one', and not on the failure of the definition to capture some metaphysical essence of security.

5. The state power to define and to manipulate definitions

The issue of persuasion in relation to legal definitions is admittedly much more complex than it is in relation to non-legal definitions. In fact, as noted in section 2, legal definitions have normative value, and therefore they do not define to clarify meaning, but define to prescribe behaviours of those subject to the law (individuals and norm-applying actors). To use John L. Austin's speech act terminology, legal definitions are 'performative utterances': they do not describe reality, but shape social reality.[103]

It follows that the persuasive nature of definitions in general must be understood according to the specificity of legal definitions. Because legal definitions are prescriptive, they are persuasive in the sense that they might or might not convince the addressees of the law about the way something is defined, however disagreement would not remove their prescriptiveness. In other words, even if legal definitions too are persuasive, disagreement, that is a component of persuasive definitions in general, is normally without much consequence with respect to their prescriptive nature.[104] This is true also in relation to definitions crafted by judicial and quasi-judicial bodies: the critique of a definition does not hinder its prescriptive force (the term must be understood in the way courts and bodies have established, at least for the purpose of the case before them).

This link between persuasiveness and prescriptiveness shows another important aspect of definitions, that is their relationship with power. As Schiappa observes, the shift towards the

[103]John L. Austin, *How to Do Things with Words* (Oxford University Press, 1962) 2-11. Also on speech act, see John Searle, *Speech Acts: An Essay on the Philosophy of Language* (Cambridge University Press, 1969). On legal language as speech act, see Jacqueline Visconti, 'Speech Acts in Legal Language: Introduction' (2009) 41 Journal of Pragmatics 393.

[104]This is not undermined by the fact that legal systems have generally mechanisms in place to deal with disagreement about legal provisions, such as judicial interpretation, or even review of constitutionality or compatibility with human rights. In fact, the cases in which courts have found a legal definition not compatible with IHRL, mentioned in section 2, constitute examples of disagreement about legal definitions.

understanding of the persuasive force of definitions underscores that all definitions are political because they are always put forward to serve political interests and, for a particular definition to be shared, persuasion or even coercion are an essential component.[105] For this reason, an audience's response to a definition "may be shaped through the application of various forms of power from logical or moral suasion, through bribery, to coercion".[106] This demonstrates, in Schiappa's words, that "power to define is power to influence behaviour".[107] This is particularly relevant to *legal* definitions, because "the establishment of authoritative definitions by law or custom requires a political process involving persuasion or force that generates political results by advancing some views and interests and not others".[108]

The recognition that the power to define is political in that it is interest-driven brings us back to the contestability of definitions mentioned earlier: since interests are normally divergent, so are definitions. Thomas Hobbes had well understood this when he seemed to suggest that "people only care about definitions when interests are at stake".[109] This confirms what was explained in the previous section: the persuasiveness of definitions can be evaluated only against the interests they are aiming at advancing. This logic applies also to any proposal of alternative definitions, because disagreement over a definition is, too, interest-driven.

Therefore, any proposed legal definition of security cannot be understood in isolation, but should be understood against the broader political aims that states seek to achieve through defining security. Seen from this perspective, the power to define is a technique that states might

[105] Schiappa (n 74) 69. Schiappa clarifies that not all definitions are the same, since some are trivial, while others may involve life or death decisions. However, he maintains that all definitions serve some sort of interests, even if one of those interests is the simple one of driving an audience to accept the meaning of a term.
[106] Peter C. Sederberg, *The Politics of Meaning: Power and Explanation in the Construction of Social Reality* (University of Arizona Press 1984) 7.
[107] Schiappa (n 74) 88.
[108] Ibid 70.
[109] The quote is from Jeremy Waldron, 'Rights in Conflict' (1989) 99 Ethics 503, 514, who summarises Hobbes's thought in the *Leviathan*.

put in place to construe their security narratives. A legal definition of security is part and parcel of a rhetorical strategy that rests upon what Zarefsky calls "strategic manoeuvring through persuasive definitions".[110]

At a broader level, the existence of an intimate connection between the act of defining and power is not at all surprising, because definitions are nothing more than a way through which the power of language reveals itself. Norman Fairclough offers a convincing perspective on the relationship between language and power.[111] Echoing Michel Foucault's recurring theme on the pervasiveness of power in everyday life,[112] Fairclough shows how power lies *behind* discourse, where the hidden effect of power shapes and constitutes social orders of institutions and societies at large.[113] According to him, "social struggle in discourse"[114] occurs at any moment of life: power is won, exercised and lost in social struggles, since in all levels (inter-personal, institutional and societal interactions) "those who hold power at a particular moment have to constantly reassert their power, and those who do not hold power are always liable to make a bid for power".[115] And power, as Fairclough stressed, is achieved in modern societies through what he calls "the ideological workings of language".[116]

The process of defining in law a politically sensitive word such as security occurs within, and is shaped by, this background of power struggle, where a legal definition might be used as a gateway through which security measures and policies are enacted. The concept of security itself, as noted in the Introduction, has much to do with power struggle. While early realist

[110]David Zarefsky, 'Strategic Maneuvering through Persuasive Definitions: Implications for Dialectic and Rhetoric' (2006) 20 Argumentation 399.
[111] Norman Fairclough, *Language and Power* (2nd ed, Longman-Pearson Education 2001).
[112] The idea that "power is everywhere", because it is embedded in human experience, is a recurring theme in Michel Foucault's work: for a comprehensive examination of this theme, see Paul Rabinow (ed), *The Foucault Reader: An Introduction to Foucault's Thought* (Penguin 1991).
[113] Fairclough (n 111) 36.
[114] Ibid 57-62.
[115] Ibid 57.
[116] Ibid 2.

accounts of security symbolising power struggle under extreme inter-state confrontations, typical of the Cold War period, are nowadays less mainstream,[117] nonetheless security – especially in the post-9/11 world – is still a standard that is brandished by virtually every government, as well as opposition parties, in an effort to maintain, or challenge, current arrangements of power.[118]

These power dynamics hidden behind the process of defining demonstrate the naivety of believing that a legal definition of security would simply attempt to capture what security should mean in law, even if that were possible. Rather, if the idea of persuasive definitions means anything in relation to security, it is that a legal definition would simply declare what states might want security to mean. In this respect, when states define in law, they behave like Humpty Dumpty: they can choose what meaning security should have.[119] And this choice discloses the political aims that states want to achieve through defining security.

As observed earlier, states have normally no interest in defining security because they can profit from an undefined notion of security to easily trigger their security powers. Even if states decided to define security, a legal definition would still somehow reflect their interest not to have their security powers excessively constrained so that they can more freely construe their security narratives. Security powers might be rooted in the lack of a legal definition of security, as much as in the power to persuasively define the term. In other words, power to define, as

[117] Buzan (n 70) 8. Buzan notes that one of the reasons for the conceptual underdevelopment of security is to be attributed to its being treated as synonym for power in early realist models of international relations.

[118] See, in the European context, Mabel Berezin, *Illiberal Politics in Neoliberal Times: Culture, Security and Populism in the New Europe* (Cambridge University Press 2009).

[119] The reference is to Lord Atkin's famous dissent in *Liversidge v Anderson* [1942] AC 206, paras 244-245. Lord Atkin referred to Lewis Carrol's character Humpty Dumpty to criticise the majority's interpretation of the Emergency Powers (Defence) Act 1939: "The words have only one meaning […] I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master – that's all".

well as power *not to* define, might achieve the same result of serving states' interests (concerning security, the broadening of their security powers).

This does not necessarily imply that legal definitions, and the law more generally,[120] are always unsuitable to constrain state power. In fact, we have seen earlier that the law often makes use of definitions to reduce the risk of an arbitrary exercise of the state power. However, the power-constraining functions of legal definitions is dependent upon the state's interest in having their powers constrained. If states do not wish to be constrained by legal definitions, they will either leave terms undefined, or arguably define them in such a way as to leave their powers substantially intact, by making definitions subservient to their interests. The definitional problem of terrorism shows that even the criminal law, which would ordinarily require precise definitions to reduce the risk of an arbitrary exercise of power, is not immune from power struggle dynamics whenever overly-politicised issues are at stake. In fact, not only there is no internationally binding definition of terrorism, but also definitions of terrorism in national laws are generally extremely broad.[121]

In sum, a legal definition would constrain power only to the extent that state power accepts to be constrained by a legal definition. This is because, as explained, legal definitions and states' interests are tied together by power struggle dynamics lying behind the process of defining. The

[120] It is not the place here to discuss more in detail the extent to which the law in general legitimises power. The topic is wide-ranging and has been tackled from different angles (such as from philosophical, Marxist, Foucauldian, feminist and post-colonial perspectives, to name but a few). The argument made here concerning the inadequacy of the law to constrain power is limited to the role played by legal definitions. However, some aspects concerning law and power more widely will be discussed in some more detail in relation to human rights, international law and the issue of compliance (see generally Chapter 5).

[121] For example, the definition of terrorism in the UK has recently rekindled some discussion concerning its indeterminacy following the Supreme Court's judgment in *R v Gul* [2013] UKSC 64. For some comments on the judgment, as well as on definitional problems of terrorism in the UK, see Alan Greene, 'The Quest for a Satisfactory Definition of Terrorism: *R v Gul*' (2014) 77 Modern Law Review 780; Antonio Coco, 'Crocodile Tears: The UK Supreme Court's Broad Definition of Terrorism in R. v Mohammed Gul' (*EJIL:Talk!*, 18 November 2013) at < www.ejiltalk.org/crocodile-tears-the-uk-supreme-courts-broad-definition-of-terrorism-in-r-v-mohammed-gul > accessed 11 May 2021.

persuasive power to define can summon the normativity of the law in order to impose the legal meaning of the concept of security. Through persuasion and prescriptiveness, legal definitions then become instruments to sustain and legitimise power struggle, rather than to thwart it.

Arguably, the only outer limit on this power to define security in law would be the 'ordinary' meaning of the term, because even legal definitions must be grounded to some extent in the way a term is ordinarily understood. But, as noted earlier, the 'ordinary' meaning of security remains quite ineffable and can be continuously shaped and re-shaped by states.

Another concluding consideration should be mentioned here in relation to the state's persuasive power to define. Even if states would find it convenient to define security in such a way as to meaningfully constrain their security powers, and such a definition would be persuasive enough as to find widespread acceptance, states have the formidable ability to distort the meaning of established legal concepts when they stand in the way of the achievement of their predetermined political aims. Two examples in the context of the US 'war against terror' will suffice here. The first one relates to the infamous 'Torture Memos' drafted by President George Bush's legal counsel to authorise 'enhanced interrogation techniques'.[122] As Zarefsky observes,[123] distinguishing those techniques from 'torture' is strategic manoeuvring: defining acts that would ordinarily fall squarely within torture or other ill-treatments as 'enhanced interrogation techniques' is a persuasive move that seeks to replace the repugnance attached to torture with a connotation of "bureaucratic ordinariness".[124] Similar strategic manoeuvring is evident in the same Bush Administration's efforts to carve the third category of 'unlawful (or enemy) combatants' by trying to redefine the two concepts of combatants and civilians under the 1949

[122] The Memos are available at www.therenditionproject.org.uk/documents/torture-docs.html (accessed 13 May 2021).
[123] Zarefsky (n 110) 404-405.
[124] Ibid 405. On the Torture Memos, see David Cole, *The Torture Memos. Rationalizing the Unthinkable* (The New Press 2009).

Geneva Conventions and the 1977 Additional Protocols, in order to deprive alleged terrorists of the legal protection afforded to them by the rules contained therein.[125] Both examples confirm that power struggle is such a potent pull as to lead states to put forward persuasive (re)definitions even of those legal concepts that before were fairly uncontroversial.[126]

This should stand as a cautionary tale against placing too much reliance upon the possibility for a persuasive definition to serve as brake on power. Even if a persuasive move will succeed, with a legal definition finding wide acceptance, more pragmatically there is always the risk that a concept defined in law – and especially a highly politicised one such as security – could be anyways manipulated, reinterpreted, transformed and, eventually, distorted in such a way as to be used to serve states' interests in the course of their power struggle. Power is also creativity. It is the ability to find new ways of exploiting the ideological workings of language to pursue precise strategies. As Foucault puts it, "power is not an institution, and not a structure; neither is it a certain strength we are endowed with. It is the name that one attributes to a complex strategical [sic] situation in a particular society".[127]

6. Conclusion

The Chapter has demonstrated that a legal definition of security would not be able to act as brake on the state security power. As the act of defining is as such a political process that is driven by the aims that states try to achieve through defining, a legal definition of security is a

[125] There is widespread consensus that, during armed conflicts, a person is either a combatant or a civilian, and no status of 'unlawful combatant' exists: see, *ex multis*: Marco Sassoli, 'Query: Is There a Status of "Unlawful Combatant"?' in Jacques R. B. (ed), *Issues in International Law and Military Operations* (Vol 80, International Law Studies, Naval War College Press 2006) 57; Knut Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 849 International Review of the Red Cross 45.

[126] We will see throughout Chapters 4 and 5 that this power to manipulate concepts is so pervasive that even human rights and human security have succumbed to it to a certain extent.

[127] Michel Foucault, *History of Sexuality: An Introduction* (Robert Hurley trans, Penguin Books 1990) 93.

device on which states might rely in order to construe their security narratives. For this reason, a legal definition of security is a power-generating factor in these narratives, rather than a constraint on them. The supposed 'ordinary' meaning of security not only does not help circumscribe the state power to define security, but on the contrary allows states to continuously shape and re-shape what security 'ordinarily' means.

The ensuing implication is that states might see in the law a convenient ally in order to authoritatively define the meaning of security in a way that would be subservient to the pursuit of their interests. To the extent that a legal definition of security would not meaningfully constrain state power, the power to define security might achieve the same result as the power to leave security undefined. State security powers can be legitimised and exercised with no meaningful constraints through the lack of a legal definition of security, as well as by a legal definition of security that would fit in the state security narratives. In addition, power dynamics that underpin the process of defining similarly drive the state power to manipulate definitions. The result is that even a well-established legal definition of security can be subject to manipulations and distortions every time the state would find it convenient to do so in order to pursue new security goals and priorities.

Therefore, the endless search for a definition of security that would clarify and circumscribe the extent of the state security power is a chimera. The key problem, to use John Rawls's words, is that "by itself, a definition cannot settle any fundamental question".[128] In fact, defining security would not offer easy solutions to the issue of the pervasiveness of the state security powers and would be even less able to set limits on them.

[128] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 130.

CHAPTER 4

DISENTANGLING RIGHTS AND SECURITY: ANTAGONISM AND SYNERGY

1. Introduction

This Chapter constitutes the first building block to try to understand more in detail the complex interrelationship between rights and security. The purpose of this Chapter is to show that rights and security overlap to a great extent, so that it is often difficult to draw a neat dividing line between their respective scopes.

In order to demonstrate this claim, the Chapter will discuss three areas in which the relationship between rights and security appears problematic. First, it will discuss the logic of balancing rights and security, as employed both in and outside of law. It will show that this logic is premised on an antagonistic understanding of rights and security that can hardly be reconciled with the also existing synergetic relationship between rights and security. Second, the Chapter will analyse the concept of human security, focusing in particular on its relationship with human rights. It will show that the supposed synergy between human security and human rights remains rather generic, since it does not explain in practice in which way the two allegedly reinforce each other. Third, the Chapter will discuss the right to security, both as a legal right in IHRL and as a right to the good of security. It will show that the exact meaning of the right to security is not fully clear in either case, and that the genericity of the term "security" affects also the *right to* security.

Crucially, the Chapter will show that security, in and outside the logic of balancing, understood as a more human-centred concept as well as a right, has the tendency of always being able to weaken the human rights discourse. From this perspective, security, even when not embedded in the expressly antagonistic logic of balancing, can anyway be exploited by states and transformed into an antagonistic force likely to be pitted against human rights.

2. Balancing rights and security

2.1. The antagonistic underpinning

Almost one century ago, Judge Benjamin Cardozo warned that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often to enslave it".[1] The metaphor of "balancing" rights and security is a popular one that has accompanied the history of rights and security. We are told, at least since Thomas Hobbes's *Leviathan*,[2] that liberty and security are in tension with each other and thus it is often necessary to limit the former in order to ensure the latter.[3]

The metaphor has a strong rhetorical force in particular in situations of real or claimed emergencies. In the post-9/11 environment, arguments that a "new" balance between rights and security should be struck have become omnipresent in political discourse, suggesting an

[1] *Berkey v Third Avenue Railway Co*., 244 N.Y. 602, 155 N.E. 914 (1927). The metaphor Cardozo referred to concerned the relation between parent and subsidiary corporations for the purpose of transfer of liability.

[2] Thomas Hobbes, *Leviathan (1651)* (Richard Tuck ed, Cambridge University Press 1991). For a discussion on Hobbes's influence, see J. Frederik M. Arends, 'From Homer to Hobbes and Beyond – Aspects of 'Security' in the European Tradition' in Hans Günter Brauch et al (eds), *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century* (Springer 2007) 263-277.

[3] I am not suggesting here that "liberty" and "rights" are synonymous. For the purpose of this section, it is sufficient to say that, in the context of balancing, both liberties and rights pertain to the sphere of the individual autonomy that can be limited in the name of collectively important values. For more insights into the concept of liberty, and its relationship with rights, see David Miller (ed), *The Liberty Reader* (2nd rev ed, Edinburgh University Press 2006).

"imbalance" in which the imaginary scale has tipped considerably towards security.[4] Balancing discourses have gained renewed momentum in the context of the ongoing fight against Covid-19, during which governments are seemingly confronted with the problem of how to ensure the protection of the population from the threat of a widespread virus without limiting more than required individual rights and freedoms.[5]

The claim that rights and security should be balanced against each other does not belong only to the political vocabulary in situations of real or claimed emergency but is firmly entrenched in the law. In fact, the logic of balancing permeates the law in and outside emergencies, with regard to security as well as other important public interests.[6] Noting the pervasiveness of balancing already some thirty years ago, T. Alexander Aleinikoff underlined that constitutional law is living in the "age of balancing".[7]

In IHRL, balancing rights and security is far from extra-ordinary because, as the ECtHR has noted, "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"[8]. Thus, balancing has acquired the status of a general principle informing the whole architecture of human rights treaties.[9] In IHRL, balancing usually takes

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[4] See, for a defence of such a position, arguing in favour of strong executive's action to fight terrorism, Eric A. Posner, Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (Oxford University Press 2007).

[5] The issue has spurred academic interest: Marcin Orzechowski, Maximilian Schochow and Florian Steger, 'Balancing Public Health and Civil Liberties in Times of Pandemic' (2021) 42 Journal of Public Health 145; Peter Levine, 'Why Protecting Civil Liberties During a Pandemic?' (2021) 42 Journal of Public Health Policy 154. See also the literature on emergency and Covid-19 that similarly tackles the issue of balancing cited in the Introduction, section 2.

[6] Some of them admittedly overlapping with security: see Chapter 1, section 3.1.

[7] T. Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale Law Journal 943.

[8] *Soering v United Kingdom* (App. 14038/88), 7 July 1989, § 89. However, the Court has later clarified that this statement should not be interpreted as allowing the balancing of public interests with absolute rights, such as the prohibition of torture: *Babar Ahmad and Others v UK* (Applications 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09), 24 September 2021, § 172.

[9] Laurens Lavrysen, 'Chapter 4. System of Restrictions' in van Dijk P and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th ed, Intersentia 2018) 316.

the shape of proportionality. More specifically, as seen in Chapter 1, the review of the lawfulness of restrictions of rights is normally understood as a threefold test: suitability test (the existence of a connection between the measures limiting rights and the legitimate aim pursued); necessity test (the non-availability of alternative measures that would not interfere, or would interfere less, with rights) and proportionality *stricto sensu* (that is, "balancing" the interference with the right and the satisfaction of the legitimate aim).[10]

Arguably, while balancing "involves a broad brush, and sometimes opaque, analysis aimed at a resolution of the interests and rights involved",[11] the three-pronged test of proportionality provides more analytical rigour,[12] by "proceduralising" the review process of the lawfulness of the interference with rights. Chapter 1, however, has noted that such a three-fold test is, in practice, not so rigorous, since human rights courts and bodies often gloss over the first step.

In any event, it is important to note here that the rationale underpinning the logic of both balancing and proportionality is the same: rights and security are in constant and unavoidable tension with each other. For the purpose of this section, I will broadly refer to balancing, irrespective of whether it is employed in political discourse or in the law (usually as part of a proportionality analysis), to indicate the general idea that some trading off between rights and security seems unavoidable, and perhaps even desirable.

Before delving into this key aspect, a few more words should be said about the logic of balancing. This logic has attracted frequent criticism, both in general[13] and in relation to rights

[10] This test was explained in more detail in Chapter 1, section 8.

[11] Benjamin J. Goold, Liora Lazarus, Gabriel Swiney, 'Public Protection, Proportionality, and the Search for Balance' (2007) 10 Ministry of Justice Research Series, 2 < commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1148&context=fac_pubs > accessed 1 June 2021.

[12] Ibid. As the authors maintain, "it is one thing to ask at the outset whether the rights and measures are 'balanced' in a broad utilitarian sense, it is another to ask this question after the first three stages of the proportionality test have been fully satisfied".

[13] The major bone of contention concerns the difficulty with justifying the utilitarian and consequentialist underpinning of balancing and proportionality. Different views are, in turn, influenced by alternative theories of

and security.[14] The main source of disagreement concerns the difficulty with conceiving an understanding of balancing that would not subject rights to utilitarian calculations in the name of a public interest.[15] The same metaphor of balancing has often come under attack, for it evokes connotation of quantity and precision that cannot be mathematically measured when rights and security are weighted against each other on an imaginary scale.[16]

On the other hand, balancing discourses are admittedly attractive because they recall the ideal of justice, often symbolised by a blindfolded woman holding a pair of scales in her hands.[17] What is balanced seems just, fair and reasonable. In addition, balancing is generally seen as a more appropriate tool for judges to make decisions without venturing (too much) into slippery moral determinations about the content of rights and their interaction with public interests.[18]

rights. For a classic defence of proportionality, see Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010). On the morality of proportionality, see George Letsas, 'Proportionality as Fittingness: The Moral Dimension of Proportionality' (2018) 71 Current Legal Problems 53. Against proportionality in human rights adjudication, among many: Guglielmo Verdirame, 'Rescuing Human Rights from Proportionality' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2014); 341-357; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights? (2009) 7 International Journal on Constitutional Law 468.

[14] Among many: David Cole and James Dempsey, *Terrorism and the Constitution. Sacrificing Civil Liberties in the Name of National Security* (The New Press 2002); Kate Moss, *Balancing Liberty and Security. Human Rights, Human Wrongs* (Palgrave Macmillan 2011); Jeremy Waldron, 'Security and Liberty: The Image of Balancing' (2003) 11 The Journal of Political Philosophy 191; Christopher Michaelsen, 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29 University of New South Wales Law Journal 1; Paul de Hert, 'Balancing Security and Liberty within the European Human Rights Framework. A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11' (2005) 1 Utrecht Law Review 68; Ben Golder, George Williams, 'Balancing National Security and Human Rights. Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 Journal of Comparative Policy Analysis 43.

[15] A classic reading on this aspect is Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 184-205. However, even a famous anti-utilitarian like Dworkin, on a closer reading, did not entirely repudiate the logic of balancing: Jacob Weinrib, 'When Trumps Clash: Dworkin and the Doctrine of Proportionality' (2017) 30 Ratio Juris 341.

[16] Waldron (n 14) 192-194.

[17] Aleinikoff (n 7) 962; Tsakyrakis (n 13) 469.

[18] However, this is arguably more of a myth, because even proportionality assumes that there is a moral minimum to the content of rights, and therefore judges often employ the language of balancing to disguise moral determinations: Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174, 177-182; Tsakyrakis (n 13) 492-493.

It is not the purpose of this section to engage more, at this stage,[19] with the strengths and weaknesses of balancing. This section will proceed from the stance that, as a matter of fact, balancing will not vanish anytime soon, since it is firmly entrenched in IHRL[20] and, more generally, is part of the way the relationship between rights and security is ordinarily conceived. Instead, this section will be concerned with the problematic aspect of balancing rights and security mentioned earlier, that is its antagonistic underpinning, according to which rights and security are against each other.

For the logic of balancing to function, in fact, the driving assumption is that there are two values in tension on both sides of an imaginary scale, and that it is possible, and arguably desirable, to find a balance between the two. As Arthur Allen Leff observed,

> in almost all conflicts, especially those that make their way into a legal system, there is something to be said in favour of two or more outcomes. Whatever result is chosen, someone will be advantaged and someone will be disadvantaged; some policy will be promoted at the expense of some other. Hence, it is often said that a "balancing operation" must be undertaken, with the "correct" decision seen as the one yielding the greatest net benefit.[21]

Hobbes, as noted before, is credited with having popularised the idea of the existence of a conflict between rights and security. In his vision of society, the absence of a strong government in the state of nature allowed people to enjoy unrestrained freedoms, which in turn threaten the social order due to what he considered to be the natural instinct of individuals to prey on one another. To keep those predatory instincts under control, governments must purse

[19] Some of the criticism against balancing, in particular with reference to rights and security, will be recalled in the following sub-section.
[20] As Verdirame (n 13) 357 notes, the ECHR was "infected with utilitarianism even before judges began to interpret it".
[21] Arthur Allen Leff, 'The Leff Dictionary of Law: A Fragment' (1985) 94 Yale Law Journal 1855, 2123.

order even at the cost of sacrificing liberty.[22] For Hobbes, security is the central justification of the conception of modern state. The state exists because absolute freedom would inevitably result in the absence of security (*nulla securitas*).[23] For this reason, "Hobbes' work seems characterized by an obsession with *securitas*".[24]

However, the driving assumption that rights and security are at two opposite ends of the scale is problematic, and arguably too simplistic. In fact, the opposite idea, that is that rights and security are in a synergetic relationship, has pervaded the liberal tradition.[25] John Locke is often said to have reversed the Hobbesian idea of the pre-eminence of security, by placing liberty and security together at the heart of his vision of the role of sovereign states.[26] Others have underscored the close relationship between rights and security. Adam Smith, for example, acknowledged that the liberty of each individual is founded "on the sense he has of his own security".[27] Montesquieu noted that liberty "consists in security or, at least, in the opinion one has of one's security".[28] For Joseph Priestly, "the people, having no political liberty, would have no security".[29] As Wilhelm von Humboldt observed, "I would call security, if the expression does not seem too abrupt to be clear, the assurance of legal freedom".[30] Even a

[22] Hobbes (n 2) 117-120. Arends (n 13) 272-274.
[23] Arends (n 2) 273.
[24] Ibid 274. Similarly, Mark Neocleous, *Critique of Security* (Edinburgh University Press 2008) 14: "In terms of contemporary politics […] Hobbes's position pushes the 'balance' overwhelmingly in the direction of security".
[25] See Emma Rothschild, 'What is Security?' (1995) 124 Daedalus 53, 60-65 and Neocleous (n 24) 11-32.
[26] The reference is to John Locke, *Two Treatises of Government* (Cambridge University Press 2004). However, it is arguably too simplistic to understand Locke's view on liberty and security as simply clashing with Hobbes's view. For some more nuanced insights, see Aziz Rana, 'Who Decides on Security?' (2012) 44 Connecticut Law Review 1417; Tom Sorell, 'Hobbes, Locke and the State of Nature' in *International Archives of the History of Ideas* (Springer 2008) 27-43. As part of his argument that security, and not liberty, is the supreme concept of bourgeois society, Neocleous (n 24) 14 argues that "Locke might in fact be thought to inaugurate less a tradition of 'liberty' and much more a *liberal* discourse on the *priority of security*" (emphasis in the original).
[27] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (R. H. Campbell, A. S. Skinner and W. B. Todd eds, Oxford University Press 1976) V. i. b. 25. For a comment, see A. M. Endres, ''Security' and Capital Formation in the 'Wealth of Nations'' (1996) 4 History of Economics Ideas 149.
[28] Annelien De Dijn, 'On Political Liberty: Montesquieu's Missing Manuscripts' (2011) 39 Political Theory 181, 195.
[29] Joseph Priestley, *An Essay on the First Principles of Government and on the Nature of Political, Civil, and Religious Liberty* (Cambridge University Press 2014) 54.
[30] Wilhelm von Humboldt, *The Limits of State Action (1792)*, (Liberty Fund 1993) 83.

utilitarian like Jeremy Bentham recognised that "political liberty is another branch of security", that is "security against injustice from the ministers of government".[31]

One does not necessarily need to bring up illustrious thinkers in order to recognise, even intuitively, the insufficiency of an understanding of rights and security that promotes the idea of their constant antagonism. If security has much to do, conceptually, with the absence of threats,[32] arguably threats to rights (or their violation) might easily fit within the scope of security. In other words, threats to rights (or violations of rights) have repercussions on people's subjective feeling and objective condition of security, and thus contribute to shaping the concept of security.[33]

The antagonism underpinning balancing, however, seems to collide with this synergetic understanding. In fact, balancing assumes the opposite: rights and security are up against each other. Even if some reconciliation might be possible, for example via necessity and proportionality arguments, the starting premise of balancing is that rights and security clash. Without this initial tension, the logic of balancing cannot be set in motion. In brief, on the one hand, there seems to be an inherently synergetic relationship between rights and security and, on the other hand, balancing points at their antagonistic relationship.

Some authors have rightly acknowledged that in a balancing operation the relationship between rights and security is much more complex than what the metaphor suggests. Jeremy Waldron has observed that "if security is also a matter of rights, then rights are at stake on both sides of

[31] Jeremy Bentham, 'Principles of the Civil Code', in *The Works of Jeremy Bentham, Vol. I* (John Bowring ed, William Tait 1843) 302.
[32] See Introduction, section 5.4, and Chapter 3, section 3.
[33] For more insights into the construction of "security threats" as "threats to rights", see Chapter 5, section 3.

the equation".[34] In a similar fashion, Laurence Lustgarten and Ian Leigh illustrate that, during the balancing,

> if an action taken in the name of national security represses human rights, its justification cannot be established merely by 'weighing' the needs of national security against the loss of individual liberty. The loss of liberty must be counted on both sides of the scale and thus deducted from any asserted gain in national security […].[35]

This logic works also in reverse, because, as Iain Cameron summarises, "if human rights are part of security, then arguably security is part of human rights. It cuts both ways".[36]

If this is true, what are the implications for the logic of balancing? Arguably, the ambiguity of a balancing exercise so conceived – in which rights and security decrease and increase simultaneously on both sides of the imaginary scale – calls into question the very mechanics of balancing.

In fact, one might ask if it does even make sense to put on two different "balance pans" rights and security while they might arguably be on the same pan. If it does not, the argument can be made that the metaphor of balancing as such is just an illusion, or an unjustified simplification of the much richer interrelationship between rights and security. In this sense, Cardozo's warning that metaphors in law risk enslaving thought should be taken seriously. Arguably, one should approach metaphors in law by adopting the sceptic attitude of David L. Shapiro, who reminds us that "[l]awyers in general, and judges in particular, coin or adopt metaphors and then forget that they are only metaphors".[37]

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[34] Waldron (n 14) 198-199.
[35] Laurence Lustgarten and Ian Leigh, *In From the Cold. National Security and Parliamentary Democracy* (Oxford University Press 1994) 9.
[36] Iain Cameron, *National Security and the European Convention on Human Rights* (Kluwer Law International 2000) 57 (at footnote 225).
[37] David L. Shapiro, 'In Defence of Judicial Candor' (1987) 100 Harvard Law Review 731, 733.

2.2. Reconciling the unreconcilable

Before arriving at the conclusion that the metaphor of balancing does not sufficiently capture the intricate relationship between rights and security, the question arises as to whether the antagonism between rights and security underpinning the logic of balancing can be reconciled with a synergetic understanding of rights and security. In other words, would it be possible for the logic of balancing to function in such a way as to acknowledging not only the tension between rights and security, but also their synergy?

In order to answer this question, let us try to understand more in detail what exactly is at stake in the balancing operation when rights and security are somehow recognised as (also) synergetic.

The logic of balancing and proportionality presupposes that on one side there is an identified or identifiable right and on the other side a general interest the attainment of which might justify interference with that right. The meaning of general interests is controversial,[38] but for the purpose of this section it is sufficient to mention that, in human rights treaties, general interests are those that allow for limitations of rights and that are conventionally called "legitimate aims".[39]

As seen throughout Chapter 1, in IHRL (mostly national) security is one of those legitimate aims that states might invoke to try to justify limitations on qualified rights. As argued, the

[38] The concept of general interest, contrary to that of human rights, has been much more understudied. For some insights into the meaning of the concept, Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 The Modern Law Review 671; Robert Alexy, 'Individual Rights and Collective Goods' in Carlos Nino (ed), *Rights* (New York University Press 1992) 163. The terminology varies, as some prefer to refer to "public interest". In the context of proportionality, usually the general interests expressly found in IHRL are referred to as "legitimate aims". Here, I will use "general interest" to loosely refer to the interests belonging to the collectivity as a whole and that are pitted against rights belonging to identified or identifiable individuals or groups within the logic of balancing.

[39] For a list of the provisions referring to (mostly national) security as legitimate aim across human rights treaties, see the table in section 2 of Chapter 1.

concept of security might be seen as incorporating the idea of human rights protection, because threats to rights are also threats to security. Let us assume, with license to simplify for the time being, that to a wider protection of rights corresponds more security, in both an objective and subjective sense. As a result, the argument can be made that the legitimate aim of security should somehow include the protection of fundamental rights. Doing so would acknowledge the synergy between rights and security on the side of a general interest.

At a normative level, there is nothing unusual about conceiving the protection of fundamental rights as general interest. In fact, human rights legal instruments expressly recognise the protection of rights and freedoms as a general interest worthy of protection, and as such it constitutes a legitimate aim to be relied upon in order to restrict some individual rights.[40] If so, then security as a legitimate aim would need to be invoked together with the legitimate aim of the protection of rights. As noted in Chapter 1, section 3.1, it is quite common for states to invoke two or more legitimate aims together for the purpose of limiting rights.[41]

Since not only rights are part of security (as legitimate aim), but security is also somehow relevant to rights, as stressed earlier, in the balancing operation security should arguably play some role alongside the individual right(s) at stake on the other pan of the scale. Apart from security as a ground for restrictions of rights, security generally features in IHRL as right to security, together with right to liberty.[42] However, the ECtHR has at times referred to security outside the context of Art.5 claims (right to liberty and security). For example, in *Keegan v United Kingdom* it held that "[t]he exercise of powers to interfere with someone's private life must be confined within reasonable bounds to minimise the impact of such measures on the personal sphere of the individual guaranteed under Article 8 which is pertinent

[40] Arts.12, 18, 21, 22 ICCPR; Arts.8, 9, 10, 11 ECHR; Arts.12, 13, 15, 16, 22 ACHR; Arts.11 ACHPR.
[41] For example, territorial integrity and national security are usually invoked jointly.
[42] See section 4 below on the right to security.

to security and wellbeing".[43] In the context of Art.3 (freedom from torture), the ECtHR held, albeit incidentally, that "the authorities failed to ensure his security in custody or to comply with the procedural obligation under Article 3 to conduct an effective investigation into his allegations".[44] In sum, the ECtHR has read a "security element" (so to speak) into Convention rights other than Art.5. This reading of security can be interpreted as some sort of generic acknowledgment that the protection of any individual right entails the protection of the individual security broadly speaking.[45] In turn, that would also confirm and strengthen the view that a general interest to the protection of rights is a component of the general interest to security. However, it is far from clear what the added normative value of this "security element" would be. The ECtHR seems to have acknowledged simply what is already intuitively evident, that is that violating individual rights undermines individual security.

Regardless of these persistent conceptual and normative shortcomings, a balancing operation that would take into account also the synergetic relationship between rights and security would show that the tension arises between:

1) on one side, the general interest to security, which somehow includes the general interest to the protection of rights;

2) on the other side, the individual right (or rights) at stake and the security deriving from its (their) protection.

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[43] *Keegan v United Kingdom* (Application 28867/03), 18 July 2006, § 34.
[44] *Popov v Russia*, (Application 26853/04), 13 July 2006, § 197.
[45] Rhonda Louise Powell, 'The Right to Security of Person in European Court of Human Rights Jurisprudence' (2007) 6 European Human Rights Law Review 649, 662 has argued that the doctrine of positive obligations, as developed in the ECtHR's case law, has been a mechanism to *secure* fundamental rights (in line with Art.1 ECHR, that provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms […]"). However, Powell might have read too much into the word "secure" rights under Art.1 ECHR. The similarity between "security" and "to secure" occurs in the English language, but not in other linguistic versions of the ECHR. For example, the French, Italian and Spanish texts use the word "recognise" (respectively, *reconnaissent*, *riconoscono* and *reconocen*).

Following this logic, any restriction of an identified or identifiable individual right (with consequent reduction of the security deriving from its protection) *might* be justified in order to pursue the general interest to security (inclusive of the general interest to the protection of rights).

For this mechanic to operate, the assumption would be that the general interest in the protection of rights (and to security) does not include the general interest in the protection of that specific right at stake (and the security deriving from it) that is likely to suffer limitations. In other words, the general interest would include the protection of *all* rights of *all* individuals (and their security) belonging to a community, *minus* the right of those individuals (and their security) that will be restricted.

This means that, in the very moment a balancing operation is set in motion, the rights and the security of some are already subtracted from the general interest in the protection of rights and security of the many. Importantly, this happens *before* the actual balancing is carried out. Even if the outcome of balancing will result in the rights and security of some not being sacrificed in the name of the general interest, the sole fact that a balancing operation is envisaged means that the rights and security of some have been already calculated away from the rights and security of the others.

Understood this way, trading off rights and security is a mechanism that produces exclusionary dynamics. In fact, this is nothing new. Counter-terrorism policies and measures enacted in many states have clearly shown this pattern.[46] Critics have convincingly demonstrated that the idea

[46] In the aftermath of the 9/11 terrorist attacks, many states, and most notably the US and the UK, passed legislation that had discriminatory effects in particular against Muslim non-citizens, and that was successfully challenged before domestic and international courts. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *A and others v Secretary of State for the Home Department* [2004] UKHL 56; *A and others v United Kingdom* (App. 3455/05), 19 February 2009.

that states balance the security of all the people against the rights of all the people is deceptive. In practice, a claimed increase in security for the majority is pursued at the expense of the liberty of a few.[47] As David Luban keenly observed, it is far too easy to balance my security against (not my own rights but) "Other People's Rights (OPR)".[48] The correct question, if any, should be: "how many of *your own* rights are you willing to sacrifice for added security?".[49]

To paraphrase the question by adding the intimate connection between rights and security on both sides of the scale, "how many of your own rights (and the security deriving from them) are you willing to sacrifice for added security (inclusive of the protection of your own rights)? Posed in this way, the question would acknowledge that the general interest in security and rights includes the interest in the fate of the individual (or group) whose rights and security are at stake in the balance. This logic postulates that we should see a restriction to the right and security of an individual (or group) as also being a restriction that concerns us, if not for an idealistic feeling of belonging to a community of individuals, at least for a more pragmatic calculus that takes into account that the said restriction may potentially affect us all in the future.[50] To argue otherwise, as noted by Waldron, would mean that

> talk[ing] of balancing the interest of the individual against the interests of the community may be a way of indicating that "the individual" in question is not really thought of as a

[47] As convincingly noted by Dworkin in the context of the US counter-terrorism legislation, "none of the administration's decisions and proposals will affect more than a tiny number of American citizens: almost none of us will be indefinitely detained for minor violations or offenses, or have our houses searched without our knowledge, or find ourselves brought before military tribunals on grave charges carrying the death penalty. Most of us pay almost nothing in personal freedom when such measures are used against those the President suspects of terrorism": Ronald Dworkin, 'The Threat to Patriotism' The New York Review of Books (New York, 28 February 2002) < www.nybooks.com/articles/2002/02/28/the-threat-to-patriotism/ > accessed 27 May 2021. More extensively on this topic: David Cole, *Enemy Aliens. Double Standards and Constitutional Freedoms in the War on Terrorism* (The New Press 2003).

[48] David Luban, 'Eight Fallacies About Liberty and Security' in Richard Ashby Wilson (ed), *Torture Power and Law* (Cambridge University Press 2014) 243 (emphasis in the original).

[49] Ibid.

[50] This aspect shows that the individual underpinning of rights can indeed be reconciled with a communitarian understanding: see, on this point, Chapter 5, section 5.3.

> member of the community at all: he is an alien, a foreigner, and so his interests have not already been counted in 'the interests of the community'.[51]

From this perspective, arguably the technique of balancing is less likely to produce exclusionary dynamics, and would underscore that that the rights and security of some individuals or groups cannot, and should not, be separated from the general interest in security and rights. However, the overwhelming problem with such an understanding of balancing is that it seems to negate the very logic on which balancing is premised. If the general interest in security (and rights) and the rights (and security) on balance are merged, the tension between the two (that is the cornerstone of the logic of balancing) disappears. Luban himself admits that, if balancing is presented as trading off your own rights for minute increments of your own security, people would most likely be unwilling to sacrifice the former.[52]

This shows that it is difficult to reconcile rights and security on both sides of the scale with the very logic of balancing, which seems to work only if rights and general interests are pitted against each other.[53] In fact, the logic of balancing implies that an increase in security (that includes the protection of rights) for some can be arguably achieved only if the rights (and the security deriving from them) of others are limited. This is evident especially when the logic of balancing is employed in IHRL as a technique to adjudicate alleged conflicts between rights and security. In these cases, *before* the balancing operation is carried out, the rights of some individuals (or groups) are already singled out and placed on the scale against a general interest (legitimate aim). If the general interest were to include the interest to the protection of the right

[51] Waldron (n 14) 201.
[52] Luban (n 48) 256.
[53] As McHarg (n 38) 680 rightly notes, "[f]irst, it is axiomatic that there are no genuine conflicts between individuals and the collective. But second, it seems implausible that all individual rights are valued solely for their contribution towards collective goals or *vice versa*. Thus, the only way to reconcile *prima facie* conflicts is to establish a domain of individual rights *distinct from* that in which collective goals may legitimately be pursued".

(and security) on the other side of the scale, the logic of balancing would have not been triggered from the start. Eventually, the right (and security) at stake on one side might merge into the general interest on the other side *at the end* of the balancing process, if its outcome is *against* a restriction of the rights involved. This is to say that once the balancing process is triggered, it is already preliminarily accepted the premise that rights and security are somehow in tension, regardless of the final outcome of the balancing. Therefore, considering the rights (and security) of some as pertinent to the general interests to security (and rights) might be the end of the balancing process, but not the starting point. In fact, if the balancing process will result in restricting rights (and security) of some, it means that those have been eventually considered as foreign to the general interest to security (and rights).

In addition, the proposition outlined earlier that the general interest in security includes a general interest in the protection of rights is, indeed, an oversimplification. On the contrary, if a tension between rights and security must exist in the logic of balancing, such a tension might arise not only between specified rights (on one side) and security (on the other side), but also within a general interest that comprises both rights and security. In other words, if the general interest in security can be seen as including a general interest in the protection of rights, this does not mean that there is an exact correspondence between the two. The lingering hurdle, admittedly, is that it is not clear how much of security derives from (or is) the protection of rights and how much of it derives from (or is) something else (and what else). Thus, the general idea that restrictions on rights might be needed to ensure security is as such part of the general interest.[54]

[54] If one takes (also) people's opinion as representative of what is in the "general interest", it appears that there is a widespread acceptance of the idea that liberties must be restricted in the name of security. Polls conducted in the US after the 9/11 attacks show that an overwhelming majority of Americans would give up their liberties to be safer from terrorist attacks: Richard Morin, 'Poll: Half of All Americans Still Feel Unsafe' *The Washington Post* (Washington DC, 3 May 2002) < www.washingtonpost.com/archive/politics/2002/05/03/poll-half-of-all-

This complication is another manifestation of the absence of a clear understanding of the meaning of security. Even if it seems logically tenable that protecting rights enhances (objective and subjective) security, it remains unclear what else security is. This would pose an outstanding problem for courts called upon to perform a balancing operation, since they would need to appraise the general interest so ambiguously conceived. This problem reiterates a well-known critique of balance, that is that the general interest cannot be meaningfully appraised by a court, especially because there are no objective criteria to evaluate such a thing as "the general interest".[55] Therefore, a general interest in security that includes (but does not equal) the interest in the protection of rights would charge judges with the impossible task of trying to measure the unmeasurable. Consequently, speaking of a general interest embracing security and rights is as such problematic.

Another conceptual ambiguity arising from a balancing operation in which security and rights are intertwined on both sides of the scale relates to two concepts that are loosely associated with security, that is threat and insecurity.[56] What the logic of balancing normally assumes, though mostly in a concealed fashion, is that the idea that rights must be restricted in the name of security implies that rights might be an obstacle to the attainment of security. From this

americans-still-feel-unsafe/8d9bc2d2-cbb8-4bbe-bc65-fc2aa5e48ff6/ > accessed 2 June 2021. More recently, the fight against Covid-19 has shown that people tend to believe that trading off rights and security is in their interest: Becky Beaupre Gillespie, 'Law Scholar's Survey Examines Balance between Civil Liberty and Public Health' *Chicago News* (Chicago, 13 April 2020) < news.uchicago.edu/story/fight-against-covid-19-how-much-freedom-are-you-willing-give > accessed 2 June 2021. As I noted also in the context of the Covid-19 pandemic, people seem to have widely accepted that governments can curtail *any* right to ensure health security: Andrea Preziosi, 'When States Steal Christmas: The Citizens' Right to Return to the Country of Citizenship in Time of Pandemic' (*Strasbourg Observers*, 7 January 2021) < strasbourgobservers.com/2021/01/07/when-states-steal-christmas-the-citizens-right-to-return-to-the-country-of-citizenship-in-time-of-pandemic/ > accessed 2 June 2021.

[55] See, generally, David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004). Even in this case, much of the answer depends on the underlying theory of rights and public interest: see Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 Oxford Journal of Legal Studies 18; McHarg (n 38) 672.

[56] As explained in Chapter 3, section 3, usually security is understood as security *against threats*. Thus, the concept of threats seems to be a key determinant of the meaning of security (though not necessarily a supposed "essential" one).

perspective, it might be said that pitting rights against security frames the rights at stake as *threats* to the general interest to security. In addition, when it is acknowledged that rights at stake include the security deriving from their protection, it follows that a restriction of these rights diminishes the deriving security, and thus produces insecurity for the right-holders. Put it differently, the tension between rights and security can be alternatively seen as a tension between security (of all) and insecurity (of some right-holders): security for all is allegedly enhanced through the production of insecurity for some. Arguably, this dynamic can be explained only if it is accepted that the insecurity deriving from a restriction of the rights of some enhances the overall level of security for all (including the right-holders), to the extent that it would be wrong to talk about insecurity on the other side of the scale. As observed earlier, however, this explanation calls into question the very logic of balancing, that needs an initial tension between two values for it to be triggered. If, at the end of the balancing, it is judged that a restriction to a right is warranted, it is then accepted that the full exercise of that right would constitute a threat to the general interest to security. Such a restriction, in so far as it reduces the security deriving from that right, would generate insecurity for the right-holder.

A possible way out of the dilemma of how to reconcile the antagonistic and the synergetic relationships between rights and security on balance might be to concede that security has nothing do with individuals and their rights, but only with the security of the state. If so, the balancing operation would pit individuals against the state (understood as an entity entirely disconnected from the people). Such an understanding, admittedly, would create an artificial concept of the security of the state that cannot be sustained. Not only, as we have seen,[57] do recent developments relating to security tend to accentuate the individual-oriented aspect of security, but even the most realist conception of (national) security would struggle to support

[57] Introduction, section 5.1.

an idea of the state so self-referential that it disregards completely the individuals as ultimate referents of the state security action.[58]

In conclusion, this analysis shows that a logic of balancing that would take into account the weight of both rights and security on both sides of the scale seems unlikely to work out. The conundrum shows that it is hardly possible to escape one of these two alternatives: either rights and security are in tension with each other, and thus there is no synergy between them, or rights and security are in synergy and thus the logic of balancing promotes a false idea of their perpetual antagonism and hence should be discarded. However, pursuing this second alternative would require to radically reimagine the whole architecture of rights and security. In fact, the omnipresence of balancing in political and legal discourses has normalised the duality rights-vs-security and impeded the search for an alternative reconstruction of the relationship between rights and security as mutually reinforced values. To the extent that thinking of rights and security is enslaved by the metaphor of balancing, any different understanding of rights and security will always need to confront the cumbersome presence of the logic of their trade-off.

[58] The broader issue, that cannot be explored here, is to what extent the state as an entity is more than the sum of its constitutive parts. For on overview of different theories of the state and how they conceive the role of individuals within it, see Barry Buzan, *People, States and Fear. An Agenda for International Security Studies in the Post-Cold War Era* (2nd ed, Harvester Wheatsheaf 1991) 39-43. See also Ralph Pettman, *State and Class: A Sociology of International Affairs* (Croom Helm 1979). For an extreme view on the state as "primordial and necessary", that "does not ask primarily for opinion, but demands obedience", see Heinrich von Treitschke, *Politics*, reprinted in Carl Cohen (ed), *Communism, Fascism and Democracy: The Theoretical Foundations* (2nd ed, Random House 1972) 289-296. It is unsurprising that von Treitschke was an extreme nationalist, member of the Reichstag during the German Empire.

3. Human security and human rights

3.1. The unclear synergy

Human security is a popular manifestation of the post-Cold War trend that sought to shift the focus of security from the state to the individual, with the ensuing broadening of the scope of security beyond military-like threats.[59] The concept of human security was introduced to the international scene by the UN Development Programme's 1994 Human Development Report.[60] According to the Report's definition, "human security can be said to have two main aspects. It means, first, safety from such chronic threats such as hunger, disease and repression. And, second, it means protection from sudden and hurtful disruptions in the patterns of daily life – whether in homes, in job or in communities".[61] This proposed vision of security thus articulates along the two clusters of "freedom from want" and "freedom from fear".[62] The Report identifies seven components of human security: economic, food, health, environmental, personal, community and political security.[63] The Report also clarifies that the concept of human security is purposefully designed to break with the state-centric understanding of national security, emphatically proclaiming that "it is now time to make a transition from the narrow concept of national security to the all-encompassing concept of human security".[64]

[59] This trend was discussed in the Introduction, section 5.
[60] UN Development Programme, 'Human Development Report' (1994). Chapter 2, entitled "New Dimensions of Human Security" introduces the concept of human security. However, the concept was not entirely new, because the thrust of human security could be traced already in previous attempts to reconceptualise security, for example by the Palme Commission ("common security"), the Brandt Commission ("global security") and the Bruntland Commission (focusing on the linkage between sustainable development and security).
[61] 'Human Development Report' 23.
[62] Ibid 24. Freedom from want and freedom from fear echo the Four Freedom Speech made by US President Franklin Delano Roosevelt in 1941, available at < www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm > (accessed 9 June 2021).
[63] 'Human Development Report' 24-25.
[64] Ibid 24.

Since its inception, human security has been welcomed with enthusiasm by some countries. Canada and Norway, most notably, pioneered the creation of the Human Security Network, tasked with promoting the concept as an instrument of national and international policies.[65] Japan also took a strong lead in supporting human security, endorsing the establishment of the Commission on Human Security in 2001, that presented its influential report in 2003.[66] Human security has been embraced by the UN[67] and the EU,[68] and spurred the development of the Responsibility to Protect (R2P) by the International Commission on Intervention and State Sovereignty.[69] It has been called "a rallying cry"[70] for civil society, galvanised by this new concept into strengthening their advocacy efforts that led, for example, to the establishment of the International Criminal Court[71] and the drafting of the 1997 Anti-Personnel Landmines Convention.[72]

The success of human security in some quarters can be explained by the growing dissatisfaction with the state-centric paradigm of (national) security that dominated during the Cold War period.[73] Even before the fall of the Berlin wall, it started to become increasingly clear that this "old" security paradigm was not suitable anymore to face a new range of emerging threats that could not be tackled only through military and military-like means, such as threats to the

[65] See www.austria.org/the-human-security-network (accessed 9 June 2021).
[66] Commission on Human Security, 'Human Security Now' (2003). The Commission was chaired by Sadako Ogata and Amartya Sen. See below for some discussion about the 2003 Report.
[67] For example: UN High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565. Also: UNGA Res 66/290 (25 October 2012) UN Doc A/RES/66/290.
[68] The Barcelona Report of the Study Group on Europe's Security Capabilities, 'A Human Security Doctrine for Europe' (15 September 2004).
[69] International Commission on Intervention and State Sovereignty, 'Report: Responsibility to Protect' (December 2001).
[70] Roland Paris, 'Human Security: Paradigm Shift or Hot Air?' (2001) 26 International Security 87, 88. For some discussion on human security as advocacy tool, see David R. Black, 'Civil Society and the Promotion of Human Security: Achievements, Limits and Prospects' (2014) 2 Asian Journal of Peacebuilding 169.
[71] The Rome Statute establishing the International Criminal Court was adopted in 1998 and entered into force on 1st July 2002.
[72] The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction entered into force on 1st March 1999.
[73] See Introduction, section 5.1.

environment, to public health, to the economy, to food production and so on. These threats exposed the vulnerabilities of individuals, who needed to become the primary referent of security as opposed to the state.[74]

However, human security has not been met with equal enthusiasm by others. Critics quickly noted the overly broad scope of human security, questioning its usefulness in translating an abstract and vague concept into a set of more tangible priorities and actions.[75] In an interesting symmetry with Buzan's famous assertion that security (broadly speaking) is an essentially contested concept[76], human security has likewise been called "contested".[77] Roland Paris sarcastically maintained that the concept is "hot air",[78] because "human security is like 'sustainable development' – everyone is for it, but few people have a clear idea of what it means".[79] Similarly, Natalie Florea Hudson observed that the scope of human security is "so inclusive to the point where it is rendered meaningless".[80] Gary King and Christopher J. L. Murray substantially agree that "even some of the strongest proponents of human security recognize that it is at best poorly designed and unmeasured, and at worse a vague and logically inconsistent slogan".[81]

However, proponents of human security have effortlessly attempted to draw clearer boundaries for the concept of human security, coming up with a plethora of definitions and a "laundry

[74] Randolph B. Persuad, 'Human Security' in Alan Collins (ed), *Contemporary Security Studies* (4th ed, Oxford University Press 2016) 139-151.
[75] For a discussion of this criticism, see Natalie Florea Hudson et al, 'Human Security' in Laura J. Shepherd (ed), *Critical Approaches to Security: An Introduction to Theories and Methods* (Routledge 2013) 30 -35.
[76] See Introduction, section 3.
[77] Taylor Owen, 'Human Security: A Contested Concept' in J. Peter Burges (ed), *The Routledge Handbook of New Security Studies* (Routledge 2010) 39-49.
[78] Paris (n 70) 87.
[79] Ibid 88.
[80] Florea Hudson et al (n 75) 30.
[81] Gary King and Christopher J. L. Murray, 'Rethinking Human Security' (2001) 116 Political Science Quarterly 585-591.

list"[82] of what threats should be included in its scope and given priority over others.[83] Thus, proponents of the concept seem to concede that, understood in this or in that way, human security retains some usefulness in so far as it might help to guide policy-makers towards a better comprehension of those events threatening individuals, and towards more incisive solutions to the root causes of insecurity affecting human beings. However, the problem remains that human security is "so vague that it verges on meaninglessness".[84]

As Paris rightly notes, human security was purposefully designed to be somewhat vague and all-encompassing. It is sufficient to look at the 1994 Human Development Report to notice that the proponents of human security take pride in stressing the "integrative" nature of the concept,[85] its universality,[86] its interdependence with development[87] and so on. The seven components of human security themselves mentioned earlier are a clear indication that "virtually any kind of unexpected or irregular discomfort could conceivably constitute a threat to one's human security".[88] Thus, even if the drafters of the Report sought to provide a definition of human security, they are "distinctly uninterested in establishing any definitional boundaries".[89]

On the one hand, few would be surprised that a concept born under the aegis of the UN is premised on expansive and unclarified interrelationships between a wide network of different concepts. It has always been part of the UN lingo to stress as a mantra the oftentimes obvious

[82] The expression is of Paris (n 70) 91.
[83] A very useful overview of the most popular definitions is contained in Owen (n 77) 41. See also Sakiko Fukuda Parr and Carol Messineo, 'Human Security. A Critical Review of the Literature' (2012) Center for Research on Peace and Development Working Paper No. 11 < soc.kuleuven.be/crpd/files/working-papers/wp11.pdf > accessed 11 June 2021.
[84] Paris (n 70) 102.
[85] 'Human Development Report' (n 60) 24.
[86] Ibid 22.
[87] Ibid 23.
[88] Paris (n 70) 89.
[89] Ibid 90.

relationships between peace, security, environment, development, climate change, human rights and the like, up to the point that many of these concepts indistinguishably conflate into each other.[90] Much more interesting is the subtle transformation that has occurred regarding the vagueness of security. In fact, whereas many have warned against the dangerous vagueness of a state-centric (national) security,[91] the turn to a human-centric security seems to have transformed vagueness into a virtue. The excitement of some non-governmental organisations and some well-intentioned states that have made of human security their banner demonstrates the existence of certain faith in the ability of a wider understanding of security to address the multi-faceted causes of human insecurity. To a certain extent, this might be true. Arguably, a wide number of threats recognised as jeopardising individual security might require a wider understanding of security that would be more suitable to address them. In fact, this is the thrust of the claimed necessity for the shift from a militarised notion of (national) security to an all-encompassing notion of security.

However, many have observed that such a wide understanding of human security generates inevitable overlaps with the human rights framework.[92] As noted by critics, often human security and human rights are used interchangeably.[93] Proponents of human security routinely employ the language of human rights, stressing the reciprocal interaction and interconnection

[90] As Paris, 92 notes, "the observation that all human and natural realms are interrelated is a truism, and does not provide a very convincing justification for treating all needs, values and policy objectives as equally important".
[91] See Introduction, section 3.
[92] Among many: Dorothy Estrada-Tanck, *Human Security and Human Rights under International Law. The Protections Offered to Persons Confronting Structural Vulnerability* (Hart Publishing 2019); Rhoda E. Howard-Hassmann, 'Human Security: Undermining Human Rights?' (2012) 34 Human Rights Quarterly 88; Gerd Oberleitner, 'Porcupines in Love: The Intricate Convergence of Human Rights and Human Security' (2005) 6 European Human Rights Law Review 588; Wolfgang Benedek, 'Human Security and Human Rights Interaction' (2008) 59 International Social Science Journal 7; David Petrasek, 'Human Rights 'Lite'? Thoughts on Human Security' (2004) 35 Security Dialogue 59; Lyal S. Sunga, 'The Concept of Human Security: Does It Add Anything of Value to International Legal Theory or Practice?' in Andreas Oberprantacher, Marie-Luisa Frick (eds), *Power and Justice in International Relations. Interdisciplinary Approaches to Global Challenges* (Routledge 2009) 131-146.
[93] Florea Hudson et al. (n 75) 31.

between human security and human rights.[94] Notably, the authoritative 2003 Report by the Commission on Human Security ('Human Security Now') stresses that human rights and human security are "complementary ideas" and "fruitfully supplement each other".[95] Nevertheless, it remains far from clear what this interrelationship actually entails, and what are the alleged implications. The same 1994 Human Development Report does not clarify this aspect, since it contains only scattered references to human rights.[96] Some attempts to narrow down the wide definition of human security proposed in the 1994 Report have exacerbated the confusion, resulting in a "pick-and-choose approach"[97] to what rights violations might constitute threats to human security. This is the case, for example, with the 2003 Report of the Commission on Human Security, which stresses that

> the basically normative nature of the concept of human rights leaves open the question of which particular freedoms are crucial enough to count as human rights that society should acknowledge, safeguard and promote. This is where human security can make a significant contribution by identifying the importance of freedom from basic insecurities – new and old.[98]

The 2003 Report thus suggests cherry-picking some fundamental rights that might be deemed "more fundamental" than others, in contrast with the long-standing view that "all human rights are universal, indivisible and interdependent and interrelated".[99]

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[94] Oberleitner (n 92) 588.
[95] 'Human Security Now' (n 66) 9.
[96] For examples, the 1994 Report stresses under the "political security" heading that "one of the most important aspects of human security is that people should be able to live in a society that honours their basic human rights" (at 32); or that human rights violations are "early warning indicators" of ongoing threats to human security (at 38).
[97] Petrasek (n 92) 61.
[98] 'Human Security Now' (n 66) 9.
[99] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna (25 June 1993) par. 1.5. For a comment on this issue, see Howard-Hassmann (n 92) 106-109.

More generally, statements of principle about the interconnection between human security and human rights fail to convincingly explain in what way human security adds value to human rights. Christian Tomuschat observed about human security that

> This new approach is largely the result of overzealous bureaucracy, which has lost sight of the existing achievements in the field of human rights. Almost all of the security items mentioned in these reports are nothing other than a reflection of the rights enunciated in the two International Covenants of 1966. […] There is no real need to coin new concepts.[100]

Many share his scepticism. Barry Buzan, who was actually at the forefront of the movement to expand security beyond military threats, maintains that "if the referent object of human security is the individual, or humankind as a whole, then little if anything differentiates its agenda from that of human rights".[101] Since human security and human rights have in common their focus on individuals as addresses of some form of protection,[102] their overlap seems inevitable. The same can be said about human security's aspiration to universality,[103] also a characterising feature of the human rights discourse. Oberleitner stresses that the ambiguity behind their unclarified relationship lies in the unanswered question of "whether human rights are *part* of the "vital core" which human security seeks to protect, or whether they *are* the core".[104] Due to this ambiguity, David Petrasek has called human security "human rights 'lite'".[105]

Yet it is not only the proponents of human security, but also its critics, who somehow believe that a clearer concept of human security might benefit the human rights discourse,[106] for

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[100] Christian Tomuschat, *Human Rights. Between Idealism and Realism* (2nd ed, Oxford University Press 2008) 64.
[101] Barry Buzan, 'A Reductionist, Idealistic Notion that Adds Little Analytical Value' (2004) 35 Security Dialogue 369.
[102] Howard-Hassmann (n 92) 109.
[103] 'Human Development Report' (n 60) 22: "Human security is a universal concern. It is relevant to people everywhere, in rich nations and poor".
[104] Oberleitner (n 92) 598 (emphasis in the original).
[105] Petrasek (n 92) 90.
[106] See, for example, Benedek (n 92) 16-17; Oberleitner (n 92) 605-606; Howard-Hassmann (n 92) 111-112; Tomuschat (n 100) 56-57.

example by drawing attention to those threats to individual security that have allegedly not been sufficiently addressed by the human rights discourse, such as violence caused by private actors or violations committed by international institutions.[107] However, IHRL has already evolved towards an increasing recognition of the need to protect individuals against non-state actors, without necessarily resorting to human security discourses.[108] Even the advocacy achievements heralded as triumphs of human security discourses, such as the International Criminal Court and the Anti-Personnel Landmines Convention, are actually firmly rooted in human rights and humanitarian discourses, and the path leading to their establishment began long before the appearance of human security on the international scene.[109]

This is not to say that the existence of an established human rights framework necessarily implicates that there is no space in the political lexicon for other concepts that also endeavour to enhance the protection of individuals. On the contrary, if human security aims at strengthening human rights as some believe (for example, through advocacy by civil society), then its lack of analytical clarity is perhaps not a fatal flaw.[110] After all, the political lexicon is very often populated by vague concepts whose boundaries with other concepts are seldom clearly demarcated. At worst, human security might be a superfluous concept.

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[107] Howard-Hassmann (n 92) 108, who however does not seem to fully endorse this reading of human security.

[108] Philip Alston (ed), *Non-state Actors and Human Rights* (Oxford University Press 2005); Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford University Press 2006).

[109] Discussions about the creation of a permanent international criminal court started already following the end of World War I. The establishment of the International Criminal Court is the culmination of a long process that has gone through the establishment of *ad hoc* criminal tribunals, from Nuremberg and Tokyo until the more recent tribunals dealing with international crimes committed in former Yugoslavia, Rwanda, Cambodia, Sierra Leone. For an historical excursus, see M. Cherif Bassiouni, 'Establishing an International Criminal Court: Historical Survey' (1995) 149 Military Law Review 49. The ban on landmines is built on pre-existing international humanitarian law rules contained in the 1949 Geneva Conventions that prohibit means and methods of war causing unnecessary suffering. For the history of the Ottawa Convention, see Stephen D. Goose, 'The Ottawa Process and the 1997 Mine Ban Treaty' (1998) 1 Yearbook of International Humanitarian Law 269.

[110] As Oberleitner (n 92) 594 notes, "[t]here is certainly nothing wrong with using the rhetoric of human security to promote and enhance what in effect are human rights. […] It can be an effective advocacy or policy tool, even though it does so at the expense of analytical clarity".

3.2. The recurring antagonism

However, human security might *weaken* the human rights frame while declaring a commitment to strengthening it. This can happen in two ways. First, the vaguely defined mutually reinforcing relationship between human rights and human security might result in human security discourses swallowing up human rights. This is likely to happen because "an accepted normative framework is recycled in the form of a disputed policy concept".[111] Human rights law, as (also) an established normative framework, imposes legal obligations, whereas human security, as a rather recent policy concept, does not prescribe specific actions to states, and instead calls for choices and prioritisation.[112] Thus, the risk is that states might find human security to be a more "palatable dish"[113] than human rights, exploiting the former in order to seek to avoid the obligations imposed by the latter.[114] This shows an important difference between human security and human rights with respect to the position of individuals vis-à-vis the two. Even though human security and human rights are both protective regimes, individuals have no standing in human security discourses. Instead, one of the strengths of the human rights framework is that individuals have actionable claims against states to demand respect for their rights, and even reparations for violations that are suffered.[115] Human security does not allow that, leaving the protection of individuals entirely in the hands of the states. For this reason, it might be much more tempting for states to employ the (rhetorical) language of human security instead of the (also legal) language of rights, making it is easier for states to fail to protect, respect and fulfil human rights in the name of human security.[116] Therefore, human security at

[111] Ibid.
[112] Ibid 605.
[113] Ibid 596.
[114] As Chapter 5, section 5 will show in greater detail, this is true not only about human security, but about security more in general.
[115] Howard-Hassmann (n 92) 95-96. This is a critical aspect that will be fully discussed in Chapter 5, section 5.1.
[116] Ibid 106.

best risks deflecting attention from human rights and at worst risks securitizing rights by making them subservient to security priorities, with all the sense of urgency that they usually convey. As Buzan again puts it, "reconstructing human rights as human security reinforces the danger that security is taken to be the desired end. Human rights is much better placed to support the idea that the desired end is some form of desecuritization down into normal politics".[117]

The second way in which human security might undermine rights is much subtler and relates to its relationship with state-centric (national) security. This relationship too is far from clear. Even though, as noted earlier, the Human Development Report stresses that human security purports to make a "transition" from national security to an all-encompassing and human-centred type of security, such a transition has not happened in full. In fact, the 2003 Report of the Commission on Human Security states that "human security does not replace the security of the state with the security of people".[118] The two are (of course…) "mutually reinforcing and dependent on each other".[119] Again, the fact that there is an obvious relationship between the state and the individual level of security says nothing about how to handle potential contradictions between the two.[120] Since states often constitute threats to the security of individuals, "there is no necessary harmony between individual and state security".[121]

One way to look at the possible impact of human security on national security might be to hope that human security could help smooth the "hard hedges" of national security, in particular its military-like and repressive connotation, by favouring a reinterpretation of the concept more in line with the protective underpinning of a human-centred idea of security. In this respect, Oberleitner maintains that human security might "trim" national security under IHRL,

[117] Buzan (n 101) 370.
[118] 'Human Security Now' (n 66) 3.
[119] Ibid 6. Similarly, UNGA Res 66/290, par. 3(e): "Human security does not replace State security".
[120] Florea Hudson et al (n 75) 28.
[121] Buzan (n 58) 50.

benefiting the human rights discourse.[122] However, he might be far too optimistic. In fact, it is more likely to be the other way around. In the post-9/11 world, the rhetoric of human security has been hijacked by states to legitimise their strategic security choices.[123] This has happened because states are able to co-opt *human* security discourses in order to portray *national* security as a more virtuous and "humane" type of security, without fundamentally changing their security priorities and measures. In fact, human security does not seem to acknowledge that states are a great source of individual insecurity, instead depicting states as benevolent agents of security. In Ken Booth's words, "human security has taken on the image of the velvet glove on the iron hand of hard power".[124] This transformation of security, whereby it morphs into a hybrid of a "humanised" national security, is detrimental to human rights especially in relation to the omnipresent logic of balancing. The more (national) security is rendered symbolically virtuous, the easier it is for states to rely on it to justify limitations on rights. In addition, since human security is an expansive concept containing within it very broad lists of security threats, states can interpret national security under IHRL expansively (for example, by understanding national security as somehow including human security). The consequence is that to a wider concept of security corresponds a wider possibility for states to invoke security concerns to limit rights. This redirecting of human security away from the intention of its proponents is not surprising if one looks at the power of states to manipulate concepts. As noted in Chapter 3, section 5, states have the formidable power to distort concepts when it is convenient for them to do so in order to pursue their goals. This is why the introduction of new concepts, even more of new concepts with ill-defined boundaries, can easily make them pray of states' power-

[122] Oberleitner (n 92) 602-603. However, the author does not specify how this might happen in practice.
[123] For some critical insights, see Giorgio Shani, Makoto Sato, Mustapha Kamal Pasha (eds), *Protecting Human Security in a Post 9/11 World. Critical and Global Insight*s (Palgrave Macmillan 2007) 8.
[124] Ken Booth, *Theory of World Security* (Cambridge University Press 2007) 324.

grabbing ambitions. As Booth synthesises, "the 'cold monster' of the sovereign state has appropriated human security in order to help further entrench its own".[125]

Is there anything that can be rescued from the concept of human security in relation to the human rights discourse? Arguably, one positive contribution of human security lies in the mainstreaming of the very general and generic idea that security and rights are not antithetic, but in a synergetic relationship. Two problems about this idea have emerged from the present excursus on human security. First, it is not sufficient to stress that human rights and security are in a mutually reinforcing relationship if the practical functioning of this relationship is not convincingly spelled out and disentangled. Failure to do so would only result in any human-centred conceptualisation of security to fall back on human rights discourses, generating intricate conceptual overlaps that will then be difficult to disentangle without resorting to unspecified "mutually reinforcing relationships". Second, an unclarified synergetic linkage between rights and security might cause damage to rights as much as an oppositional understanding of rights and security. Even a well-meaning concept such as human security can distort human rights discourses, making them subservient to security interests, rather than reciprocally reinforcing the two as human security aspired to do.

4. Security as a right

The difficulty with untangling rights and security emerges again in relation to the meaning of the right to security. This section will proceed by analysing the right to security from two different angles. First, it will discuss the right to security in IHRL. As a legalised right, an enquiry into its content is required: what is the meaning of the right to security in IHRL?

[125] Ibid 327.

Second, the section will discuss the political invocation of the right to security, understood as right to t*he good of security*. It will ask not only the same question about the meaning of the right to security so understood, but also the separate question about the desirability of such a right: is a right to the good of security desirable? As it will be shown, these two lines of enquiry, albeit distinct, have in common a similar difficulty with delineating the specific content of the right to security, that in turn translates into a certain tendency of the right to security to conflate with the content of other rights, or with the human rights discourse as a whole.

4.1. The positive right to security

As a legal right, the right to security appears in all the main human rights treaties[126] as well as in many constitutions.[127] In IHRL, the right to security is usually laid out in connection with the right to liberty.[128] Article 5 of the ECHR, for example, reads:

> Right to liberty and security
>
> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases […].

As Liora Lazarus notes,[129] the provision is worded in a convoluted way, since it begins with a normative commitment to both liberty *and* security but proceeds to list the conditions to lawfully restrict *only* liberty, with no further reference to security ("no one shall be deprived of his liberty […]"). By reading the provision, it remains unclear whether Article 5 makes

[126] Art.9 ICCPR; Art.5 ECHR; Art.7 ACHR; Art.6 ACHPR; Art.3 UDHR.

[127] For example: Constitution of Spain 1978, Section 17(1); Constitution of Hungary 2011, Art.IV (1); Constitution of Finland 1999, Section 7; Constitution of South Africa 1996, Art.12(1). See also below for other examples.

[128] The wording of the articles is substantially the same across treaties. Art.9 ICCPR and Art.5 ECHR refer to "right to liberty and security of person". Art.7 ACHR refers to "right to personal liberty and security". Art.6 ACHPR refers to "right to liberty and to the security of his person". The only exception is Art.3 UDHR, in which the right to security is laid out together with right to liberty and right to life: "Everyone has the right to life, liberty and the security of person".

[129] Liora Lazarus, 'Mapping the Right to Security' in Liora Lazarus and Benjamin J Goold (eds), *Security and Human Rights* (1st ed, Hart Publishing 2007) 334.

provision for a "right to liberty and security" or "right to liberty *and right to* security", i.e. whether it is one or two rights under the same heading.[130]

The Strasbourg organs seem to have opted for the first interpretation. In *East African Asians v. United Kingdom*, the former European Commission expressly held that

> the Commission considers that the term "security of person" under this Article must be interpreted in its particular context. The full text of Article 5 shows that the expression "liberty and security of person" in para. (1) must be read as a whole and that, consequently, "security" should be understood in the context of "liberty". […]
>
> It appears, therefore, to be in accordance with the structure both of Article 5 and of the Convention as a whole to take the expressions "liberty" and "security" of person in para. (1) of Article 5 as being closely connected.[131]

The Commission further stressed that "this is does not, however, mean that the term 'security' is otiose in Article 5. In the Commission's view, the protection of 'security' is in this context concerned with arbitrary interference, by a public authority, with an individual's personal 'liberty'".[132] For the Commission, the right to security relates to the substantive and procedural requirements that must be complied with in order to justify the deprivation of liberty.[133] The subsequent case law shows that the Commission has rejected claims of an alleged violation of the right to security alone (under Article 5) in cases not related to a deprivation of liberty, because "'liberty of person' in Art. 5(1) […] means freedom from arrest and detention, and 'security of person' the protection against arbitrary interference with this liberty".[134] The

[130] Same consideration applies to the other similar provisions mentioned in footnote 126 above. Arguably, Art.6 ACHPR is the only article that might hint at a disjointed interpretation, since it mentions "right to liberty *and to* the security of his person" (emphasis added). If there is a difference at all in comparison to the other corresponding articles, such a difference is admittedly very thin.

[131] *East African Asians (Citizens of the UK) v United Kingdom* (App.4626/70), 6 March 1978, § 5.

[132] Ibid § 6.

[133] Ibid.

[134] *A., B., C., D., E. F. G. and I. v Federal Republic of Germany* (Joined App.5573/72 and 6670/72), 16 July 1976, § 28. See also *X v United Kingdom* (App. 5877/72), 12 October 1973, § 2;

ECtHR has substantially followed the Commission's interpretation, treating right to liberty and security as a whole and dismissing claims of violations of the right to security that not fall within the ambit of deprivation of liberty.[135] Even in the context of alleged deprivations of liberty, however, the ECtHR has not fully clarified the relevance of the right to security in connection with the right to liberty, simply reiterating that "what is at stake here is not only the 'right to liberty' but also the 'right to security of person'".[136] That the right to security in the ECHR is *only* pertinent to the right to liberty under Article 5 is confirmed by the fact that the ECtHR has sometimes vaguely referred to a *general concept of security* as relevant under Article 3 and Article 8 claims, without finding that the *right to* security was engaged.[137]

It remains unclear, in the ECtHR case-law, why the security-liberty link is supposed to be a necessary one. As Edwin Bleichrodts observes,

> the obligation to give legal protection to the right to liberty of person and the prohibition of arbitrariness in the restriction of that right result from Article 5 and the system of the Convention even without the addition of 'and security', while the term 'security', according to normal usage, refers to more than mere protection against limitation of liberty.[138]

In fact, that this link is not essential is demonstrated by many constitutions that omit the reference to the right to security within the right to liberty.[139] Admittedly, what transpires from the Strasbourg organs' case law is the difficulty with meaningfully separating the right to

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[135] *Menteş and others v Turkey* (App. 58/1996/677/867), 28 November 1997, § 79: "the insecurity of their personal circumstances arising from the loss of their homes did not fall within the notion of "security of person" for the purpose of Article 5 § 1 of the Convention."; *Pretty v United Kingdom* (App. 2346/02), 29 April 2002, § 23 (rejecting claims that euthanasia falls within the scope of the right to security under Art.5).

[136] *Bozano v France* (App. 9990/82), 18 December 1986, § 54. Similarly, *Kurt v Turkey* (App. 15/1997/799/1002), 25 May 1998, § 123; *Öcalan v Turkey* (App. 46221/99), 12 May 2005, § 83-85; *El-Masri v The Former Yugoslav Republic of Macedonia* (App. 39630/09), 13 December 2012, § 231.

[137] See *Keegan v United Kingdom*, § 34 and *Popov v Russia*, § 197 (both discussed in section 2 above).

[138] Edwin Bleichrodt, 'Right to Liberty and Security' in van Dijk and others (n 9) 441.

[139] For example, Constitution of Italy 1947, Art.13; Constitution of Ireland 1937, Art.40(4); Constitution of Lebanon 1926, Art.8; Constitution of the Democratic Republic of the Congo 2005, Art.17; Constitution of United Arab Emirates 1971, Art.26.

security from the right to liberty, as well as some basic acknowledgement that the protection of liberty somehow entails safeguarding the right to security. Overall, the right to security lacks an in-depth theoretical elaboration in the Strasbourg case law.

Interestingly, the case law of the HRCttee has moved in a totally different direction. Even though Article 9 of the ICCPR is identical to Article 5 of the ECHR, in that it also refers to "right to liberty and security", the Committee has refused to understand the right to security only in the context of deprivation of liberty. In fact, in *Delgado Páez v Colombia* (a case in which the applicant alleged that Colombia failed to protect him against death threats), the HRCttee held that

> The first sentence of article 9 does not stand as a separate paragraph. Its location as a part of paragraph one could lead to the view that the right to security arises only in the context of arrest and detention. The travaux préparatoires indicate that the discussions of the first sentence did indeed focus on matters dealt with in the other provisions of article 9. […] Although in the Covenant the only reference to the right of security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. At the same time, States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.[140]

In finding a violation of the right to security under Article 9, the Committee in effect delineated the scope of the right to security independently of the right to liberty. This interpretation has

[140] UNHRC, Communication No. 195/1985, *Delgado Páez v. Colombia*, UN Doc. CCPR/C/39/D/195/1985 (23 August 1990) § 5.5.

been confirmed in a number of subsequent cases concerning death threats, harassment, intimidation and so on.[141] As General Comment No.35 summarises, "the right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained".[142] The right covers bodily or mental injury inflicted by both private actors and state authorities.[143] In order to avoid the right to security being engaged when other rights might be at stake, the General Comment adds that not all risks to physical and mental health are included in its scope (for example, indirect psychological harm derived from being subject to civil or criminal proceedings is excluded).[144]

A similar interpretation of the right to security as protection against some physical and psychological harm has been developed in the Inter-American human rights system, albeit with some major differences.[145] Admittedly, it was much easier for the IACHR and the IACtHR to come up with this interpretation, because they did not need to disentangle the right to security from the right to liberty as the HRCttee had to do. In fact, although the right to security appears in the ACHR in the usual pair with right to liberty (Article 7), there is another provision (Article 5) that could have been used to define the content of the right to security. Article 5 does not expressly mention "security", but reads:

> Right to Humane Treatment
>
> 1. Every person has the right to have his physical, mental, and moral integrity respected.
>
> 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of

[141] For an overview of this case law, see Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (2nd rev ed, N.P. Engel 2005) 213-215.
[142] UNHRC, General Comment No.35. *Art.9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35 (16 December 2014) § 9.
[143] Ibid.
[144] Ibid.
[145] See discussion below.

their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

[…].

As it appears, the first paragraph is conceptually very close to the right to security as interpreted by the HRCttee. In fact, the Inter-American organs have expressly referred to the provision as "right to security or integrity",[146] which affords protection against acts of violence committed by private persons, as well as against the use of non-lethal force by state agents.[147] This "right to security or integrity" seems therefore synonymous with right to humane treatment (the proper heading of Article 5). The scope of this right to security or integrity is so broad as to include freedom from torture and other ill-treatment.[148] This is due to the somewhat unique wording of Article 5, that lists freedom from torture and other ill-treatment under a general right to humane treatment affording protection also against acts not qualifiable strictly speaking as torture or ill-treatment. As a matter of conceptual orthodoxy, this is at odds with other human rights treaties, that usually lay down freedom from torture and other ill-treatment as a stand-alone right.[149] In sum, the right to security or integrity, in the Inter-American system, has something to do with humane treatment, that in turn includes, but is broader than, freedom from torture and ill-treatment.

The Inter-American organs have left unresolved the problem of the meaning of the right to security in conjunction with the right to liberty (Article 7). Attempts by the IACtHR to clarify

[146] IACHR, 'Report on Citizen Security and Human Rights' (31 December 2019) OEA/Ser. L/V/II (Doc 57), paras 121-143, available at < www.cidh.oas.org/countryrep/seguridad.eng/citizensecurity.toc.htm > (accessed 25 June 2021).

[147] Ibid paras 121-134, also containing an overview of the relevant case law.

[148] Ibid paras 126-132.

[149] Art.7 ICCPR; Art.3 ECHR. However, Art.5 ACHPR is broader: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".

that "security […] is the absence of interferences that restrict or limit liberty beyond what is reasonable"[150] and that "security should also be understood as protection against all unlawful or arbitrary interference with physical liberty"[151] simply confirm that, as with the European human rights case law, the right to security under Article 7 is an unclear appendix to the right to liberty.[152]

In the African system of human rights protection, the right to security is even more multi-faceted. Like all other treaties, the ACHPR contains an express reference to the right to security in conjunction with the right to liberty (Article 6). In contrast to the European and the Inter-American case law, and in a similar fashion to the HRCttee, the African bodies have tried to carve out a meaning of the right to security more independent from the right to liberty and detention issues. In a case brought by some non-governmental organisations against Sudan in relation to the widespread human rights violations occurring in Darfur, the ACtHPR held that the right to security has a two-fold dimension:

> [t]he right to security of the person includes, *inter alia*, national and individual security. National security examines how the State protects the physical integrity of its citizens from external threats, such as invasion, terrorism, and bio-security risks to human health.[153]

For the ACtHPR, individual security is also two-fold:

> [i]ndividual security on the other hand can be looked at in two angles - public and private security. By public security, the law examines how the State protects the physical integrity of its citizens from abuse by official authorities, and by private security, the law examines

[150] I/A Court H.R., *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Judgment of 21 November 2007, § 52.
[151] Ibid § 53.
[152] See, for a comment, Cecilia Medina Quiroga, *The American Convention on Human Rights. Crucial Rights and their Theory and Practice* (2nd ed, Intersentia 2017) 194-198, who concludes that "in light of the Court's case law concerning these rights, the existence of an autonomous right to security appears irrelevant".
[153] African Court (App. 279/03-296/05), *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, 27 May 2009, § 174.

how the State protects the physical integrity of its citizens from abuse by other citizens (third parties or non-state actors).[154]

On this interpretation, the right to security is related to the right to liberty, because the former, "even though closely associated with the first arm, the right to liberty, is different from the latter".[155] In fact, it is much broader, because "[s]ecurity of the person can be seen as an expansion of rights based on prohibitions of torture and cruel and unusual punishment".[156] This "expansion" is noteworthy in that it resembles the interpretation proposed by the Inter-American organs of the right to security and integrity, of which freedom from torture and other ill-treatment is conceptually part. It seems that the right to security is in fact broader than that, because it "guards against less lethal conduct, and can be used in regard to prisoners' rights".[157]

However, the ACtHPR's zeal for conceptual distinctions faded when it applied concepts to the facts of the case. In fact, the ACtHPR found that forced eviction, internal displacement and sexual violence constitute violations of the right to security and right to liberty indistinctly[158] (with liberty very broadly understood as "freedom from restraint – the ability to do as one pleases"[159]). Nor did the ACtHR attempt to clarify what aspect of the right to security (national or individual) was at stake in the given circumstances, usually referring generically to "security".[160]

Admittedly, the reference to national security as a component of the right to security under Article 6 is confusing, because the African Charter also contains a discrete "right to national

[154] Ibid § 175.
[155] Ibid § 173. As Rachel Murray, *The African Charter on Human and Peoples' Rights. A Commentary* (Oxford University Press 2019) 199, rightly notes, the words "inter alia" suggest that there might be other components of the right to security.
[156] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, § 174.
[157] Ibid.
[158] Ibid § 169-179.
[159] Ibid § 172.
[160] See for example § 177-178. On this point, see also Murray (n 155) 199-201.

and international peace and security" (Article 23(1)).[161] The African Charter is the only human rights treaty with such a right, although similar provisions can be found in some constitutions.[162] The exact scope of the right is unclear.[163] As is common across so called "third-generation rights",[164] its holders are contested, and so is its enforceability.[165] In the only instance to date in which the African Commission found a violation of Article 23, the case concerned an inter-state application brought by the Democratic Republic of the Congo, alleging widespread violations of human rights committed on its territory by the armed forces of Burundi, Rwanda and Uganda.[166] The Commission found a violation of Article 23 because Burundi, Rwanda and Uganda violated general international law rules on non-interference in internal affairs of sovereign states, on prohibition of aggression and on the obligation to settle disputes with peaceful means.[167] In doing so, in effect the Commission filled the content of the right to international and national peace and security with well-established international law provisions. Thus, the type of security (national and international) under Article 23 is arguably something different from the (individual) security under Article 6 (even though it remains unclear what is the difference with the national security component also relevant under this latter provision).

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[161] "All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organisation of African Unity shall govern relations between States".

[162] For example, Constitution of the Democratic Republic of the Congo, Art.52: "All Congolese have the right to peace and security, both on the national as well as on the international level".

[163] The *travaux* of the Charter show that the article was approved with almost no discussion: Murray (n 155) 538-539. For some discussion of the right and how it fits within the whole African system of human rights, see Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff 2003) 333-353.

[164] What is meant by "third generation rights" is also controversial. Among many, Patrick Macklem, 'Human Rights in International Law: Three Generations or One?' (2015) 3 London Review of International Law 61; Philip Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) 29 Netherlands International Law Review 307.

[165] See, generally: Corsin Bisaz, *The Concept of Group Rights in International Law. Groups as Contested Rights-holders, Subjects and Legal Persons* (Martin Nijhoff 2012).

[166] Communication 227/99), *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*, 29 May 2003.

[167] Ibid § 68-76, in which the Commission recalled the UN Declaration on Friendly Relations among States, adopted by UNGA Res 2625 (XXV) (24 October 1970); Art.33 of the UN Charter; and Art.3 of the OAU Charter.

From this overview of the right to security in IHRL, it appears that the common nucleus of this right has something to do with the protection of individuals against any form of (non-lethal) bodily or mental invasion perpetrated by states or non-state actors. Interestingly, the right to security seems to have been interpreted by some human rights courts and bodies as a "gap-filler" when the relevant treaty does not provide for an express right to bodily or mental integrity. This is the approach taken by the HRCttee, which had to disentangle the right to security from the right to liberty in the absence of an express provision in the ICCPR that would protect individuals against non-lethal harm. To a certain extent, African bodies have followed a similar approach, by finding that the right to security is relevant beyond issues of deprivation of liberty (though it is not clear what is the exact difference). Conversely, since in the ACHR there was already a provision broadly covering physical and moral integrity (Article 5, labelled "right to humane treatment"), the Inter-American organs did not have to carve out an autonomous meaning of the right to security, linking instead the concept of security to the right to humane treatment (Article 5). As a result, they have left unresolved the issue of the meaning of the right to security in the pair "liberty and security". More complex is the interpretative strategy followed by the ECtHR as well as the former European Commission. The Strasbourg organs have refused to sever the link between the right to liberty and the right to security, even though there is no provision in the ECHR expressly protecting individuals against bodily or mental harm (not constituting torture or ill-treatment). Instead, in order to ensure protection against bodily and mental harm, they have opted for an extensive interpretation of Article 8

(right to private and family life), covering physical and moral integrity,[168] as well as health,[169] reproductive rights[170] and many more issues worth of protection.[171]

The right to security in IHRL, in sum, appears to show a certain malleability, most likely due to the lack of an in-depth theoretical elaboration of what "security" precisely means when used as a positive right. That raises the question of whether the right to security is synonymous with physical and mental integrity, humane treatment and the like, or whether the right to security includes those aspects, but is wider than that. In addition, different views exist as to whether liberty and security are a single right, or what exactly differentiates them in the context of deprivation of liberty.

4.2. The right to the good of security

Having determined that the scope of the right to security in IHRL has still some unclear edges, it is time to pursue the second line of enquiry anticipated at the beginning of this section: what is the meaning of the right to security when the right is invoked in political discourse? The question might seem odd, because there is no reason to suspect, generally, that when a right is invoked in political speeches, it might mean something different from what it means in law. If a politician says, for example, that action is needed to protect individuals' right to life, or right to privacy, usually the meaning of these rights aligns, at least approximately, with their legal meaning. To a certain extent, this might be true with regard to the right to security as well. So, if the right to security is invoked in the context of terrorism, it is fair to assume that security would mean protection of individuals against loss of life and physical harm that a terrorist attack

[168] Among many, *X and Y v The Netherlands* (App. 8978/80), 26 March 1985, § 22.
[169] Among many, *Vasileva v Bulgaria* (App. 23796/10), 17 March 2016, § 63.
[170] Among many, *A, B, and C v Ireland* (App.25579/05), 16 December 2010, § 214.
[171] For an overview of the case-law on Art.8, see ECtHR, 'Guide on Article 8 of the European Convention on Human Rights' (updated on 31 December 2020), available at < www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf > (accessed 29 June 2021).

is likely to cause. An example is former European Commissioner Franco Frattini's speech delivered to present the EU Counter-terrorism Strategy, in which he said that "our political goal remains to strike the right balance between the fundamental right to security of citizens, which is first, right to life, and the other fundamental rights of individuals, including privacy and procedural rights".[172] John Reid, former UK Home Secretary, was much more precise in distinguishing the right to life from the right to security, when he said that "as we face the threat of mass murder, we have to accept that the rights of the individual that we enjoy must and will be balanced with the collective right of security and the protection of life and limb that our citizens demand".[173] These examples show that the right to security might conceptually overlap with the right to life, but it does not distance itself too much from the idea of protection against bodily or mental harm underpinning the interpretation given by some human rights courts and bodies.

However, the right to security in political discourse is much more insidious in many other circumstances. For example, when the former Italian Minister of Interior Matteo Salvini tweets, in relation to his claimed effort to curb migratory fluxes, that he is working "to defend the right to security of Italian citizens",[174] what does "security" mean in this context? Is it security against violence and crimes committed by immigrants, often portrayed as dangerous criminals by some right-wing propaganda? Or maybe social, economic, job security that is allegedly threatened by a claimed unsustainable number of migrants? Or both? Or neither?

[172] The speech is available at < ec.europa.eu/commission/presscorner/detail/en/SPEECH_07_505 > accessed 30 June 2021.

[173] Nigel Morris, 'Tough Baggage Rules May Be Extended to Cover Rest of Europe' *The Independent* (London, 22 September 2011) < www.independent.co.uk/news/uk/home-news/tough-baggage-rules-may-be-extended-to-cover-rest-of-europe-412218.html > accessed 30 June 2021.

[174] Available at < twitter.com/matteosalvinimi/status/1082206376645005312 > accessed 30 June 2021 (my translation from Italian).

As Lazarus rightly notes, "if there is little agreement between legal systems as to what the right to personal security might entail, how can politicians be blamed for their expansive claims for the right in other ways?".[175] The issue is that the right to security, when used in political rhetoric, seems to be best understood as right to *the general good* of security, rather than by reference to any more or less specific understanding of the right to security in IHRL. From a conceptual standpoint, this is very problematic because the meaning of security, as repeatedly stressed, is rather ineffable and vague not only in law, but also in ordinary language.[176] Therefore, if it is hard to define the meaning of security in general, it is also hard to define the meaning of the right to the good of security. In addition, if security has the tendency to be an expansive concept, so does the right to security.

In fact, some support for a catch-all understanding of the right to security can be found in the 2005 World Summit Outcome, which proclaims the "right to human security" in the following terms:

> We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end, we commit ourselves to discussing and defining the notion of human security in the General Assembly.[177]

Such a broad notion of the right to security, articulated along the human security's clusters of freedom from fear and freedom from want,[178] illustrates the tendency to deploy the right to security in a much broader fashion than the way the right to security is understood, albeit also

[175] Liora Lazarus, 'The Right to Security – Securing Rights or Securitising Rights' in Rob Dickinson and others (eds), *Examining Critical Perspectives on Human Rights* (Cambridge University Press 2012) 91.
[176] See Chapter 3, section 3.
[177] UNGA '2005 World Summit Outcome' adopted by UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, par. 143.
[178] See section 3.1 above for the explanation of these two clusters.

with some degree of vagueness, in IHRL. The right to the good of security thus is likely to suffer from the same conceptual shortcomings that affect security in general. Admittedly, if the good of security is conceptually vague, a right to the good of security cannot but be vague too.

Vagueness is not the only problem that affects the right to security. In fact, another, more serious problem concerns what Lazarus calls "duplication",[179] that is that the right to the good of security so vaguely conceived is not clearly distinguishable from the scope of other well-established rights. When a right to the good of security is generically invoked in political discourse, it operates as a rhetorical substitute for the human rights discourse. It is, in this sense, a "hologram".[180] The right to human security is a good example. Its vagueness demonstrates that basically all human rights can be made to fit within its scope, from right to life and freedom from torture (freedom from fear cluster), to right to food and right to work (freedom from want cluster). Thus, as Lazarus argues, any invocation of the right to security is a "rhetorical flourish" that does nothing more than duplicate other rights, because it is made up of the content of other rights.[181] Rhonda Powell arrives at a similar conclusion when she argues than, rather than talking about a right to security, it would make more sense to talk about "rights as security", because the whole human rights architecture can be seen as an instrument to ensure security.[182]

Arguably, as similarly noted in the previous section in relation to human security, there would be no substantive danger to human rights if a right to the general good of security were simply to express people's legitimate demand for human rights protection, and the state's commitment to uphold human rights. At the most, the right to the general good of security would just be a

[179] Lazarus (n 175) 101.
[180] Ibid.
[181] Liora Lazarus, 'The Right to Security' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *The Philosophical Foundations of Human Rights* (Oxford University Press 2015) 438.
[182] Rhonda Powell, *Rights as Security: The Theoretical Basis of Security of Person* (Oxford University Press 2019) 162-170.

rhetorical simplification that stands for "protection of human rights" generally understood. As Jeremy Waldron observes, nothing "is seriously lost if politicians and diplomats at the United Nations or whatever go around saying that communal goals are individual rights or talking about group rights".[183]

However, a dynamic similar to the one observed in relation to human security can be triggered when the right to the general good of security is used in the political discourse to absorb some human rights, or even the human rights discourse as a whole. In fact, the right to the good of security can be used as a rhetorical artifice to undermine human rights. This problem calls into question the desirability of the right to the good of security.

This dynamic is in fact triggered when the right to the good of security acquires the status of a "meta-right",[184] that is a right whose protection is a precondition for the protection of all other rights. Scholars have often pointed to this idea. Famously, Henry Shue wrote that security is a "basic right", and "basic rights need to be established securely before other rights can be secured".[185] Others, like Sandra Fredman[186] also understand the right to security as an essential prerequisite for the exercise of freedom.[187] Albeit from different perspectives, the underlying rationale of these views is that there is something "special" about the right to security, and there cannot be any right if the right to security is not guaranteed. The idea that the right to the good of security has such a privileged status has great purchase also in the political discourse.[188] Non-

[183] Jeremy Waldron, 'Can Communal Goods Be Human Rights?' (1987) 28 European Journal of Sociology 296, 321.
[184] Lazarus (n 175) 98-103.
[185] Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (2nd ed, Princeton University Press 1996) 19-20.
[186] Sandra Fredman, 'The Positive Right to Security' in Benjamin J. Goold and Liora Lazarus (eds), *Security and Human Rights* (1st ed, Hart Publishing 2007) 307-324.
[187] For a discussion about Fredman's view and other authors who have acknowledged, albeit from different perspectives, the pre-eminence of the right to security, see Lazarus 'The Right to Security' (n 181) 432-434.
[188] See, for example, John Reid's speech: "The right to security, to the protection of life and liberty, is and should be the basic right on which all others are based". Speech reported by BBC News, 'Reid Urges Human Rights

governmental organisations too are occasionally lured into this idea. As Amnesty International has bluntly maintained, "the right to security is a basic human right".[189]

However, criticising Shue's view of security as a basic right, Waldron has convincingly argued that the right to security is not necessarily a precondition to the enjoyment of all other rights: in fact, it is possible to exercise rights (or at least some of them) even in conditions of insecurity,[190] because "security is not an all-or nothing matter, but a matter of more or less".[191] Crucially, he observes that Shue might not have foreseen that, especially after 9/11, talks about the pre-eminence of the right to security have been exploited in political discourses to displace other human rights.[192] This happens when the right to security becomes a constitutive part of the omnipresent logic of balancing. This way, a supposed superior status of the right to security is likely to make other rights more vulnerable to limitations in the name of the claimed exigency to uphold the former. In other words, a meta-right or basic right to security can make it easier to tip the scale in favour of it and to the detriment of other rights. The dangers are evident also outside the logic of balancing and more generally. If the right to security is the precondition of all other rights, ensuring the right to security becomes the priority for the state. To the extent that all other rights become subservient to a supreme right to security, this right to security risks securitizing rights in general.[193]

The lingering question thus is what the advantage is, from the state's perspective, of using the rhetoric of the *right to the good* of security rather than simply referring to security as a common

Shake-up' (London, 12 May 2007) available at < news/bbc.co.uk/1/hi/uk_politics/6648849.stm > accessed 30 June 2021.

[189] William Schulz, 'Safer or Scared? Impact of the War on Terror' CNN (Atlanta, 28 May 2003).

[190] Jeremy Waldron, 'Security as a Basic Right (After 9/11)' in Charles R. Beitz and Robert E. Goodin (eds), *Global Basic Rights* (Oxford University Press 2009) 218-219.

[191] Ibid 219.

[192] Ibid 209-210.

[193] Lazarus (n 175) 103-105.

good (not having the status of a right). The insidious advantage is that the right to security allows states to sell security to individuals as their legal entitlement just for the purpose of presenting their security action as a de-politicised duty to protect a right.[194] It is a process through which states are able to appropriate the language of rights, with all the correlative sense of legal obligation that it conveys, to conceal the inherent political and strategic connotation of the security goals they wish to achieve. Lazarus calls this process of sanitising security by turning it into a right "righting security".[195] In fact, when states claim that they are acting to protect the right to security of individuals, they are more surreptitiously trying to justify their security action with the mask of a right. In practice, a "right to security" might well just mean "security". As Lazarus again argues, "the double trump of rights (normatively) and security (politically) means that claims to a right to security are potent when used in political rhetoric, legitimating coercive action".[196] Once again, states' power to manipulate concepts for their own interest[197] reappears in this dynamic, hidden behind vague concepts and ready to take advantage of them.

Alessandro Baratta neatly summarises the consequences of the ambiguity of the right to security.[198] As he notes, the right to security is "the result of either a false or a perverse construction":[199] if the right to security is just another version of the individuals' legitimate demand for security, then its construction is superfluous, because it would make more sense to talk about "the security of rights". If instead the right to security is a way to legitimise the action

[194] This is an important theme that will be discussed more in detail throughout Chapter 5.
[195] Lazarus (n 175) 105.
[196] Ibid 104.
[197] On this power, see Chapter 3, section 5.
[198] Alessandro Baratta, 'Diritto alla Sicurezza o Sicurezza dei Diritti?' in Mauro Palma and Stefano Anastasia (a cura di), *La Bilancia e la Misura* (Franco Angeli 2001).
[199] Ibid 21. My translation from Italian.

of the state by strengthening its repressive apparatus, then its construction is ideological, because it aims at limiting the security of rights through the artifice of a right to security.[200]

From the standpoint of the concept of security, nothing really changes if security is just "security" or "right to security": as noted earlier, it cannot be expected that the content of security becomes clearer just because the good of security is qualified as a right. The vagueness of the good of security is thus transferred to the right to the good of security. If the vagueness of security is potentially dangerous in that it can easily undermine rights, so too is the vagueness of the right to the good of security.

The lesson learnt from this discussion is that the right to security, as a legal right in IHRL and, even more, as a right to the good of security, has a certain tendency to incorporate within it the scope of other rights, or the human rights discourse in general. This is yet another confirmation that security, also when it is a right, tends to erode human rights. Thus, even though a right to security might be seen as having the protective connotation that characterises rights, its vagueness instead allows states to deploy it to weaken the protection afforded by the human rights framework.

5. Conclusion

From the discussion of the three topics analysed in this Chapter, two main themes have emerged. First, rights and security are so tangled up in each other that it is often difficult to trace a clear dividing line between the two at a conceptual level. In the logic of trading off, the antagonism between rights and security does not seem to account for the also existing synergetic

[200] Ibid. The view of the author is freely translated from Italian by me.

relationship between them. On the contrary, balancing and proportionality negate this synergy, raising the issue of whether these logics promote a false idea of a perennial and unavoidable conflict between rights and security. Outside the trade-off, human security and the right to security do not *per se* negate the synergy between rights and security. However, their unclear and often ever-expanding scopes do not fully clarify in which way human security and the right to security can be distinguished from other rights, or from the human rights discourse as a whole. In fact, it appears that any attempt to make sense of their meaning usually generates unclear overlaps between rights and security, leading to some general and generic acknowledgment that rights and security are mutually reinforcing. In the absence of a clear understanding of any synergetic relationship between rights and security, then the doubt begins to arise as to whether concepts such as human security and the right to security are really necessary, given the existence of a well-established human rights framework that might already capture what human security and the right to security try to include in their indistinct scopes. It will be a task for Chapter 5 to try to provide some answers to this question.

The second theme, clearly related to the first, concerns the ability of security, whatever its form and variation, to always be able to be set against rights. While the antagonism between rights and security is inherent in the logic of balancing, human security and the right to security too can be deployed by states in order to pit security against rights. The way this antagonism is generated is sneakier than the way it operates in the logic of balancing. This is because human security and right to security are not overtly in opposition to rights. On the contrary, they might be seen as being in synergy with them. However, due to their vague and indistinct meaning, both human security and the right to security can easily be employed by states to undermine human rights, usually on the pretext of protecting them. This happens due to the phenomenon already explained in Chapter 3, that is the states' ability to appropriate vague concepts and to

distort them in order to pursue their security goals. This demonstrates that, for as long as security remains a vague and expansive concept, it will always carry the risk of being an antagonistic force likely to weaken human rights. This is true also when security is qualified as "human security" or acquires the status of a right. Even when security and rights appear to be synergetic, albeit in an unclarified fashion, the rights-vs-security dynamics often manage to prevail. As a result, the question becomes how to counter the antagonistic force of security and its ability to undermine rights. Chapter 5 will try to provide an answer to this question.

CHAPTER 5

REJECTING SECURITY

1. Introduction

The previous Chapters have so far shown that security cannot be defined in law in such a way as to constrain state power, and that even some reformulations of security that are seemingly less sinister than realist national security (such as human security and the right to security) are not able to act as brake on state power, and thus are likely to do more harm than good to the human rights discourse. At this point, the lingering question that awaits an answer is what to do with security? Since definitions and reformulations of security are not likely to act as brake on the state security power, is there a way to defuse the might of security and to avert damage to human rights caused by it?

This concluding Chapter will argue that the answer is radically simple. To avoid security undermining human rights, the concept of security should be rejected in its entirety. As I outline below, at a purely conceptual level, there is no intrinsic reason why states should tackle threats to individuals through security, rather than through the mobilisation of the protective regime afforded by human rights. Drawing from previous findings about the unclear overlap between security and rights, this Chapter will show that the human rights regime already encompasses issues that can be made to fit within the scope of security. Thus, the Chapter will argue that tackling threats through security, rather than through human rights, is a matter of framing. From this perspective, the choice of the security frame is the product of a strategic move that states

put in place in order to sidestep the power-constraining features inherent in the human rights frame.

The Chapter will delve into these features, namely the legalisation of human rights, their compliance pull and their drive towards equality. Finally, the Chapter will also explore the power-enhancing strand of the human rights frame, in order to outline its enduring ambiguity. It will be argued that these features, despite their contradictions, make the human rights frame much more suitable to constrain state power than any new, rebranded or alternative conceptualisation of security has been capable of doing to date.

For this reason, this Chapter will make a case against the alleged necessity and inevitability of the concept of security. At the same time, it will show that liberating human rights from the cumbersome presence of security would open up spaces to (re)focus on the protective regime afforded by rights, in order to better understand their virtues and to try to rescue them from their many enduring contradictions. The proposed paradigm shift thus constitutes an argument against misplaced efforts to understand security as something conceptually different from rights, and in favour of redirecting energy towards efforts to strengthen a human rights framework that too often has been moved to the background by the ubiquity of security across public and legal discourse.

2. Security as an unnecessary concept?

Let us start with a provocative question: is security a necessary concept in the current legal and political lexicon? Admittedly, the question seems odd, not only because security is a term that is widely used, but also, and more importantly for the argument pursued here, because it features

heavily in politics and in legal instruments.[1] Ordinarily, once a concept is well-established in political and legal life, the tacit assumption is that the concept *must* exist, simply because it already exists. In other words, if a concept exists, it is because it allegedly retains some usefulness.

Normally, dissatisfaction with the way a concept is understood and operationalised translates into continuous efforts to find alternative understandings, or to advocate for the reshaping of its boundaries, without questioning, more deeply, the necessity of the concept itself. There is perhaps nothing odd about this, since the critique of existing concepts, generally, is exercised within a framework that accepts the fact that a concept is used, therefore it should exist. To put it differently, the critique of concepts is often carried out as part of a perceived, albeit usually unstated, moral obligation, or simply an intellectual commitment, to "fix" concepts that are perceived as inadequate.

This commitment is implied in the great majority of works about security, which have relentlessly attempted to make sense of the concept, to define it and to understand how it is (or should be) operationalised in contemporary politics as well as in law.[2] The majority of critics seems to believe that security should, and can, be fixed. The many efforts to make sense of trade-offs between security and rights constitute a telling example of how the presence of security in the political and legal discourse has steered the search for a reconciliation between the two based on the assumption that rights and security are two distinct concepts that, one way or another, reciprocally influence each other and thus must coexist.[3] Similarly, the post-Cold

[1] On the relationship between ordinary meaning and legal meaning, see Chapter 3, section 3.

[2] The relevant security literature was reviewed in the Introduction. The claim here is that, generally, attempts to define or to understand security differently are premised on the implicit idea that security is an important concept. However, there are some who have questioned at more fundamental level the necessity of the concept of security as such, as we shall see soon.

[3] See Chapter 4, section 2.

War trend towards a more "human" security, that was supposed to represent a major break with the realist understanding of national security, is guided by the presupposition that security is an important concept, but it needs to be understood differently.[4]

Proposed re-definitions, re-conceptualisations or re-understandings of security have in common the implicit idea that security as a concept is worth preserving, and the explicit, perennial dissatisfaction with the way security is increasingly employed to strengthen state power. This dissatisfaction normally translates into a stated or unstated commitment to re-direct the concept of security towards the aim of enhancing the protection of people, by trying to dismantle an idea of (national) security too subservient to states' interests. The most evident result of these attempts is the expansion that security has undergone in recent years, from state-centric national security to an all-encompassing concept of security that seeks to capture any matter of concern for human beings, such as food, the environment, the economy, health and the like. Even those who remain unsatisfied with current broad understandings of security do not normally question the importance of the concept of security as such, but rather attempt to find more or less creative solutions to try to take security away from the state power's grab.[5]

Admittedly, this thesis was no exception thus far, in that it too has examined the possibility of defining security in law, with the tacit assumption in the background that security is an inevitable concept, the invocation of which by states should be subject to some form of effective constraint.

However, in the security studies literature, some isolated voices have expressed uneasiness about the concept of security as such, fearing that any new idea and critical approach to security

[4] On human security, see Chapter 4, section 3.
[5] The critique of the expansion of security, and in particular of the concept of human security, was discussed in Chapter 4, section 3.

might only continue to legitimise repressive security practices. Jef Huysmans, for example, observes that "speaking and writing about security is never innocent. It always risks contributing to the opening of a window of opportunity for a "fascist mobilization" or an "internal security-gap ideology".[6]

The thrust of Huysmans's worry is that any proposed understanding of security is always likely to be exploited by political actors to serve their interests and to purse specific security aims.[7] That this fear is well-founded is confirmed by the fact that even those recent understandings of security that purported to devise a concept of security alternative to traditional state-centric security have been misappropriated by states. As observed in Chapter 4, section 3, in fact, human security, developed to replace a war-prone, realist conception of national security with a more human-centred idea of security, has mutated genetically into a hybrid: a concept of security that aims at the protection of human beings, while at the same time still being deeply entrenched in the repressive apparatus of the state.

What Huysmans fears is that whatever the reformulation of security, it cannot be effectively shielded from states' extraordinary ability to manipulate concepts; as discussed in Chapter 3, section 5, the creativity of power allows states to distort even new proposed understandings of security that were born out of different intentions. This phenomenon shows that, if the power to manipulate concepts is not tamed, any attempt to suggest another understanding of security is not only doomed to fail but provides further suggestions to the state of how to creatively strengthen its power grip.

[6] Jef Husymans, 'Defining Social Constructivism in Security Studies: The Normative Dilemma of Writing Security' (2002) 27 Alternatives 41, 43.
[7] Ibid 43-44.

Mark Neocleous shares similar scepticism about intellectual efforts to understand security differently, believing that "[i]n rationalising the political and corporate logic of security, the security intellectual conceals the utter irrationality of the system as a whole. The security intellectual, then, is nothing less than the security ideologue, peddling the fetish of our time"[8]. Neocleous argues that security is too compromised by power to be liberated from it, suggesting that

> [t]he only way out of such a dilemma, to escape the fetish, is perhaps to eschew the logic of security altogether – to reject it as so ideologically loaded in favour of the state that any real political thought other than the authoritarian and reactionary should be pressed to give it up.[9]

As he argues, rather than trying to reconceptualise security, to humanise it, to keep asking how much security people need, to see it as an instrument of emancipation and so on, the struggle is to envisage an alternative to security.[10] To do so, the default position should be to be "against security".[11] Neocleous stops short of telling us what such an alternative to security might be. In fact, he seems to argue that an alternative is not really needed, because it is a mistake to think that eschewing security would create a conceptual hole that security was supposedly designed to fill.[12]

Admittedly, there is much to agree with in these views. Chapter 4 has exposed the naivety of those who believe that it is sufficient to move away from a state-centric understanding of security towards a more "human" security to transform the state's often repressive security action into a virtuous action that by itself is more likely to increase the protection of individuals

[8] Mark Neocleous, *Critique of Security* (Edinburgh University Press 2008) 184.
[9] Ibid 185.
[10] Ibid. See also Mark Neocleous, 'Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics' (2007) 6 Contemporary Political Theory 131, 146-147.
[11] Neocleous (n 8) 146. See also Mark Neocleous, 'Against Security' (2000) 100 Radical Philosophy 7.
[12] Neocleous (n 8) 185-186.

against any sort of threats. Even well-intentioned efforts to dismantle old security paradigms have failed to explain why the risk of repressive security action is supposedly minimised by simply expanding the scope of security to including a whole "new" range of security threats to individuals as opposed to "old", realist-inspired, threats to the state. If anything, as also suggested in Chapter 4, such a risk might be heightened.

Some arguments to support the idea that security should be rejected can be found by looking at phenomena that have influenced the concept of security in recent years. First, the gradual expansion of the scope of security has generated what Giovanni Sartori in the 1970s called "conceptual stretching".[13] As Sartori puts it, "the larger the world, the more we have resorted to *conceptual stretching* […], i.e. to vague, amorphous conceptualizations".[14] Therefore, it is not surprising that security has been accused of being an overly vague concept,[15] as well as one that defies definitions, because "conceptual stretching would produce indefiniteness and elusiveness".[16] By stretching the boundaries of a concept such as security, "we do not obtain a more general concept, but its counterfeit, a mere generality".[17] That this stretching has happened regarding security is in fact demonstrated by the recent securitization of an ever-expanding range of issues, including, for example, development[18] and cultural heritage[19]. As a result, it

[13] Giovanni Sartori, 'Concept Misformation in Comparative Politics' (1970) 64 The American Political Science Review 1033.
[14] Ibid 1034 (italics in the original).
[15] See Introduction, section 3, for this line of critique.
[16] Sartori (n 13) 1035.
[17] Ibid 1041.
[18] See, among many: Ramses Amer, Ashok Swain, Joakim Öjendal (eds), *The Security-Development Nexus. Peace, Conflict and Development* (Anthem Press 2012); Stephen Brown and Jörn Grävingholt (eds), *The Securitization of Foreign Aid* (Palgrave Macmillan 2015).
[19] Alessandra Russo and Serena Giusti, 'The Securitisation of Cultural Heritage' (2019) 25 International Journal of Cultural Policy 843.

becomes more and more difficult to understand where the scope of security ends and the scope of other concepts begins.[20]

Second, in addition to conceptual stretching, security has been infected by another related problem that often plagues other popular concepts and ideas, which is what John Tasioulas has called "conceptual overreach".[21] In his words, "this occurs when a particular concept undergoes a process of expansion or inflation in which it absorbs ideas and demands that are foreign to it. In its most extreme manifestation, conceptual overreach morphs into a totalising 'all in one' dogma".[22] That security, as a result of its expansion, has overreached as a concept is demonstrated by the fact that it seems to have indistinctly absorbed within it also the human rights regime. As noted throughout Chapter 4, security and rights overlap to a great extent, to the point that it is often hardly possible to trace a dividing line between the two concepts, and even less to convincingly explain how the two interact with each other.[23] This is not to say that human rights are foreign to the concept of security, quite the contrary indeed: the problem is that security and rights are in theory distinct, but in practice they are so intertwined that it remains unclear, conceptually, why any given adverse occurrence affecting individuals should be a security problem as opposed to a human rights problem. In fact, since human rights and security seem to broadly cover similar grounds and concerns, it is easy for security to overreach into the scope of rights or, to put it differently, to gobble up human rights. A concrete example of this phenomenon is provided by the recent tendency emerged within the UN Global Counter-

[20] In Chapter 2, section 3, we have seen that this phenomenon is quite evident regarding the concepts of (human) security and (positive) peace, that are combined into the "international peace and security" formula in the UN Charter.

[21] John Tasioulas, 'The Inflation of Concepts. Human Rights, Health, the Rule of Law – Why Are These Concepts Inflated to the Status of Totalising, Secular Religions?' (*Aeon*, 29 January 2021) < aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason > (accessed 4 August 2021). As the author argues, human rights too have undergone conceptual overreach.

[22] Ibid.

[23] As argued in Chapter 4, section 3, usually the way out for those who insist on a synergetic relationship between rights and security is to argue that they are "mutually reinforcing" or similar, without specifying in which way.

Terrorism Strategies to present rights as a mode of effective counter-terrorism and counter-terrorism as a mode of protecting human rights.[24] The fact that this correlation does not seem absurd, but instead appears tenable, is evidence of the difficulty with disentangling the state action to counter terrorism (protecting individuals from the terrorist threat) from the state action to ensure human rights (protecting the rights of individuals that are endangered by terrorism). Since human rights law imposes an obligation upon states to ensure the rights of individuals under their jurisdiction, counter-terrorism is arguably a means through which states seek to comply with this obligation.[25]

To be clear, the problem with conceptual overreach is not just about the blurring of boundaries between supposedly distinct concepts. It is about the risk that such a blurring might in practice make one concept subservient to the other, which eventually disappears within the scope of the concept that is subject to expansion. This risk was highlighted in Chapter 4, section 3, regarding the unclear relationship between human rights and human security: if human security contains indistinctly within it the human rights frame, rights risk being absorbed within security. The same risk has been noted regarding the tendency to consider counter-terrorism as a mode of protecting rights: if rights are co-opted to become part of counter-terrorism, rather than being used to set limits on counter-terrorism, the human rights frame might be deployed to legitimise security narratives,[26] and even be absorbed within them.[27]

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[24] On this trend, see Fiona de Londras, *The Practice and Problems of Transnational Counter-Terrorism* (Cambridge University Press 2022 [forthcoming]) 115-119.
[25] Ibid 115.
[26] Ibid 119.
[27] Some have noted that counter-terrorism has become a de facto "fourth pillar" of the UN, expressing concern that measures to counter/prevent violent extremism increasingly exploit the language of rights to prompt more counter-terrorism. See Saferworld, 'A Fourth Pillar for the United Nations? The Rise of Counter-terrorism' (Report, 2020) < www.saferworld.org.uk/resources/publications/1256-a-fourth-pillar-for-the-united-nations-the-rise-of-counter-terrorism > accessed 25 August 2021.

Thus, if one must take at face value that security nowadays is, and should remain, a more expansive concept than traditional (national) security, a doubt arises as to whether such an expanded security might have overreached and swallowed up the well-established, pre-existing human rights regime. If that is the case, then, the argument can be made that security is not a necessary concept, because whatever threat to individuals is supposed to fall within the scope of security is already falling, as it has always been, within the scope of the human rights regime. In this sense, Neocleous might be right to observe that expunging security would not necessarily create a hole in our legal and political vocabulary. Arguably, without security, what is left is the human rights regime. The argument, admittedly, can be reversed, since it might be said that, without human rights, what is left is security. However, as we shall see in the following sections, there are more convincing reasons to abandon security, rather than human rights.

This perspective raises several questions. What if dissatisfaction with the coexistence of security and rights in the political and legal landscape is the product of a concept of security that has come so dramatically close to human rights, yet it has continued to portray itself as something different (and too often even in opposition to them)? What if the unfading malaise resulting from the struggle to understand the relationship between rights and security has something to do with the urge to dominate an ever-expanding world through ever-expanding concepts? What if the craving for fixing concepts has lost sight of the fact that some concepts are not really necessary, because they might do more harm than good to individuals? And, importantly, what if the antibodies against the continuous expansion of states' security powers can be more easily found by (re)focusing on human rights, rather than by continuing to try to understand security differently?

The following sections will try to answer these questions, in order to potentially conclude that security should, and can, be rejected.

3. A distinction with no difference

The first issue to explore concerns the difference between the domain of security and the domain of human rights. One might suppose that, since security and human rights are two distinct concepts, they should capture distinct issues within their respective scopes. The fact that there seems to be a close relationship, although not fully clear in practice,[28] between security and rights does not undermine the consideration that different concepts should encompass, in principle, distinguishable issues. The question can be posed in the following terms: is there any event that is likely to have adverse consequences on individuals, in the present or in the future, that constitutes a "security issue", but *not also* a "human rights issue"? Or, seen from the perspective of state action, is there any scenario in which state action aims at safeguarding security but does *not* also result, directly or indirectly, in the protection of human rights?

Let us consider some "new" security threats, such as food security, health security or environmental security. Can one think of a situation in which the state takes action aiming to ensure food, health or environmental security, that is not an action that also has the effect of protecting people's right to food, right to the highest attainable standard of health, or right to a clean environment? Admittedly, it is difficult to envisage a scenario in which the state seeks to improve an aspect of security without, at the same time, enhancing also the protection afforded by a certain right, or rights generally speaking.

This is true also regarding those "old" types of threats that are conventionally seen as belonging *par excellence* to the domain of (national) security, for example terrorism. As noted above, even in the case of terrorism, state action to guarantee security against terrorist attacks can be seen

[28] See, on this theme, Chapter 4.

as a state action to protect individuals' right to life and right to bodily (as well as mental) integrity[29] against lethal or non-lethal violence. In this respect, the UN High Commissioner for Human Rights has recently stressed that "[t]errorism is a threat to the most fundamental human right, the right to life".[30]

Arguably, the example of terrorism is complicated by the existence of the logic of balancing, that sees (national) security as a conceptual entity set in opposition to rights, rather than in synergy with them. However, it can still be said that restrictions to some rights are necessary *not* in the name of an amorphous notion of security, but rather to safeguard individuals whose rights are threatened by terrorist violence. In fact, Karima Bennoune has argued that seeing terrorism as a human rights violation, rather than as a threat to security, is desirable, because it "prioritises the human concern over the statist concern".[31] This view, for the reasons explained in the previous section, is not without risk, in that it might expose human rights to the danger of being exploited in the fight against terrorism. However, the fact that terrorism might be understood as a human rights violation confirms that the action to ensure security and the action to protect rights are not meaningfully distinguishable at a conceptual level.

What appears evident from these examples is that whatever constitutes a "security issue" can be alternatively construed as a "human rights issue" too. This is because threats to security (or one of its aspects) are usually also threats to human rights (or some of them), and it appears hardly possible to separate the latter from the former. Conventionally, the concept of "threat" forms an integral part of the concept of security, to the extent that the meaning of security is to

[29] As observed in Chapter 4, Section 4, the right to physical and mental integrity (whatever its exact denomination) is often understood by some courts as "right to security", whereas other courts, such as the ECtHR, have interpreted the right to private and family life as encompassing the protection against any bodily and mental harm.

[30] UN ECOSOC, 'Report of The United Nations High Commissioner for Human Rights and Follow-Up to The World Conference on Human Rights' (27 February 2002) UN Doc E/CN.4/2002/18, para 2.

[31] Karima Bennoune, 'Terror/Torture' (2008) 26 Berkeley Journal of International Law 1, 42.

a great degree filled with some content through the specification of identified or identifiable threats.[32] It is also a convention to refer to infringements of rights, once they have occurred, as "human rights violations". However, potential or actual human rights violations are, also, "threats". From this perspective, there is no obvious reason, at conceptual level, why a threat to (an aspect of) security should be something different from a threat to (some) human rights.

An objection might be that the concept of security conveys a sense of urgency that human rights violations do not necessarily entail. Proponents of the securitization theory have convincingly explained that the purpose of a securitization move is to remove an issue from the realm of "ordinary" politics and to elevate it to the realm of exceptionality that arguably warrants emergency measures.[33] That is, security and emergency often go hand in hand.[34] However, human rights violations, especially when they are widespread, can also constitute an "emergency". In other words, even though security and emergency have been traditionally developed as cognate concepts, there is nothing preventing the qualification of human rights violations, whether systematic or occasional, as "emergencies" in that they diverge from what should be the ordinary condition of human rights protection.[35] Nor can it be logically argued that a widespread pattern of human rights violations is a security emergency, but not a human rights emergency, or vice versa. Even a state of emergency under IHRL is a situation in which

[32] On this point, see Introduction, section 5.4. See also Chapter 3, section 3, on the dependence of the meaning of security on the identification of threats.

[33] Barry Buzan, Ole Waever and Jaap de Wilde, *Security. A New Framework for Analysis* (Lynne Rienner Publishers 1998) 21-26.

[34] However, as noted in Chapter 1, section 3.2, IHRL seems to draw a distinction between "ordinary" national security (allowing for restrictions of qualified rights) and "emergency" (allowing for derogations). Therefore, as a matter of positive law, emergency and security are in theory distinct, although the distinction is not so sharp in practice, as demonstrated by the frequent normalisation of states of emergency (also discussed in section 3.2).

[35] In fact, it is rather common for the UN, as well as NGOs, to talk about "human rights emergencies". See among recent ones, UNHRC Res 45/31 'The Contribution of the Human Rights Council to the Prevention of Human Rights Violations' (7 October 2020) UN Doc A/HRC/RES/45/31, para 6; UNHRC 'Human Rights Situations that Requires the Council's Attention. Written Statement Submitted by Amnesty International (AI), a Non-governmental Organization in Special Consultative Status' (30 May 2008) UN Doc A/HRC/8/NGO/47, page 3; UNHRC 'Overview of Consultations on the Contribution of the Human Rights Council to the Prevention of Human Rights Violations. Report of the Rapporteurs' (14 January 2020) UN Doc A/HRC/43/37, para 31.

rights are at risk of being compromised, thus a "war or other public emergency threatening the life of the nation"[36] is, most likely, a human rights emergency too.

In addition, the general obligation incumbent upon states to protect human rights often exhibits a clear urgency dimension. This is evident even regarding Economic, Social and Cultural Rights. Although these rights are usually considered progressively realisable, the International Covenant on Economic, Social and Cultural Rights imposes obligations with immediate effects.[37] In fact, as the Committee on Economic, Social and Cultural Rights observed, "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned".[38]

Admittedly, the connection between security and emergency is also symbolic because it provides states with an appealing possibility to justify measures that are deemed necessary due to the claimed exceptionality of some circumstances. Terrorism is again a good example. It is traditionally understood that terrorism is somehow special, in that it requires exceptional measures to be more effectively tackled. However, as Conor Gearty rightly observes, states have already at their disposal a broad range of ordinary measures that would be sufficient to punish the underlying "orthodox" criminal conducts of terrorism, such as murder, manslaughter, criminal damage and so on, as well as the inchoate crimes such as inciting, conspiring or soliciting.[39] Thus, terrorism has always been an archetypical "security issue" for

[36] Art.15 (1) ECHR. See Chapter 1, section 3.2, for the discussion of the definitions of emergency under IHRL.
[37] Manisuli Ssenyonjo, 'Economic, Social and Cultural Rights: An Examination of State Obligations' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 36-70.
[38] UNHRC, *General Comment No. 3: The Nature of States Parties' Obligations (Art.2, Para 1 of the Covenant)*, UN Doc. E/1991/23 (14 December 1990), para 2.
[39] Conor Gearty, *Essays on Human Rights and Terrorism. Comparative Approaches to Civil Liberties in Asia, the EU and North America* (Cameron May 2008) 545-546.

the purpose of legitimising tough security measures, but it is not a phenomenon that belongs *intrinsically* to the realm of security. On the contrary, the terrorist threat can easily be qualified as a "human rights emergency", because a terrorist who blows himself up in the crowded tube of London or Brussels poses a risk to the rights of individuals. If people are accustomed to hearing that terrorism is a "security threat", as opposed to a "human rights threat", this is simply because security threats are customarily treated as something more exceptional, more serious and more dangerous than "ordinary" threats to human rights. However, this does not mean that security threats are something conceptually distinct from threats to human rights.

However, the terrorist threat offers only a small, albeit widespread, insight into the present multi-faceted security landscape. In fact, as repeatedly noted in this thesis, nowadays there is no single occurrence likely to negatively affect individuals' lives that cannot be included within the scope of security. It has become routine to hear or read about health, economic, environmental, climate, food, water security and the like.[40] While some of these aspects of security might acquire a connotation of emergency in specific circumstances or periods, it would be wrong to assume that security is always, by itself, characterised by an emergency connotation. Instead, the popularisation of security generated by the post-Cold War expansion beyond military or military-like threats has arguably transformed security into a concept that easily adapts to all seasons, in and outside emergencies. Thus, it appears that the mainstreaming of security across virtually any sphere of life has rendered security a much more "ordinary" concept, not necessarily characterised by emergency-like connotations.

Therefore, if one moves away from an idea of security that is always closely associated with the existence of a real or claimed emergency, the question remains of what makes an issue a

[40] Liora Lazarus and Benjamin J. Goold, 'Security and Human Rights: Finding a Language of Resilience and Inclusion' in Liora Lazarus and Benjamin J. Goold (eds), *Security and Human Rights* (2nd ed, Hart Publishing 2019) 6.

"security issue" as opposed to a "human rights issue". Is there any particular reason why states should tackle threats through the security lens, rather than through the mobilisation of the human rights regime?

4. Strategic framing

Since any event that might disrupt individuals' lives can be alternatively construed as a security issue, or a human rights issue, it remains unclear why, at a purely conceptual level, a threat – real or perceived, present or future, actual or potential – should be dealt with by states by employing the language of security rather than the language of rights, and vice versa. The lack of a clear justification seems confirmed by the fact, noted throughout Chapter 4, that security and rights overlap in many respects, to the extent that even those who argue that there is a synergy between the two have failed to convincingly spell out the concrete mechanics of their reciprocal interaction.

Since conceptual analysis does not assist us in making sense of any potential distinction between security and rights, it is useful to turn to the idea of framing. George Lakoff has explained that frames are unconscious structures in our brain that are activated by words.[41] As he observes,

> [a]ll of our knowledge makes use of frames, and every word is defined through the frames it neurally activates. All thinking and talking involves framing. And since frames come in systems, a single word typically activates not only its defining frame, but also much of the system its defining frame is in.[42]

[41] George Lakoff, 'Why it Matters How We Frame the Environment' (2014) 4 Environmental Communication 70, 71-72.
[42] Ibid.

Because framing is unavoidable, it is not surprising that it plays a fundamental role in structuring political ideologies and is successfully deployed in rhetorical discourses, often through repetition of words:

> [s]ince political ideologies are, of course, characterized by systems of frames, ideological language will activate that ideological system. Since the synapses in neural circuits are made stronger the more they are activated, the repetition of ideological language will strengthen the circuits for that ideology in a hearer's brain. And since language that is repeated very often becomes ''normally used'' language, ideological language repeated often enough can become ''normal language'' but still activate that ideology unconsciously in the brains of citizens […].[43]

That security has become the "normal language" through which many (if not all) political issues are tackled is amply demonstrated. From terrorism to migration, to the recent securitization of states' responses to the Covid-19 pandemic, there is hardly a sector of political life that has not been framed as a security problem.[44] Since frames come with structures, the word "security" activates the related system defining the security frame, such as emergency, urgency, secrecy and, importantly, necessity of rights limitation. In other words, once the security frame is activated, the whole security vocabulary is set in motion, triggering as a result the state security machinery. The consequences of the activation of the security frame are also far-reaching in law. Once an issue is framed as a security issue, the frame triggers the logic of balancing expressly authorised by human rights treaties, and security is thus pitted against rights.

The many attempts to understand security differently, for example as human security, have produced the effect of strengthening the security frame, by normalising security language. Whatever the merits of any proposed (re)understanding of security, the hidden consequence is

[43] Ibid 72.
[44] See Introduction, section 2.

that the security frame is continuously activated. This echoes, again, what security scholars such as Huysmans and Neocleous have noted: reframing security only reinforces it and builds up entry points for seemingly new, or rebranded, security frames that can too easily be exploited by authoritarian states.

If security is somehow a lost cause, because it has always the potential to weaken the human rights discourse,[45] the question becomes whether it is possible to deactivate the security frame, and to substitute it with an alternative one. Lakoff warns that deactivating a frame is a difficult process, that requires time.[46] In fact, once a frame has been instilled in people's mind through continuous repetition of ideological language, it permeates people's modes of thinking. This is because "frames can become reified – made real – in institutions, industries, and cultural practices. Once reified, they don't disappear until the institutions, industries and cultural practices disappear. That is a very slow process".[47] As a result, an alternative frame can be developed only in the long term, through "sufficient spread in the population, sufficient repetition, and sufficient trust in the messenger".[48] What is worse, Lakoff argues that simply negating a frame just activates the frame, making it even more difficult to get rid of it.[49] Saying that an issue is *not* a security issue activates anyway the security frame.

Nonetheless, there are reasons not to be so pessimistic about the possibility of eschewing the security frame. In fact, Lakoff observes that an overwhelming difficulty with trying to develop alternative frames is what he calls "hypocognition", that is "the lack of ideas we need".[50] However, the search for an alternative frame to security can start from a vantage position,

[45] As it was concluded in Chapter 4.
[46] Lakoff (n 41) 72.
[47] Ibid 77.
[48] Ibid 72.
[49] Ibid. The example provided by Lakoff illustrates the point with brilliance: "when Nixon said, "I am not a crook" […] everyone thought of him as a crook".
[50] Ibid.

because arguably there is no hypocognition hindering this search. Security is not an unavoidable frame, because the human rights frame can easily replace it. The human rights frame is the "idea we need" to reject the security frame altogether.

In fact, it is arguably improper to talk about "replacing" the security frame with the human rights frame. It might be more correct to understand the security frame as a smokescreen that is lifted by states with the purpose of obscuring the human rights frame, and eventually weakening it. From this perspective, the framing of issues as "security issues" can be better understood as a *strategic framing* that states conveniently activate in order to circumvent the human rights frame.

If this is true, then a suspicion arises as to whether talking about security and talking about rights might be the same talking, with the only key difference being that it is more strategically convenient for states to look at threats through the lens of security rather than through the lens of rights. In order to justify this argument, it is important to enquire into the reasons that might prompt states to avoid the human rights frame and turn to the security frame. The enquiry can begin from the following question: what features of the human rights frame states try to elude that induce them to reframe it as security?

5. The power-constraining features of the human rights frame

As explained, the security frame and the human rights frame seem to cover broadly the same issues, because any event of concern for human beings can be a security issue, as much as a human rights issue. If this is true at a conceptual level, it does not mean that the human rights frame is identical to the security frame. In fact, the human rights frame has some intrinsic "power-constraining" features that sharply differentiate it from, and make it preferable to, the

security frame. Enquiring into these features is key to providing an explanation of what exactly states want to avoid when they strategically reframe human rights as security. At the same time, the enquiry will show that these intrinsic features of the human rights frame provide convincing reasons to reject the security frame and to abandon unconvincing efforts to reconceptualise or redefine security.

5.1. Legalisation

Legalisation is the first intrinsic feature of the human rights frame that sharply differentiates it from the security frame. In fact, the human rights frame can only be partially understood if one does not acknowledge that human rights are also embedded in a *legal* framework.[51]

It is useful to provide some clarification about the meaning of "legalisation". Legalisation is the specification, implementation and interpretation of the moral ideal of human rights through the law.[52] Moral rights, or at least most of them, have been incorporated at the international level into legally binding texts as legal rights throughout a process that started with the 1948 Universal Declaration of Human Rights.[53] There are many "prudential reasons"[54] why this incorporation of moral rights into legal rights would seem appropriate. First, the law arguably constitutes a much simpler instrument through which different viewpoints about rights might be put forward, without always debating controversial moral standpoints, that often lead to

[51] For the sake of clarity, I will use throughout this Chapter the term "frame" to refer to the human rights frame, and the term "framework" to refer to the idea of legalisation. Thus, the human rights *frame* encompasses, but is not limited to, the legal *framework* in which human rights are embedded.

[52] Başak Çalı and Saladin Meckled-García, 'Human Rights Legalized – Defining, Interpreting, and Implementing an Ideal' in Saladin Meckled-García and Başak Çalı (eds), *The Legalization of Human Rights. Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge 2006) 1.

[53] For the history of the legalisation of human rights, see Lynn Hunt, *Inventing Human Rights: A History* (W. W. Norton & Company 2008).

[54] The expression if of Çalı and Meckled-García (n 52) 3.

irresolvable disagreement.[55] Second, the coercive component of the law, which is one of its characteristic features, allows for any disagreement to be eventually settled, in particular when it comes to deciding on concrete cases. Third, the structure of international human rights adjudication, typical of IHRL, empowers internationally-constituted judicial and quasi-judicial bodies to scrutinise the behaviour of states, without being directly embroiled in the quarrels of domestic politics.[56] In the background lies the assumption that disagreement over rights is not political or, even if it is, it can be anyway reduced to the ability of the law to resolve disputes.[57]

There are some who believe that it only makes sense to talk about legalised rights. Famously, Bentham maintained that talks about moral rights is "nonsense upon stilts",[58] and Alasdair MacIntyre argued that belief in moral rights equals to a "belief in witches and unicorns".[59] At the other end of the spectrum, the employment of the law as a means to give more concrete substance to the human rights ideal is not immune from criticism. Even though there seems to be a natural driving force pulling human rights ideals towards legalisation,[60] critics have pointed out that the law is not the only means through which human rights can be advanced, and that a certain fetishism of legal forms has obstructed other suitable means for the promotion of rights that are more strictly political, such as public discussion.[61] As David Kennedy puts it, "speaking

[55] This is not to say that the law eradicates disagreement. As we shall see below, even when rights are legalised, there is still room for disagreement on many aspects concerning their interpretation and implementation. On this point, see Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999).

[56] The mentioned three points are taken from Çalı and Meckled-García (n 52) ibid 3-4. See also John Tasioulas, 'Saving Human Rights from Human Rights Law' (2019) 52(4) Vanderbilt Journal of Transnational Law 1167, 1176.

[57] See below for more discussion on this point.

[58] Jeremy Bentham, 'Anarchical Fallacies' in Jeremy Waldron (ed), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen 1987) 53.

[59] Alasdair MacIntyre, *After Virtue. A Study in Moral Theory* (4th ed, Bloomsbury 2011) 83.

[60] This is the view of some prominent philosophers: see Joseph Raz, 'Human Rights Without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 321-338; Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 Metaphilosophy 464; Allen Buchanan, *The Heart of Human Rights* (Oxford University Press 2013).

[61] See, for example, Amrtya Sen, 'Human Rights and the Limits of Law' (2006) 27 Cardozo Law Review 2913. More generally, see Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006) 60-98.

law to politics is not the same thing as speaking truth to power".[62] An aspect related to this critique concerns the belief that unelected and unaccountable (international and national) judges would know better than politicians how human rights have to be interpreted and realised, taking upon themselves the responsibility of allocating stakes in the society by mediating between individual and collective interests.[63]

It is not the purpose of this section to engage more with the many pros and cons of the legalisation of rights. There is, however, one key aspect that must be stressed. If the thrust of the human rights project is to provide people with a tool to challenge state power, then it is apparent that the legalisation of rights has historically constituted the most tangible realisation of what I have called human rights' "power-constraining function". The purpose of human rights treaties, and of IHRL as whole, is to try to set limits on the exercise of arbitrary and repressive political power.[64] From this perspective, the legalisation of human rights has been the product of an historical process that has allowed the human rights frame to (at least try to) function as brake on this power, and to (at least try to) advance one of the pre-eminent aims of the human rights project, that is to emancipate human beings from the repressive apparatus of the state.[65]

The most visible expression of this power-constraining function through legalisation is constituted by the possibility granted to people to challenge state actions before (national and international) courts and bodies. To do so, individuals can rely on a well-established corpus of

[62] David Kennedy, *The Dark Side of Virtue. Reassessing International Humanitarianism* (Princeton University Press 2004) 28. The relevant excerpt draws from a previous article: David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 Harvard Human Rights Journal 101.

[63] Tasioulas (n 56) 1201-1206; Kennedy (n 62) 21-22; Çalı and Meckled-García (n 52) 3-4. This line of criticism was also discussed more specifically regarding the issue of trading off rights and public interests: see Chapter 4, section 2.

[64] Hinting at this aspect, Çalı and Meckled García (n 52) 4-5.

[65] This is, admittedly, a partial account, because human rights have also been used to dominate individuals, rather than to emancipate them. I will deal with this line of critique in section 6 below, where I will discuss the limits of human rights and their "power-enhancing" strand.

human rights provisions laid down in international and regional treaties and incorporated into domestic laws. Treaties provide for specific mechanisms through which individuals can submit applications to international and regional judicial and quasi-judicial bodies if they are not satisfied with the way national judicial authorities have dealt with a complaint. The mere fact that such a possibility for individuals concretely exists is per se evidence of the power-constraining function of rights.

But the possibility for individuals to sue states for alleged human rights violations does not exhaust the power-constraining function of the legalised human rights frame. The existence of a legal framework protecting human rights is also a yardstick against which political decisions and measures are assessed. As Jack Donnelly notes, "human rights advocates, whether public or private, national, international, or transnational, can appeal to authoritative international standards that target states have publicly endorsed, repeatedly, usually by ratifying international treaties".[66] Even before such decisions and measures are evaluated, political discussions preceding their enactment are usually informed and to a certain extent influenced by the human rights *legal* framework. This is because respect for human rights has become a "standard of political legitimacy"[67] for all those governments that do not want to risk paying the political and diplomatic price of being seen as indifferent or even manifestly hostile to human rights. That powerful states, and often authoritarian regimes too, manage to get away with repressive policies and measures without seeing their political legitimacy substantially hindered does not change the fact that a human rights legal framework is there to try to constrain the otherwise boundless political power of states to do whatever they want.[68] To use a metaphor, the human rights legal framework exists to dictate the rules of political games, but – as all the rules – it

[66] Jack Donnelly, 'The Virtues of Legalization' in Meckled-García and Çalı (n 52) 68.
[67] Ibid.
[68] For more insights into this issue, see next section on compliance.

cannot guarantee with absolute certainty that cheaters will not be sitting at the table and play by their own rules.

It is true that the legalisation of human rights seems to have brought about what Conor Gearty has called "the prioritisation of the legal over the political",[69] but this effect should not be overestimated. In fact, the process of discussing laws and measures by referring to the legal framework provided by IHRL is still (also) a political process, even though it employs this framework as a legal compass to guide decision-making. In other words, the divide between the legal and the political is not as neat as it might appear; rather, the two aspects are welded together.[70] Even when rights are legalised, there are many questions left on how best to realise and implement them that beg answers which IHRL alone cannot provide. Thus, it is perhaps an oversimplification to assume that once rights are legalised any avenue for further political discussion is blocked off. On the contrary, as Gearty also observes,

> the claim to definitive authority implicit in the term 'human rights' is left to one side, the statement 'these are our human rights' being best understood to be part of an argument rather than a revelation about our moral obligations that should – through force of its Truth – bring all discussion to an end.[71]

Admittedly, a more pragmatic consideration is that nobody knows whether human rights would have been able to constrain power had they not been incorporated into legal documents. Perhaps an un-legalised human rights frame would have been more effective in advancing the protection of people against abusive states. Or maybe it would have been a mere ensemble of moral principles unable to be leveraged to challenge state power. But we do know what happens instead when the state action purporting to protect individuals is pursued by relying on elusive

[69] Gearty (n 61) 65.
[70] See, for a defence of a similar position, Saladin Meckled-García and Başak Çalı, 'Lost in Translation. The Human Rights Ideal and International Human Rights Law' in Meckled-García and Çalı (n 52) 11-26.
[71] Gearty (n 61) 67-68.

words, whose invocation is able to enhance state power, but unable to constrain it. This is the case with security. Security, as demonstrated in Chapter 1 and Chapter 2, appears widely across many legal texts and thus in a sense it might be said that it has been legalised. However, there is no clear legal definition of it, and the word remains extremely vague, to the extent that it can be employed to describe the state action to tackle virtually any circumstance threatening individuals. As a result, any invocation of security, in law as well as in political talk, cannot be countered by reference to any parameter against which such invocation might be judged as appropriate or, on the contrary, improper. Much worse, due to its all-encompassing scope, any invocation of security can be deemed appropriate, because there is no single threatening occurrence that cannot be framed as a security problem.

One might object that entrusting the law with the delicate task of constraining power by guiding it towards an appropriate invocation of security would be too much to ask of it. Even if this is true, the history of human rights demonstrates that, so far, the law has played an essential role in *at least trying* to constrain a political power that would be otherwise unfettered. This is because the law has traditionally emerged as a means of "both constraining and facilitating political and especially state actions, but in this form it is also a self-limiting activity in that it is rule-bound as well as rule-enforcing".[72] Political discussion plays and will always play a fundamental role in advancing the protection of rights, but such a discussion, as already stressed, should not take place without any rule that sets some limits on the possible outcomes. This is not to say that using the law to frame political discussion is always a sufficient guarantee against arbitrary power. On the contrary, the law is often leveraged in order to sustain domination. The conflict between Israel and Palestine is a telling example of how the law

[72]Anthony Woodiwiss, 'The Law Cannot Be Enough' in Meckled-García and Çalı (n 52) 34.

(including human rights law) continues to be used as part of a legal and discursive move to suppress Palestinians' rights and disrupt their lives.[73]

Admittedly, legalised rights are not shielded from contradictions, as we shall see in more detail in section 6 below. However, the danger of downplaying the fundamental power-constraining function of legal rights is evident when the human rights frame is compared to the un-legalised security frame. The absence of any legal definition of security, together with the difficulty of devising a legal definition of the term[74], has allowed states to discuss and pass security laws and measures without any rule specifying whether security concerns justified their enactment. In addition, the fact that the power to invoke security reasons is often expressly authorised in international treaties has allowed states to rely on the law to justify this invocation. However, since IHRL is silent about the legal meaning of security, this reliance upon the law is, to say the least, fictitious. In practice, appeals to the law to justify security in any possible circumstance will only serve the purpose of giving legal cover to what is in practice an unchecked power to frame anything as a security problem. To return to the earlier metaphor, players at the security table can pretend that rules exist, when in reality they are so vaguely formulated as to allowing the game to be conducted with no discipline. As a result, cheaters are not really cheating, because there is nothing preventing them from dealing the security card as they please.

The legalisation of rights, instead, though still an imperfect system for all the limits outlined at the beginning, at least attempts to specify some ground rules about what should and should not be allowed. By framing political discussion through the law, it tries to constrain power and to

[73] Nimer Sultany, 'The Legal Structures of Subordination. The Palestinian Minority and Israeli Law' in Nadim R. Rouhana, Sahar S. Huneidi (eds), *Israel and Its Palestinian Citizens. Ethnic Privileges in the Jewish State* (Cambridge University Press 2017) 191-237.
[74] As it was concluded in Chapter 3.

reduce the risk of abusive exercise of powers. And, by constraining this discussion, at the same time the law also attempts to facilitate decision-making, by directing state actions towards the promotion of rights and impeding, as far as it can, those actions that constitute blatant violations of rights.

This is possible also because the human rights legal framework can be more clearly broken down into several rights whose content is much more clearly understandable than the over-inclusive "security". An easy objection might be that even human rights provisions have contestable edges because the seemingly broad consensus on the content of rights is actually shallower than it appears at first glance. However, this objection is most likely an exaggeration. Even if some aspects of rights might be controversial, the core content of (at least the majority of) rights can be more easily appraised than the catch-all word "security". There might be controversy, for example, on whether the right to life encompasses the right to assisted suicide, but few would deny that the core content of the right to life generally concerns the right not to be arbitrarily deprived of his or her own life; or there might be disagreement on which acts fall short of torture or inhuman and degrading treatment of punishment, but the aim of the prohibition of torture and other ill-treatment is generally understood.[75] This is because legal rights are not an abstract construct, but they are "embedded in the 'moral operating system' of a striking number of people throughout the world irrespective of the place they occupy in any given social hierarchy".[76] If anything, the existence of some grey areas surrounding the content of rights reinforces the view expressed earlier that the law has not impeded political discussion: issues about further specification of the content of rights, their interpretation and how best to

[75] For a defence of a similar position, see Donnelly (n 66) 70. Donnelly maintains that a certain level of abstraction is indeed necessary for human rights to remain a progressive force.
[76] Tasioulas (n 56) 1178.

realise them remain matter for political discussion, and even for disagreement.[77] Again, the simple legalisation of rights does not solve all the problems related to the advancement of human rights protection, but at least it tries to make sure that state action does not go too far from it.

The fact that the human rights frame is also a legal framework whereas the security frame has failed to find any legal parameter against which to judge the appropriateness of the invocation of security explains why it is convenient for states to resort to the security frame. The absence of legal constraints in the security frame gives states a free hand to invoke security, with little to no risk of being challenged on the substance of this invocation. After all, how could anybody fight a state's assertion that something is a security problem, if there is no guidance on what security means? How a state's determination of what security should mean can be countered by another determination made by somebody else, being another state, a non-governmental organisation or an individual?

For this reason, even though the two frames are very similar in their scope, the state's choice of the security frame over the human rights frame is not accidental, but the product of a strategic move. By seeing a threatening event through the security lens, states manage to escape the power-constraining function of the human rights frame ensured by the law. From this perspective, the choice of the un-legalised security frame is a *de-legalising move* that allows states to dodge the boundaries established by the legalised human rights frame. It is a move that empowers states to make and play by their own rules, while being sure that their determinations cannot be meaningfully challenged.

[77] Similarly, Donnelly (n 66) 70, who maintains that "[i]nternational definitions need to leave space for differences in the details of implementation that reflect historical, cultural, economic, and political differences among states".

5.2. Compliance

Another inherent power-constraining feature of the human rights frame, strictly connected to legalisation, is its drive towards compliance. In fact, the result of the incorporation of human rights into the law so that some parameters are established to constrain state action entails, by implication, that legalisation is the product of a process driving states towards compliance.

The human rights legal framework is made up of norms. And it is in the very nature of norms to have what Donnelly calls a "compliance pull".[78] The Latin maxim *pacta sunt servanda* encapsulates the idea that the law obliges states to comply with the obligations they have freely chosen to impose upon themselves.[79] In their work on compliance, Abram Chayes and Antonia Handler Chayes have demonstrated that this drive towards compliance is not necessarily related to the existence of sanctions or a threat of sanctions directed against noncompliant states.[80] Rather, the pull towards compliance derives from three factors: efficiency ("compliance saves transaction costs"[81]), interests ("it is [...] a fair assumption that parties' interests were served by entering into the treaty in the first place"[82]), and norms ("the existence of legal obligation, for most actors in most situations, translates into a presumption of compliance"[83]). Chayes and Chayes sees compliance as a management process, in which non-adherence to the norms must

[78] Donnelly (n 66) 74.
[79] The maxim is crystallized into positive law, as far as international law is concerned, by Art.26 VCLT, headed "pacta sunt servanda": "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".
[80] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995).
[81] Ibid 4.
[82] Ibid.
[83] Ibid 8. The authors also explain noncompliance as stemming from the ambiguity of legal provisions, limitations on the capacity to comply and the time lag between the state's undertakings and their performance. I will discuss the first factor further below.

be managed through an interactive process of justification and persuasion, rather than enforcement strategies.[84] As they put it,

> [...]compliance strategies seek to remove obstacles, clarify issues, and convince parties to change their behaviour. The dominant approach is cooperative rather than adversarial. Instances of apparent non-compliance are treated as problems to be solved, rather as than wrongs to be punished. In general, the method is verbal, interactive, and consensual. [...] In the background more generally there is the threat of various manifestations of disapproval: exposure, shaming, and diffuse impacts on the reputation and international relationships of a resisting party.[85]

This latter process of singling out noncompliant states is what Oona Hathaway and Scott J. Shapiro have called "outcasting"[86]: more often than on enforcement through force, international law usually relies on outcasting to "den[y] the disobedient the benefits of social cooperation and membership".[87] In fact, the authors mention as an instance of outcasting the reporting mechanisms existing under many human rights treaties, according to which states are required to report to the relevant human rights treaty body about their compliance with human rights obligations.[88] In these cases, "shaming is used as a nonviolent means of inducing compliance with the human rights treaties".[89]

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[84] Ibid 109-286.

[85] Ibid 109-110.

[86] Oona Hathaway and Scott J. Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121 Yale Law Journal 252. Though outcasting has some similarity with the management model as understood by Chayes and Chayes, the latter authors distinguish their model from enforcement, whereas outcasting is seen by their proponents as a typical form of enforcement. As it appears clear from the introduction, Hathaway and Shapiro put forward their understanding of enforcement to counter the frequent commonplace that International Law is not really law as it lacks coercive enforcement mechanisms.

[87] Ibid 258.

[88] Ibid 309. See, for example, the Universal Periodic Review carried out by the UN Human Rights Council, established by the UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251. Other reviews are carried out under other treaty-body mechanisms, such as the CCPR, the CESCR, the CAT and so on.

[89] Hathaway and Shapiro (n 86) 309. Another mentioned example (at 316-317 and 337-338) is the possibility for the Council of Europe to suspend from the organisation a member state that has persistently violated human rights and the rule of law. Noncompliance with the measures adopted by the ECtHR to order the redress of specific violations of human rights can also lead to the suspension or revocation of a state's membership in the Council of Europe, constituting another instance of outcasting triggered by the adjudicatory process established by the ECHR. For more insights into the execution process and the problems related to non-execution, see Fiona

Aside from specific examples of outcasting, the legalisation of the human rights frame as a whole constitutes an attempt to induce states to comply with some established and generally agreed parameters.[90] And, by inducing compliance, it restricts the infinite range of political choices available to states. Norms such as human rights provisions, thus, can be understood as "*prescriptions for actions in situations of choice,* carrying a sense of obligation, a sense that they *ought* to be followed".[91]

In fact, the concept of obligation is central to the human rights legal framework.[92] Obligations give content to the actions of states, in situations of choice, directed towards the protection of rights holders. In the same way as the content of rights is often subject to a further process of specification, the content of obligations too must often be clarified.[93] However, the concept of obligations remains key to establishing some parameters against which state actions should or should not be pursued. In doing so, the law provides some sort of measurement – albeit imperfect – of the state's compliance with its human rights commitments.

A sceptic might reply that the law – with its artificial machinery requiring institutionalised forms and entities, judges and lawyers, procedures and outcomes, obligations and right-holders

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de Londras and Kanstantsin Dzehtsiarou, 'Mission Impossible? Addressing Non-execution through Infringement Proceedings in the European Court of Human Rights' (2017) 66 International and Comparative Law Quarterly 467.

[90] Human rights scholarship has in fact often noted the role played by IHRL in discouraging noncompliant behaviours of states: Ryan Goodman and Derek Jinks, *Promoting Human Rights through International Law* (Oxford University Press 2013); Emilie M. Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62 International Organization 689; Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599 (reviewing Chayes and Chayes (n 86) and Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press 1998)).

[91] Chayes and Chayes (n 86) 113 (italics in the original).

[92] Tasioulas (n 56) 1179 - 1183, who stresses that obligations are grounded in universal interests and human dignity, that as such justify the obligations to treat people in a certain way.

[93] This process of specification might have gone at times too far, for example through the gradual development of coercive positive obligations by international courts, that have increasingly required a wider use of criminalisation to foster a broader anti-impunity agenda: see Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights. Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020). On the concept of positive obligations more in general, and their relationship with negative obligations, see Laurens Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2017).

– is not necessarily the best instrument to induce states to comply with the moral ideals that the human rights discourse is supposed to encapsulate.[94]

Once again, the example of security exposes the dangers of having instead a frame that does not rely on any model to induce some sort of compliance. In fact, when a state invokes security, supposedly to pursue the aim of protecting people, there is nothing that can serve as a mechanism to verify whether a state is acting in compliance with this aim. Admittedly, there is always the possibility of political disagreement over whether and to what extent the state is complying with what can only be understood as a generic duty to provide security to the people.[95] From this perspective, political accountability might be the only means to induce a state's compliance with this undefined duty, with political exposure being the only possible adverse consequence for noncompliant states. Shaming and exclusion at international level might be, in theory, instances of outcasting to sanction non-compliant states. However, even outcasting requires some legal parameters to confirm non-compliance. When it comes to security, outcasting cannot work in the same way as it does in relation to the legalised human rights frame. For the reasons outlined earlier, in fact, disagreement on how security should be pursued can hardly be settled, in the absence of any wide agreement on what security means and what type of obligations it would entail.

[94] So Kennedy (n 62) 12: "[t]he strong attachment of the human rights movement to the legal formalization of rights and the establishment of legal machinery for their implementation makes the achievement of these forms an end in itself. Elites in a political system – international, national – which has adopted the rules and set up the institutions will often believe and insist that they have addressed the problem of violations with an elaborate, internationally respected and 'state of the art' response".

[95] A generic duty to provide security can only be derived from one of the justifications for the existence of the state, that is to provide some form of protection to its citizens (whether this protection is called "security", "public order" or similar). There is no unitary theory of the state able to justify its functions, but for a helpful overview of the main theories, see Bernard Bosanquet, *The Philosophical Theory of the State* (Cambridge University Press 2012); Erika Cudworth, Timothy Hall and John McGovern, *The Modern State. Theories and Ideologies* (Edinburgh University Press 2007).

This is not to say that there are no compliance mechanisms operating specifically in the security environment. However, as Fiona de Londras has demonstrated with regard to the intricate UN counterterrorism bureaucratic machinery, (limited) compliance mechanisms that seek to induce some form of accountability (for example through more transparency) in practice promote the interests of hegemonic actors and institutions in the counterterrorism arena that are not genuinely committed to accountability.[96] In fact, actual justification of counterterrorism measures and practices does not appear possible,[97] if anything because counterterrorism operates in an environment in which the underlying proposition that security is at stake is not usually challenged.[98]

This reinforces the view that the security frame can be easily justified in virtually any circumstance constituting (or perceived as) a threat. It follows that a state's claim to have complied with a generic duty to provide security can also be easily justified. It is impossible, in practice, to meaningfully measure a state's adherence to a generic duty to provide security when it is not even clear what the scope of the term "security" is.

This further demonstrates that an interactive process of justification and persuasion, such as the management model proposed by Chayes and Chayes to explain compliance mechanisms, is rendered virtually impossible in the absence of norms that establish some frame of reference that might guide such justification and persuasion. Chayes and Chayes expressly mention the indeterminacy of treaty provisions as one of the causes of noncompliance.[99] As they explain,

[96] de Londras (n 24) 154-185. Mechanisms that seek to induce some sort of accountability in the counter-terrorism environment exist also at state level. For a critical analysis of the UK experience, and the shortcomings of the counterterrorism review mechanisms, see Jessie Blackbourn, Fiona de Londras and Lydia Morgan, *Accountability and Review in the Counter-Terrorist State* (Bristol University Press 2021).
[97] de Londras (n 24) 183-184.
[98] This is because, as explained in section 2 above, terrorism is customarily treated as a threat to (national) security.
[99] Chayes and Chayes (n 80) 10-13.

> [i]t is, of course, by no means unheard of that states, like other legal actors, take advantage of the indeterminacy of treaty language to justify indulging their preferred course of action. Indeed a state may consciously seek to discover the limits of its obligation by testing its treaty partners' responses.[100]

In sum, the broader the indeterminacy of a provision, the easier it is for a state to justify compliance and elude allegations of noncompliance by other parties. This is because justification and persuasions to induce compliance are rendered more difficult when norms are too loosely formulated.[101]

Looking deeper, the problem goes beyond compliance or non-compliance. Other than a generic duty to provide security, there is no legal obligation a state is supposed to comply with. As Chapters 1 has demonstrated, IHRL authorises states to invoke security, but it does not prescribe *if and when* security should be invoked. It gives states faculty to invoke it, but it does not establish an obligation. Therefore, whenever a state tries to justify its compliance with a duty to provide security by holding on to some legal grounds, it finds a powerful ally in the law: treaties are silent as to when a state is permitted to activate the security frame, and they just authorise the power to activate it. In other words, treaty-based norms referring to security have no compliance pull: a state is always compliant to the extent that it can find a provision that allows it to invoke its security powers.

That the law has emerged as a necessary instrument to drive states towards compliance is further demonstrated by the fact that, while the invocation of security cannot be challenged by resorting to legal criteria, measures and laws stemming from the security frame are the ones routinely subject to scrutiny. However, the legal parameters to carry out this scrutiny are set in the legalised human rights frame. In other words, once the focus shifts from the security invocation

[100] Ibid 12.
[101] Though it is likewise true that precision might generate loopholes: ibid 11.

itself to the measures and laws constituting the expression of this invocation, the review must necessarily cling on to the legal parameters ensured by IHRL, because they are the only ones able to ensure that the security powers of the state can remain within some limits. That is, the legalisation of human rights law has proved to be an indispensable tool to try to circumscribe the state security powers, to the extent that any challenge to security itself cannot happened internally (by contesting the invocation of security, given the absence of any legal parameter defining its scope), but externally (by employing the legal framework established by human rights to contest measures and laws).

Admittedly, this is in part explainable by the structure of the legal human rights framework itself, that subjects security to a judgment of compatibility with human rights provisions laid down in the treaties. This structure requires a review of the proportionality of the security measures under scrutiny.[102] But the fact that legal parameters seem inescapable to ensure compliance explains the difficulty for judges – when carrying out the scrutiny of restrictions on national security grounds – to conduct a more thorough review of the invocation of the legitimate aim as such, shifting instead to the last step of this test, that is the proportionality *sensu stricto*.[103] This is because, as noted in Chapter 1, the review of the legitimate aim invoked (first step) is nearly impossible, due to the absence of a legal definition of security, whereas proportionality *sensu stricto* (last step) can count on the more developed set of legal provisions that make up the human rights framework.

From a broader perspective than the one provided by legal adjudication, any attempt to criticise security is normally transformed into an evaluation of its compatibility with human rights. The

[102] See generally Chapter 1 on this aspect. For a critique of trading off security and rights, see Chapter 4, section 2.

[103] The tendency of human rights courts and bodies to sidestep the substantive enquiry into the meaning of security as legitimate aim and to focus instead on proportionality was explained in Chapter 1, section 8.

practice of advocacy by non-governmental organisations[104] in the field of human rights shows that ordinarily the contestation of security cannot happen without resorting to human rights. Like courts, human rights advocates do not normally ask the question "what is security?", but rather "is security compatible with human rights?".[105] This is because the first question cannot be meaningfully asked without some parameters that help define its meaning. Or perhaps because they are aware that everything can be framed as security, so security is always more or less at stake.[106] On the contrary, the second question appears easier to answer, because at least the legal framework of human rights tries to provide some criteria to guide a process of justification and persuasion. The avoidance of the hard question of what security is permits to abandon the unchartered waters of justification with no guidance, and to land in the comfort zone of justification guided by legal criteria. It perhaps matters little that this comfort zone might be at times illusory. It is at least better than fighting a fight over meanings without the weapon of the law on the side to guide justification and persuasion, thus inducing compliance.

[104] NGOs plays a fundamental role in exposing states, thus contributing to outcasting: Hathaway and Shapiro (n 86) 309. They also contribute to the management model to drive states towards compliance: Chayes and Chayes (n 80) 250-270. For an history of advocacy on the international stage, see Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998).

[105] Admittedly, this is to a certain extent an over-simplification of the multifaceted work that human rights advocates carry out at national and international level. As it is also somehow obvious that the work of *human rights* organisations tends to have a special focus on the human rights impact of security measures. In a certain way, it can be said that attacking security measures is in itself an attempt, at least tangentially, to understand security in a different manner. In addition, a great deal of NGOs' work on security has been carried out, in recent years, in the context of counter-terrorism, where states' invocation of national security seems, in abstract terms, more plausible. However, this does not undermine the conclusion that resorting to IHRL is a more effective strategy than trying to reformulate security as such, in the absence of legal parameters that might guide these reformulating efforts.

[106] Interestingly, the questionable immigration-security link that has emerged in recent years has allowed civil society entities to reject more firmly the plausibility of the invocation of (mostly national) security, though human rights have remained a fundamental driving force to substantiate this rejection: see, for example, Saferworld, 'Partners in Crime? The Impacts of Europe's Outsourced Migration Controls on Peace, Stability and Rights' (Report, 2019) <www.saferworld.org.uk/resources/publications/1217-partners-in-crime-the-impacts-of-europeas-outsourced-migration-controls-on-peace-stability-and-rights> accessed 9 November 2020; Amnesty International, 'Dangerously Disproportionate. The Ever-expanding National Security State in Europe (Report, 2017) <www.amnesty.org/en/documents/eur01/5342/2017/en/> accessed 9 November 2020.

What has been said is helpful in exposing another reason behind states' strategic security framing. In fact, states' propensity for the security frame is a de-legalising move that they tactically make to avoid the compliance pull of the legalised human rights frame. The language of security speaks of power, of easy overreach of state action and of unverifiable invocations. The language of rights, through their legalisation, speaks of obligations, justification and compliance. The security frame thus seeks to sidestep the constraints of the legalised human rights frame, by shifting to the states' more comfortable terrain of invocation with no justification, of power with no compliance, of words with overly-broad meanings.

This should not be taken to the extreme conclusion that the law is a panacea against any possible overreach of state power. As section 6 below will show, in fact, the law has played an important role also in empowering states. But at least the law tells states to exercise self-restraint, because not all actions are permissible actions. It calls for a justification of these actions. To paraphrase Judge Aharon Barak, the law tells states to act with one hand tied behind their back.[107]

It would also be wrong to interpret the advantages of a legalised frame as an argument in favour of a hyper-legalisation of all the public interests that form the basis of the state action. Public interests cannot be easily reduced to legal definitions, as Chapter 3 has shown, and, even if possible, it would perhaps be an illusion to believe that a legal definition alone would be enough in order to direct all political choices towards better choices. On the other hand, there must be some way to push back against a state's overreliance on a vague interest such as security that has little possibility of being challenged. It is not enough to say that security must be seen from the people's perspective, if there is no system in place – no matter in principle if legalised or

[107]H.C. 5100/94, *Public Committee Against Torture in Israel v Government of Israel*, 53(4) P.D. 817, 845: "[s]ometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security". See also Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in Democracy' (2002) 116 Harvard Law Review 19, 148.

un-legalised – able to take the power to arbitrarily invoke security away from the state. Despite its flaws, the legalised human rights frame has proved to be, at least so far, the only model able *to try* to disempower the state by mandating justification for its actions and inducing compliance. Reformulations and reconceptualisations of security, as helpful as they might be, do not take into account the formidable power of states to appropriate concepts, especially unlegalised ones, and to bend them to serve their interests.[108] In fact, these reformulations have served the state power more than they have constrained it.[109]

5.3. Beneficiaries and equality

Equality is another feature that characterises the human rights frame. To understand equality as a trait that fundamentally differentiates the human rights frame from the security frame, it is useful to start with some discussion about the beneficiaries of the human rights frame.

The only undisputed aspect of human rights concerns their beneficiaries. Regardless of the moral, philosophical or legal conception one might have about rights and their role, it is uncontroversial that the beneficiaries of the human rights frame are, indeed, human beings.[110] More contested is the idea of groups as right-holders underpinning so called "third generation rights". Whether one supports or not the moral desirability and practical effectiveness of group

[108] As it was argued in Chapter 3, section 5.
[109] See, on this point, Chapter 4, section 3.
[110] However, it has been argued that human rights should be reconceptualised as "sentient rights", because human rights are not distinct from entitlements of other sentient creatures, such as animals: Alasdair Cochrane, 'From Human Rights to Sentient Rights' (2013) 16 Critical Review of International Social and Political Philosophy 655. On animal rights, see also Conor Gearty, 'Can Animals Have "Human Rights" Too?' (London School of Economics, 23 January 2008) < adam1cor.files.wordpress.com/2013/12/animals.pdf > accessed 28 November 2021. Whether or not one supports the extension of "human" rights as to include other non-human creatures, there is no dispute that at least legal rights in IHRL are, currently, addressed to human beings.

rights,[111] even a concept of group as something distinguishable from the individuals that comprises it ultimately has to rest upon human beings as beneficiaries of the rights.[112]

Evidently, it would be nonsense to talk about the *human* rights of states.[113] From this perspective, the existence of clear identifiable beneficiaries of human rights constitutes already a considerable advantage of the human rights frame over the security frame, since it removes the ambiguity of referent[114] inherent in the latter. As explained in the Introduction, in fact, one of the many difficulties with the concept of security resides in the plurality of its referents. The concept of national security – at least since its early realist inception – has been synonymous with state security. The post-Cold War trend to widen the security agenda, exemplified by the popular concept of human security, has attempted to shift the referent of security from the state to the individual, however without clarifying what happens when national and human security clash.[115] The problem of the referent of security is admittedly more complex than the dichotomy state versus individual security. As Buzan[116] and Wæver[117] show, security is a multi-layered concept that has state security in the middle, and that extends downwards to the security of

[111] Different views about third generation rights have been discussed in Chapter 4, section 4 regarding the right to national and international peace and security (Art.23(1) of the ACHPR). The ACHPR is the only human rights treaty containing this peculiar right.

[112] To argue otherwise would imply endorsing a concept of group as an abstract artifact that is not made up of human beings. For an excellent summary of the different views about the notion of groups, see Peter Jones, 'Group Rights', *The Stanford Encyclopedia of Philosophy* (Summer edn, 2016) <plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=rights-group> accessed 16 November 2020.

[113] This is valid when talking, in fact, about *human* rights. A different issue would be to talk about "the right of a state to act in a certain way". In this case, the meaning of right is different from that of *human* rights.

[114] Literature on security usually employs the word "referent", instead of beneficiary or addressee. I will maintain this terminology in this section when talking about security.

[115] See Chapter 4, section 3.

[116] Barry Buzan, *People, States and Fear. An Agenda for International Security Studies in the Post-Cold War Era* (2nd ed, Harvester Wheatsheaf 1991) 35-55 and 328-360.

[117] Ole Wæver, 'Security, the Speech Act: Analysing the Politics of a World' (1989) Copenhagen Centre for Peace and Conflict Research Working Paper 1989/19.

individuals and upwards to international security (with regional security also playing a fundamental role).[118]

After all, our simple linguistic intuition seems to support the proposition that security has multiple referents. In fact, while it would not make sense to talk about the human rights of a state, it seems to make perfectly sense to talk about the security of individuals, the security of the state and the security of the international community as a whole.

Even though the human rights frame is less complex with regard to its beneficiaries in comparison to the multi-layered security, human rights' focus on individuals has been frequently targeted by those who believe that rights are too individualistic.[119] Famous in this respect is Karl Marx's critique that rights are a bourgeois construct rooted in the idea of an egoistic man, "namely an individual withdrawn into himself, his private desires, and separated from the community".[120] Communitarians have often charged the liberal ideology informing human rights with the accusation of disregarding the community by promoting an abstract conception of human beings that does not sufficiently recognise the community structures in

[118] See the 'Regional Security Complex Theory' in Barry Buzan and Ole Wæver, *Regions and Powers: The Structure of International Security* (Cambridge University Press 2003).

[119] In fact, the term "individualism" was arguably coined by Joseph de Maistre in polemic against the spirit of the French Revolution and the emergence of the *droits de l'homme et du citoyen*: Koenraad W. Swart, '"Individualism" in the Mid-Nineteenth Century (1826-1860)' (1962) 23 Journal of the History of Ideas 77, 78.

[120] Karl Marx, 'On the Jewish Question' in John Raines (ed), *Marx on Religion* (Temple University Press 2002) 60.

which human experience can only make sense.[121] From this perspective, liberal rights are seen as a construct that promotes an "atomized" view of the society.[122]

If one supports these accusations against human rights, it is then tempting to believe that the security frame is better placed than the human rights frame to tackle threats to human beings in a less individualised fashion by targeting individuals indistinctly and as members of a community of people as such worthy of protection.[123] In other words, one might say that a fundamental difference between the state action to protect rights and the state action to ensure security lies in the fact that the former targets identified or identifiable (groups of) individuals whose rights are, or might be, at stake, whereas the latter is less individualised, in that it protects against events threatening all individuals as members of a community.

However, such a difference is not justifiable. In fact, there are several reasons for resisting the communitarian charges of "excessive individualism"[124] of rights. The first one concerns the function of rights. Even though the liberal underpinning of rights places emphasis on the protection of individual interests, it is a mistake to assume that rights do not serve any other

[121] This is a recurring theme in the work of some well-known communitarian authors, such as Alasdair McIntyre, *After Virtue: A Study in Moral Theory* (3rd ed, Bloomsbury 2007); Charles Taylor, *Philosophy and the Human Sciences. Philosophical Papers 2* (Cambridge University Press 1985); Michael Sandel, *Liberalism and the Limits of Justice* (2nd ed, Cambridge University Press 1998). For some more insights into the multi-faceted communitarian critique of liberal rights, see Amy Gutmann, 'Communitarian Critics of Liberalism' (1985) 14 Philosophy and Public Affairs 308; G.A. van der Wal, 'The Individualism of Human Rights' (1989) 18 Rechtsfilosofie und Rechtstheorie 195. For an overview of communitarianism more in general, see Will Kymlicka, *Contemporary Political Philosophy. An Introduction* (2nd ed, Oxford University Press 2002) 208-273.

[122] As Taylor (n 121) 187, explains: "[T]he term "atomism" is used loosely to characterize the doctrines of social contract theory which arose in the seventeenth century and also successor doctrines which may not have made use of the concept of social contract but which inherited a vision of society as in some sense constituted by individuals for the fulfilment of ends which were primarily individual. Certain forms of utilitarianism are successor doctrines in this sense. The term is also applied to contemporary doctrines which hark back to social contract theory, or which try to defend in some sense the priority of the individual and his rights over society, or which present a purely instrumental view of society".

[123] This is true with regard to security understood as security of individuals. The problem of the plurality of referents remains.

[124] I am using this expression because, as it will be clear later in this section, individualism remains a characterising feature of rights.

wider, more community-oriented, purposes. Even Marx had to recognise that what he called "political rights", such as the right to vote, freedom of speech and freedom of association, "are only exercised in community with other men. Their content is formed by participation in the common essence, the political essence, the essence of the state".[125] What Marx meant to say is that upholding (individual) rights to political participation also entails the protection of a general (community) interest in the active political participation of all members of the community.[126]

In trying to reconcile liberal and communitarian understandings of rights, Joseph Raz makes a more explicit case for this community-oriented function of rights.[127] As he rightly notes, freedom of religion protects the individual right to worship as much as the existence of religious communities within which this right is normally exercised.[128] Freedom of speech, he continues, can only be understood as protecting the collective good of preserving an open society.[129] And the right against discrimination makes sense only by reference to the individuals' membership to a certain identified group.[130]

This view can be admittedly generalised beyond specific rights. Raz openly concedes that when he tells us that the importance of rights

> results from their service to the promotion and protection of a certain public culture. That culture is in turn valued for its contribution to the well-being of members of the

[125]So the English translation of Marx, 'On the Jewish Question' in Waldron (n 58) 119. Slightly different the translation in Raines (n 120) 58: "These rights of man are partly *political* rights which are only exercised in community with others. What constitutes their content is *participation* in the *community*, in the *political* community or *state*" (italics in the original).
[126] For a comment on Marx's view, see Waldron (n 58) 119-150.
[127] Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 245-263.
[128] Ibid 251.
[129] Ibid 253-254.
[130] Ibid.

> community generally, and not only of the right-holders. The importance of liberal rights is in their service to the public good.[131]

Therefore, rights can be construed as having a dual function: in protecting the individual interests of a given right-holder, they also contribute to the protection of the well-being of the community as a whole. This is true also with more personal, non-participatory rights, such as the right to life, right to private life and freedom from torture. For example, the protection of the right to life of a certain right-holder entails also the protection of the interest of the community to have the lives of its members safeguarded. This ulterior interest can be justified by appeals to solidarity bonds between members of the community ("any wrong done to any one of offends us all – as one might put it in a romantic moment"[132], Raz would observe); or by more pragmatic considerations, according to which rights of all members of the community must be protected because a violation of the right of a certain person in the present might be a violation that can interest my right in the future.[133]

A second reason to doubt a purely individualistic understanding of rights relates to the type of state action required to guarantee rights. While traditional liberal theory's focus on personal autonomy has as its corollary the endorsement of state's non-interference to guarantee individual (negative) freedom[134], it has become increasingly clear that the protection of rights

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[131] Ibid 256.

[132] Ibid 248.

[133] Legal actions before national and international courts brought by any right-holder to vindicate his or her right are a useful example of this double nature of rights. Though these actions might seem a manifestation of the individualism of rights *par excellence*, in fact they are far from being exclusively individualistic. This is because any action leading to the ascertainment of a violation by a court serves the individual interest of the right-holder (and claimant), but also the interest of the community members to live in a society free from violations. It matters little that the right-holder might act for purely egoistic purposes. Even if this is the case, the claimant is anyway acting as a proxy for all community members whose rights – even though not at stake in the present case – might be affected by certain state practices. The so called "strategic human rights litigation" is the most evident instance through which specific cases are picked out and litigated before courts for the clear purpose of advancing human rights protection in a certain area. More in general, the enhancement of rights protection through judicial decisions is always the by-product of individual actions that unfold their long-lasting effects over time for the benefit of the whole community.

[134] Kymlicka (n 121) 53-101.

requires more than the state's abstention from intervening in individual matters. This has always been evident regarding Economic, Social and Cultural Rights, whose protection requires a state to devise a broad range of measures and policies "to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively [their] full realization" (Article 2(1) ICESCR). Thus, states are required to play a very active role in order to fulfil the positive obligations necessary to maximise the realisation of Economic, Social and Cultural Rights.[135]

The protection of Civil and Political Rights also requires much more than simple non-interference by the state. As Waldron notes,

> [e]ven with regard to those "first generation" rights [...] it is seldom merely *inaction* that is called for. According to traditional liberal theory, we set governments up, not only to *respect* our rights [..], but to protect, uphold, and vindicate them. That involves positive collective action, and action which makes use of scarce manpower and resources. It involves the operation of a police force, law courts, and so on, which are certainly not inconsiderable expenditures on the part of the state and of society collectively.[136]

In fact, in IHRL it is now established that even Civil and Political Rights need to be safeguarded not only by inaction (non-interference), but also by the state's proactive action. The progressive development of the doctrine of positive obligations by the ECtHR[137], as well as of due diligence by the IACtHR[138], constitute two clear examples of judicial specification of what this proactive

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[135] For a comprehensive overview of what these obligations concretely entail, see Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009).

[136] Jeremy Waldron, 'Can Communal Goods Be Human Rights?' (1987) 28 European Journal of Sociology 296, 300 (italics in the original).

[137] See, on positive obligations, Lavrysen (n 93). The author points out that positive obligations, as construed by the ECtHR, are more exceptional than the archetypical negative obligations: 214-221.

[138] See Patricia Tarre Moser, 'Duty to Ensure Human Rights and its Evolution in the Inter-American System: Comparing Maria de Pengha v. Brazil with Jessica Lenagan (Gonzales) v. United States' (2012) 21 Journal of Gender, Social Policy and the Law 437; Laurens Lavrysen, 'Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights' (2014) 7 Inter-American and European Human Rights Journal 94. In the same way as positive obligations in the European context have raised some concern with regard to an allegedly excessive use of criminal law (see footnote 93), so have due diligence obligations under the Inter-American system: see Fernando Felipe Basch, 'The Doctrine of the Inter-American Court of Human Rights

action practically entails. Therefore, at the current stage of development of IHRL, the distinction between inaction and action seems to have lost any decisive importance.[139] In sum, states' obligations to protect rights relate not only to specific individuals, but to the community of individuals at large.

A final, brief mention of the third reason why a purely individualistic understanding of rights cannot be fully sustained concerns the emergence of group rights. As previously noted, one might be sceptical about the exact identification of the right-holders, however their existence – which is also a matter of positive law[140] – leaves little doubt that in the human rights frame there is room for conceiving a beneficiary other than an atomized individual. Group rights, in fact, seem to be addressed, as a minimum, to an individual embedded within a community, if not to the community as such.[141]

For the reasons just mentioned, then, it is too simplistic to maintain that the liberal, individualistic underpinning of rights rules out any more community-prone understanding of the function of rights, according to which the protection of each single "atomized" individual serves also the broader interest of the community to protect the moral worthiness of its members.

From this angle, the difference between the human rights frame and the security frame fades. In fact, if security action can be construed as protective action directed at individuals indistinctly (that is towards the community of individuals as a whole), so can state action to

Regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 American University International Law Review 195.

[139] Lavrysen (n 93) 304-308.

[140] The ACHPR is the only human rights treaty expressly providing for group rights, such as the right to national and international peace and security. For the analysis of the content of this right, see Chapter 3, section 4.

[141] Admittedly, this is not entirely unproblematic because collective and individual rights might coexist and often conflict, as it is the case with indigenous rights. On this topic, which cannot be examined here, see Austin Badger, 'Collective v. Individual Human Rights in Membership Governance for Indigenous Peoples' (2011) 26 American University International Law Review 485.

protect rights. The latter is also a protective action directed not only at single individuals but, through them, also at the community in which they are embedded. If so, then the similarity between the two actions becomes striking, because both target the collectivity of individuals as an ensemble worthy of protection. In other words, once rights are freed from the frequent allegations of excessive individualism, and their important social function for the collectivity is acknowledged, it becomes more difficult to understand why state action to protect the collectivity should be pursued through the security frame, rather than through the human rights one.

However, the argument that the two frames are so similar in that they both serve community interests should not be taken too far. In fact, there is at least one crucial aspect that differentiates the human rights frame from the security frame on this respect. I have consciously talked earlier about accusations of "excessive individualism" of rights from communitarians. With that, I mean that there is ample space for communitarian understandings of rights that can coexist with their individualism. Nonetheless, individualism remains an important feature of the human rights frame. Thus, when Michael Ignatieff says that "rights language cannot be parsed or translated into a nonindividualistic, communitarian frame [because] it presumes moral individualism and is nonsensical outside that assumption"[142], he is both wrong and right. He is wrong because individualism can be reconciled with community interests. He is right because the human rights frame is deeply entrenched in the idea of the protection of individuals, without which human rights will make no sense. This is why human rights are not "excessively individualistic" in that they are not addressed to egoistic individuals with no bonding between

[142]Micheal Ignatieff, 'Human Rights, Sovereignty, and Intervention' in Nicholas Owen (ed), *Human Rights, Human Wrongs: The Oxford Amnesty Lectures 2001* (Oxford University Press 2003) 67.

each other and disconnected from the community, as some communitarian critics argue, but they are anyway necessarily individualistic.

This focus on the individualism of rights is important because it allows rights to be rooted in the idea of equality of individuals. Equality marks the greatest difference between the state security action and the state action to protect human rights.

Allen Buchanan understands the egalitarian aspect of human rights in five ways, that it is useful to report in full:

1. *Inclusive ascription*: IHRs are explicitly ascribed not just to men, or whites, or 'civilized peoples', but to all persons.
2. *Robust equality before the law*: governments are required to ensure that domestic legal systems give legal recognition to human rights for all citizens, and all citizens are to have the right to legal remedies for violations of their human rights; in addition, equal rights of due process are prominent in several major human rights conventions.
3. *'Positive' rights*: IHRs encompass social and economic rights that can reduce material inequalities and indirectly constrain political inequalities, to the extent that the latter are a function of material inequalities.
4. *Political participation rights for all*: all individuals have the right to participate in their own government, and increasingly this is understood as a right to equal participation and hence to democratic government.
5. *Strong rights against discrimination on grounds of gender and race*: some human rights conventions contain rights against all forms of discrimination on the basis of gender or race, including both formal (legal) discrimination and informal practices of discrimination in the public and private sectors.[143]

Among these understandings of equality, arguably numbers 2 (robust equality before the law) and 4 (political participation rights for all) are characteristic of the human rights frame and have

[143] Allen Buchanan, 'The Egalitarianism of Human Rights' (2010) 120 Ethics 679, 683-684.

little to do with security.[144] The so-called "material inequality" referred to under number 3 is mostly associated with ESCR, whose purpose is to try to reduce it. However, reducing material inequality is increasingly seen from the perspective of security alike. The "freedom from want" cluster of human security purposefully attempts to address the causes likely to produce material inequality.[145] In fact, economic security, food security, health security and the like are nowadays part of the political lexicon.[146] Whether the framing of the state action to tackle economic, food and health issues as security action rather than human rights action has some tangible beneficial effects on the reduction of material inequalities is admittedly hard to evaluate.[147]

More relevant for the purposes of this section are number 1 (inclusive ascription) and 5 (non-discrimination). They can be both treated as expressing the idea that the human rights frame is addressed to individuals with no distinction, since its purpose is to protect individuals without discrimination of any sort.[148] That equality is, in principle, a fundamental underpinning of the rights discourse is not disputed. In IHRL, it is clearly established that states have an obligation to protect the rights of all individuals within their jurisdiction, without discriminating between citizen and non-citizen.[149] In addition, non-discrimination provisions on grounds of gender, ethnic origin, religion, political opinions and the like feature in all main human rights treaties.[150]

[144]Unless one wants to argue that equality before the law and political participation are essential for the maintenance of security. This would be in theory possible because security, as repeatedly stressed, is an umbrella term under which everything can be made to fit. The argument, however, is not explored here.

[145] See 1994 Human Development Report, 24.

[146] Explicitly mentioned in the 1994 Human Development Report, 25-30.

[147] Though it remains unclear whether tackling material inequalities as a security issue is more effective than using human rights, critics have frequently pointed out that human rights address insufficiently the causes of material inequality. Among many, see Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).

[148]On equality and non-discrimination in IHRL, see Stephanie Farrior (ed), *Equality and Non-Discrimination under International Law. Vol. 2* (Routledge 2015).

[149] Art.2(1) ICCPR; Art.1 ECHR; Art.1(1) ACHR.

[150] General prohibitions of discrimination can be found in Art.2(1) ICCPR; Art.2(2) ICESCR; Art.14 ECHR and Protocol No.12; Art.1(1) ACHR; Art.2 ACHPR. Many other provisions in these treaties prohibit non-discrimination in relation to specific issues, such as marital rights, children rights, access to courts and so on.

On the contrary, equality does not seem to be a fundamental trait of security. Even though there is nothing inherently discriminatory in the term "security", and in the state action it triggers, security rhetoric and practices have often shown that security is increasingly meant to be for some people and not for other (or even for some people against the alleged threat posed by other). Post-9/11 counter-terrorism is the most notable instance in which security is known to have produced discriminatory dynamics, with security measures targeting, often disproportionately, mostly people belonging to certain religious groups and coming from specific regions of the world, fuelling a culture of suspicion that employs security as a means to separate those worthy of security from those posing a threat to it.[151] The contemporary highly securitized management of migration flows towards Western countries is another example of security rhetoric and measures being employed to build a narrative of migrants and refugees as "others" from whom people in the Global North need protection.[152] This shows that the concept of security, though seemingly neutral, has in recent years been employed often as a means to strengthen a sense of national identity based on a suspicious, if not openly hostile, attitude towards what is perceived as "foreign".[153]

At a deeper level, the problem with security is that perhaps it was never meant to be an egalitarian concept. National security, as conceived by realist orthodoxy, was a concept deeply embedded in the state sovereign power to defend its citizens from foreign threats. Traditionally,

[151]I have explored this problem, including the relevant case law that has generated in the post-9/11 environment, in Chapter 4, section 2 in relation to the issue of trading off security and rights. For more insights, see Daniel Moeckli, *Human Rights and Non-discrimination in the "War on Terror"* (Oxford University Press 2008).

[152]The theme of "othering" in relation to migration has recently attracted a great deal of scholarship. See, for example, Moritz Jesse (ed), *European Societies, Migration, and the Law. The 'Others' amongst 'Us'* (Cambridge University Press 2020); A. Chebel d'Appollonia, *Migrant Mobilization and Securitization in the US and Europe. How Does it Feel to Be a Threat?* (Palgrave Macmillan 2015).

[153] So called "populist" governments in many countries have vigorously promoted an understanding of security that divides "us" from "them". The theme has been widely explored in academic circles: see, for example, Gabriella Lazaridis and Giovanna Campani (eds), *Understanding the Populist Shift. Othering in a Europe of Crisis* (Routledge 2017); Thorsten Wojczewski, '"Enemies of the People": Populism and the Politics of Insecurity' (2020) 5 European Journal of International Security 5.

it was a concept whose primary purpose was to pursue state interests. Even though it has gradually become clearer that the security of each state is deeply dependent upon the security of other states and of the international community as a whole – to the extent that nowadays even state security requires multilateral cooperation within international systems – arguably nothing has dramatically changed. National security appears difficult to disentangle from national sovereignty.[154]

Human security, on the other hand, might seem more equal insofar as it focuses on the security of people generally speaking. According to the 1994 Human Development Report, material inequality is understood as a cause of insecurity.[155] However, proponents of human security do not seem to have clarified how state action to ensure individual security should be pursued within a framework that guarantees that all individuals will be treated equally. By simply reading the Report, one can notice the absence of clear references to non-discrimination clauses in the pursuance of individual security. Arguably, the fact that human security is addressed to human beings indistinctly might be considered sufficient to presume an implicit non-discriminatory aim. Nonetheless, the issue remains that non-discrimination does not appear to be explicitly stated as the cornerstone that instead characterises the human rights frame.

The same seems true if one looks at national security provisions in human rights treaties and how they operate generally within IHRL. References to national security in the treaties do not specify that national security grounds must be non-discriminatory as such.[156] This does not

[154] On the history and evolution of national security, see Introduction, section 5.1.
[155] 1994 Human Development Report, 25-30.
[156] This is true, to a certain extent, also in relation to emergency. However, Art.4(1) ICCPR adds more explicitly that derogations in case of emergency are allowed "provided that such measures […] do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". Similarly, Art.27(1) ACHR. Art.15 of the ECHR does not contain a similar non-discrimination clause. The ACHPR does not have any provision regulating emergency situations. On emergency more in detail, see Chapter 1, section 3.2. For a case where the ECtHR found that measures passed in the context of a declared emergency were discriminatory in nature, *A and others v UK*, § 182-190.

mean, however, that the state power to restrict rights on grounds of national security can be discriminatory. In fact, non-discrimination provisions in the treaties constitute a safeguard against security measures overtly discriminatory. There is here an interesting analogy with what was said earlier about the necessity of using human rights to evaluate the legality of security invocations.[157] The fact that non-discrimination in the invocation of security is derived from the human rights machinery proves that it is not national security that is non-discriminatory in its nature, but rather that human rights are needed to inject a non-discrimination safeguard into national security *measures*. In other words, to try to ensure that the restrictions of rights on national security grounds do not arbitrarily discriminate, the inherent non-discriminatory pull of the human rights frame as a whole is essential. This means, more generally, that attempts to make security equal are normally not arguments in favour of a more equal understanding of security, but rather are human rights-based arguments. The Commission on Human Security's 2003 Report supports this argument, whereby it openly admits that "a right-based approach, like a human security approach, […] emphasises non-discrimination policies, equality and equity".[158] Therefore, security is not necessarily equal due to some constitutive qualities, but security measures *must be* equal thanks to the equality-driven human rights frame.

In sum, the security action of the state serves the community interest insofar as it aims at ensuring the protection of its members. From this perspective, the human rights action of the state is not dissimilar, in that it constitutes a protective action of the community's members. But, unlike security, the traditional individual underpinning of rights helps ensure that equality characterises state action. Thus, the state's choice for the security frame is often a strategic choice away from the equality ensured by the human rights frame, and a stratagem to escape

[157] See section 5.2 above.
[158] 'Human Security Now' Report, 27. The Report was more thoroughly discussed in Chapter 4, section 3.

the obligation, both moral and legal, to treat individuals equally. In order to render security equal, human rights are once again needed.

6. The limits of human rights: the power-enhancing strand

As already outlined, the human rights frame, through its legalisation, its compliance pull and its drive towards equality, is much more suitable than any idea of security to act as brake on state power. Due to these features, human rights have played an important role in fostering the emancipation of individuals from state power.[159] One does not have to be a blind human rights enthusiast to recognise the achievements of human rights in this respect. The increased protection of the rights of women,[160] minorities,[161] people with disabilities,[162] children[163] and the elderly,[164] as well as the emergence of international criminal law as an instrument to tackle the most egregious violations of human rights,[165] are only some of the results achieved by the human rights regime in the last seventy years. The struggle for rights has been (and still is) a struggle for the emancipation of human beings from coercion and authoritative power structures. The possibility for individuals to defend rights in domestic and international courts is one of the most tangible examples of what Costas Douzinas calls "emancipation through

[159] I will use the term "emancipation" here as "the act or process of being set free from political, economic, cultural and social restrictions and structures": 'Emancipation', *The Concise Oxford Dictionary of Politics and International Relations* (4th ed, 2018) 174-175.

[160] See Anne Hellum, Henriette Sinding Aasen (eds), *Women's Human Rights. CEDAW in International, Regional and National Law* (Cambridge University Press 2013).

[161] See Joshua Castellino (ed), *Global Minority Rights* (Routledge 2017).

[162] See Coomara Pyaneandee, *International Disability Law. A Practical Approach to the United Nations Convention on the Rights of Persons with Disabilities* (Routledge 2018).

[163] See Wouter Vandenhole, Gamze Erdem Türkelli, Sara Lembrechts (eds), *Children's Rights. A Commentary on the Convention on the Rights of the Child and its Protocols* (Edward Elgar 2019).

[164] See Claudia Martin, Diego Rodríguez-Pinzón, Bethany Brown, *Human Rights of Older People. Universal and Regional Legal Perspectives* (Springer 2015).

[165] The history of International Criminal Law is linked to the progressive emergence of IHRL: see Andrew Clapham, 'Human Rights and International Criminal Law' in William Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press 2016) 11-33.

reason and law".[166] In fact, as Michael Ignatieff observes, "[w]e know from historical experience that when human beings have defensible rights – when their agency as individuals is protected and enhanced – they are less likely to be abused and oppressed".[167] Likewise, human rights advocacy and activism by civil society entities as well as private individuals – most of the time pursued within the framework provided by positive rights – are examples of what can be termed "emancipation through collective action", whereby civil society acts as a proxy in the fight for people's emancipation. Even a moderate sceptic of the emancipatory power of rights like David Kennedy recognises that

> [t]here is no question that the international human rights movement has done a great deal of good. It has freed individuals from great harm, provided an emancipatory vocabulary and institutional machinery for people across the globe. It has raised the standards by which governments judge one another, and by which they are judged, both by their own people, and by the elites we refer to collectively as the "international community".[168]

However, all that glitters is not gold about human rights. In fact, if it is true that the human rights frame has a strong power-constraining nature, it is likewise true that it has often been used by states as a power-enhancing instrument. In fact, even though human rights are usually regarded as a counterhegemonic force, they often support states' hegemonic projects.[169]

The case of humanitarian intervention provides a well-known illustration of the power-enhancing strand of the human rights frame.[170] Anne Orford has fired the most piercing critique in this regard:

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[166] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000) 2.
[167] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2003) 4.
[168] Kennedy (n 62) 3.
[169] Nicola Perugini, Neve Gordon, *The Human Right to Dominate* (Oxford University Press 2015) 2-26.
[170] On humanitarian intervention in general, see Brendan Simms and D.J.B. Trim (eds), *Humanitarian Intervention. A History* (Cambridge University Press 2013); Aidan Hehir, *Humanitarian Intervention. An Introduction* (2nd ed, Red Globe Press 2013).

> [i]ntervention by international institutions in the name of human rights and democracy provides a reason, or, as some have argued, an 'alibi,' for the presence of the international community in many parts of the world.[...] While on the one hand the appeal to human rights is used to undermine the legitimacy of 'rogue', 'failed' or target states in the context of intervention, that appeal also serves at the same time to authorise or legitimise the actions of those powerful states who collectively act as the 'international community'. [171]

It is a recurring theme also in the Marxist and post-Marxist tradition that rights are inextricably linked to Western capitalism,[172] functioning as "an ideological mask at home and […] a form of cultural imperialism abroad".[173] As Boaventura de Sousa Santos similarly observes, "[t]oday, we cannot be even sure if present-day human rights are a legacy of the modern revolutions, or of their ruins, if they have behind them a revolutionary, emancipatory energy, or counter-revolutionary energy".[174]

The problem lying at deeper level behind this criticism is that the state action to protect human rights, no matter how much it is presented as legally compulsory, remains very often subject to political will, that dictates whether and how certain actions should be pursued. The same holds true when the action to protect rights is justified by reference to ethical imperatives. Martti Koskenniemi makes this point with regard again to humanitarian action: "intervention remains a political act however much it is dressed in the language of moral compulsion or legal technique"[175], because "the turn to ethics, too, is a politics".[176]

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[171] Anne Orford, *Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law* (Cambridge University Press 2003) 34-35.

[172] Marx was in fact among the first ones to cast doubt on the emancipatory potential of human rights, observing that rights might well contribute to "political emancipation" (from the state), but are a barrier to bring about "human emancipation", that is premised on a communal idea of freedom: Marx (n 120) 48-50.

[173] Neil Stammers, 'Human Rights and Power' (1993) 41 Political Studies 70, 72.

[174] Boaventura de Sousa Santos, 'Human Rights: A Fragile Hegemony' in François Crépeau and Colleen Sheppard (eds), *Human Rights and Diverse Societies: Challenges and Possibilities* (Cambridge Scholars Publishing 2013) 20.

[175] Martii Koskenniemi, '"The Lady Doth Protest Too Much". Kosovo, and the Turn to Ethics in International Law' (2002) 65 The Modern Law Review 159, 173.

[176] Ibid.

Admittedly, the vocabulary of rights is not employed only by individuals (right-holders) against the state, but also by national and supra-national institutions and authorities. As Orford puts it, "the language of rights still appears to promise the energy and moral authority of resistance to power, yet it is increasingly spoken by officials seeking to convince their audience that the resort to violence in a particular instance is justified".[177] This is because the language of rights has a strong rhetorical force, that makes rights appealing to states seeking to justify their actions. In this respect, the human rights frame is not so different from the security frame: the rhetoric of security too provides a useful tool for states attempting to legitimise security policies and laws.[178]

Beyond humanitarian intervention, and more generally, human rights appear to be unable to escape from a fundamental ambiguity: they are an instrument of emancipation from state power and, at the same time, an instrument of state empowerment.[179] Even though rights provide an emancipatory vocabulary to the powerless, in fact this vocabulary often empowers hegemonic actors: "insofar as human rights discourse is deployed by the weak in order to make demands on the dominant actor to exert its power more ethically, then human rights end up empowering the dominant actor since this discourse expands the spheres of legitimate sovereign intervention".[180]

[177] Orford (n 171) 131.

[178] On the rhetoric of rights, see Andreas von Arnauld, Jens T. Theilen, 'Rhetoric of Rights' in Andreas von Arnauld, Kerstin von der Decken, Mart Susi (eds), *The Cambridge Handbook of New Human Rights. Recognition, Novelty, Rhetoric* (Cambridge University Press 2020) 34-50. On the rhetoric of both rights and security, see Goold, Lazarus (n 40) 1-8.

[179] See, on this point, Douzinas (n 166) 175: '[L]egal rights remain a state language and power can shape them in its own image. Through their formal equality and less than universal citizenship, rights emerged as a highly paradoxical institution, both an instrument of emancipation and a means for empowering bourgeois dominance. Their history has been equally ambiguous; they have been used to protect from arbitrary power but they have also helped secure and naturalise dominant social powers and their class, gender, race, and ethnic exclusion'.

[180] Perugini and Gordon (n 169) 13-14.

When human rights are successfully defended against the state, it is ultimately the state that is responsible for remedying the violations it has perpetrated.[181] The ambiguity, in brief, is that emancipation *from* state power via human rights can only happen *through* state power, because states are the ones that provide protection of individual rights.[182] Antonio Cassese captures this ambiguity very clearly:

> In the present-day international community, sovereign States have gradually decided to place limits on their powers by assuming upon themselves stringent obligations: they have limited the power they have on their subjects (nowadays called 'citizens'), committing themselves internationally to ensure rights and freedoms to them. The lesson is clear: to ensure that these rights and freedoms are upheld, one has to *turn to* those very entities that instead tend to infringe upon rights and freedoms on a daily basis. It is like asking a slave trader in the 17th Century if he would kindly agree to abandon or limit this trade practice.[183]

In fact, Cassese underlines a very important dynamic concerning the relationship between individuals and the state in the system devised by the human rights frame: the states that are supposed to secure human rights are those very entities that too often violate rights. This 'protector-violator' dynamic is another feature that human rights have in common with security: a state is both a guarantor and a violator of rights, as much as it is also a provider of, and often a threat to, security.[184] The two dynamics are actually correlated. In fact, since rights and security are synergetic, a state that guarantees rights also provides security. Conversely, a state that violates rights is also a threat to security.

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[181] So Kennedy (n 62) 113: "However much one may insist on the priority or pre-existence of rights, in the end rights are enforced, granted, recognized, implemented, their violations remedied, by the state".

[182] It is sufficient to recall that human rights treaties explicitly impose obligations upon states to ensure human rights. For example, Art.1 ECHR provides that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedom defined in Section I of this Convention". Similarly, Art.2 ICCPR; Art.1 ACHR; Art.1 ACHPR.

[183] Antonio Cassese, *I Diritti Umani Oggi* (first published 2005, Laterza Editori 2008) 233 (emphasis in the original). My translation from Italian.

[184] Buzan (n 116) 35, 43-50.

What has been said shows an interesting similarity between the human rights frame and the security frame, that is that some of the criticism usually levelled against security is in fact very similar to that levelled against rights. The language of rights, like the language of security, can be easily exploited by states to pursue their own interests, and to legitimise their actions. Rights, like security, are often instruments to enhance state power. Nicola Perugini and Neve Gordon rightly observe that rights are invoked by both liberals and conservatives to advance opposite political ideologies because rights "have an ever-present potential to acquire new political meanings, which may mirror or invert existing ones".[185] This can be explained by turning again to the state's formidable power to distort and misappropriate concepts:[186] rights, like security, are not entirely immune from this power.

However, the human rights frame, despite its undoubted shortcomings, contains within it some antibodies against power, even if they are not always fully effective. At least the human rights frame contains the possibility to challenge power thanks to the presence of some legal yardsticks through which power can be criticised. At least human rights attempt to drive states towards compliance with some established (legal) parameters. At least the human rights frame attempts to direct state action towards an equal protection of individuals. These features, as argued, are missing in the security frame.

Due to these features, human rights facilitate the exercise of some form of critique of existing arrangements of power, often even empowering individuals to directly challenge state actions. Thus, the human rights frame is also a frame of critique of power, and not only a power-enhancing tool. In fact, as argued in previous sections, in practice there seems to be no real alternative to human rights to criticise security measures and practices.

[185] Perugini and Gordon (n 169) 17.
[186] See Chapter 3, section 5.

States are well aware of the power-constraining function of rights. To answer the question posed earlier, states try to elude the language of rights because its vocabulary provides tools, albeit often insufficient, to criticise their power. This explains why it is much more convenient for states to use the security frame. The security frame to date has not managed to provide a similar form of critique of state power. On the contrary, the security frame is often deployed by states to suppress rights-based criticism of their powers. This phenomenon is particularly evident in the global counter-terrorism space, in which measures to fight terrorism, including those aiming at preventing/countering violent extremism, are often used to de-legitimise civil society actors and to shrink civic space, so that states can silence human rights-based critique of their security powers.[187]

The expansion of the scope of security, corollary of the efforts to redirect security towards the individual referent and away from the state, has not successfully explained, in a more tangible way, how power should be tamed. It remains unclear why an expansive notion of security would be sufficient *per se* to redirect the state security powers towards an increased protection of human beings. On the contrary, expansive security has continued to perpetuate the illusion that security is something distinct from rights. By doing so, security has weakened the human rights frame more than it has reinforced it, and the language of security has equipped states with a frame that only in appearance differs from human rights, but in practice is just a strategic move

[187]de Londras (n 24) 140-149. On this topic, see also Thomas Carothers and Saskia Brechenmacher, *Closing Space: Democracy and Human Rights Support under Fire* (Carnegie Endowment for International Peace 2014). The current UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Ní Aoláin has been very outspoken in her criticism of the effect of counter-terrorism on the shrinking civic space: UNHRC 'Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders', Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (1 March 2019) UN Doc A/HRC/40/52.

for states to shift away from the stronger protection that human rights afford, with all their inherent limitations.

7. Conclusion

This final Chapter has tried to challenge the idea that security is a necessary concept in the current legal and political lexicon. The analysis has attempted to unmask the strategic move that states put in place when they choose to tackle threats through the security frame, rather than through the human rights frame. It was argued that security functions as a smokescreen, that states lift in order to sidestep the human rights frame's power-constraining features: legalisation, compliance and equality. Other than that, there is no justifiable reason why security should be used by states in order to enhance the protection of human beings, instead of human rights. The protection afforded by rights, although imperfect, is much better suited than security to set limits on state power. Once this strategic move has been exposed, it becomes easier to understand why security should, and in fact can, be rejected in its entirety. Without security, what is left is the human rights regime.

Therefore, rejecting security means liberating the legal and political vocabulary from the excruciating logic of a perpetual conflict between rights and security. It also means liberating the legal and political vocabulary from the triviality of inexplicable and generic synergies. Importantly, to reject security means to deprive states of a frame that is easily employed to weaken human rights, rather than to reinforce them. As a result, rejecting security opens up spaces to bring human rights back into focus, and to embrace their contradictions and weaknesses. Ultimately, to reject security means to redirect energy towards more fruitful efforts to strengthen a human rights regime that, to date, has accomplished much more than any

security reformulation with respect to the enhancement of the protection of human beings from the risk of an arbitrary exercise of state power.

CONCLUSION

Let me recall the quote from George Orwell's 1984 that was used at the beginning of this thesis: "[i]t's a beautiful thing, the destruction of words"[1]. As should be clear by now, this thesis was, admittedly, about the destruction of words. However, those familiar with Orwell's work should have understood that the quote was, in fact, a provocation. The destruction of words Syme – the overzealous bureaucrat in the Ministry of Truth – alluded to was part of the Big Brother's project to expunge words from the Newspeak dictionary, in an effort to narrow the range of thought of Oceania's citizens.

Clearly, this is not what I intended to suggest with the argument that security should be expunged from the legal and political vocabulary. In fact, I meant to suggest the contrary, that is that rejecting security is a starting point to encourage some more critical thinking about the necessity of some concepts that populate the legal and political lexicon. In the dystopian world of Oceania, purging the vocabulary from some words was seen as an instrument to increase control over the citizens. But are we sure that the proliferation of vague concepts in our real world has not achieved, often, the same result?[2]

Jean d'Aspremont and Sahib Singh argue that the root cause of international lawyers' contemporary malaise can be traced to the inability to understand how old concepts have been

[1] George Orwell, *1984* (1st ed, Harcourt 1949) 49.

[2] Many have talked about Newspeak in relation to the use of vague concepts in modern-day politics: see, for example, Yuliya Komska, David Gramling, and Michelle Moyd, 'It's not Orwell's Newspeak: Why We Must Take Charge of Shaping our Language' *Euronews* (Lyon, 6 August 2018) < www.euronews.com/2018/08/02/it-s-not-orwell-s-newspeak-why-we-must-take-charge-of-shaping-our-language-view > accessed 22 November 2021; Jean Seaton, Tim Crook and DJ Taylor, 'Welcome to Dystopia – George Orwell Experts on Donald Trump' *The Guardian* (London 25 January 2017) < www.theguardian.com/commentisfree/2017/jan/25/george-orwell-donald-trump-kellyanne-conway-1984 > accessed 22 November 2021; Peter Foster, 'Sustainable Newspeak by 2050' *Financial Post* (Toronto, 5 January 2021) < financialpost.com/opinion/peter-foster-sustainable-newspeak-by-2050 > accessed 22 November 2021.

deployed in new ways, and how new concepts have emerged.[3] They are right, although perhaps the reasons for this malaise are even more profound and can be found in the lack of a more fundamental enquiry into whether those "old" or "new" concepts are really necessary.

This thesis has argued that the concept of security is beyond repair, because any attempt to "fix" it, by redefining it, expanding its scope, re-understanding it and so on, has failed to explain how security can be used in such a way as to minimise the risk of states exploiting its ever-expanding confines to strengthen their powers. This, it was argued, has detrimental effects on human rights, because security, no matter how it is understood differently, can always be deployed as an antagonistic force likely to weaken the human rights regime.[4]

Admittedly, as it was also argued, security is a superfluous concept, because whatever issue likely to have an adverse impact on people's lives can be alternatively framed as a "human rights issue", rather than as a "security threat".[5] Thus, this thesis has suggested that our legal and political vocabulary is already well-equipped with concepts that serve the function of fostering the protection of human beings. The human rights frame is capable of protecting individuals much more than any reformulation, re-definition or expansion of security has been able to do to date. In fact, it was argued that the security frame is a smokescreen that states find convenient to lift in order to obscure the human rights frame with its inherent power-constraining features.[6]

This thesis was then a call to arms to reject unnecessary concepts, and to focus on existing ones, in order to rework them, understand them better and embrace their persistent contradictions.

[3] Jean d'Aspremont and Sahib Singh, 'The Life of International Law and its Concepts' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law. Contributions to Disciplinary Thought* (Edward Elgar 2019) 4.
[4] See conclusions to Chapter 4.
[5] See Chapter 5, section 3.
[6] These features are legalisation, compliance pull and drive towards equality: see Chapter 5, section 5.

Thus, rejecting security is far from an attempt to block off critical thinking. It is as such an attempt to direct critical thinking away from the continuous rebranding of compromised concepts, and towards a more fruitful engagement with those concepts that have historically proved to be much more successful in enhancing the protection of individuals from those occurrences that might jeopardise their existence. This is possible because, as it was argued, rejecting security is also, and especially, rejecting the duality rights-vs-security that keeps our mind enslaved by the fallacious, albeit commonplace, idea that rights and security are two distinct concepts that are doomed to clash. It is also liberating our thoughts from the trite assumption that they are instead synergetic. Such a synergy, to the extent that has remained nothing more than a truism, only reinforces the usual assumption that rights and security are distinct.

To a certain extent, the argument that any issue that is a "security threat" can be framed as a "threat to human rights" seems to lean towards the conclusion that security *is* human rights. Arguably, one could attempt to define security as "the condition of being (or feeling) free from threats to the enjoyment of rights". This is not a legal definition of security but just a proposition that underlines that people's sense of security is nothing more than their objective condition, and subjective belief, that they are living freely in a state that upholds their rights, rather than violating them. As tenable as this proposition might be,[7] the idea that security *is* rights is also dangerous. The danger, in fact, is that human rights might be subsumed within security and used to legitimise even more repressive security actions. As de Londras notes with respect to the emerging trend to consider counter-terrorism as human rights,

[7] Rhonda Powell arrives at the conclusion that human rights law as a whole is a tool to ensure security, and thus she proposes to understand "rights as security": Rhonda Powell, *Rights as Security: The Theoretical Basis of Security of Person* (Oxford University Press 2019) 152-174.

> [t]he risk […] is that human rights would become hollowed out by being subsumed within counter-terrorism, and that this trend could not only enable states to legitimate their repressive actions by passing them off as a rights-enhancing pursuit of counter-terrorism […] but also that human rights actors and agencies would be pulled more and more into the counter-terrorism space, undermining and distorting human rights along the way.[8]

This is unsurprising because "security is a voracious ideal"[9] that easily eats up everything it encounters on its way, including human rights. And because states, as noted in Chapter 3, section 5, have a formidable power to distort concepts, to the extent that even a simple proposition such as "security is rights" can be easily exploited to serve their security agenda.

From this perspective, this is admittedly yet another argument to conclude that security is beyond redemption and cannot but be rejected. Security does not contain within it the antibodies against the risk of a state power's overreach, and instead facilitates it. Human rights, instead, have proved to be much more efficient in constraining state power, since they had been purposefully designed to this effect.

However, as also observed in this thesis,[10] human rights have also a power-enhancing strand, mostly because nothing is completely immune from the state's ability to manipulate concepts. In fact, there is no guarantee that rejecting security and refocusing on rights will prevent the state action to ensure rights from straying away from protecting individuals and, instead, enhancing state power,[11] similarly to what security usually does.

However, looking deeper this is another argument *against* security and *pro* rights. In fact, if it is true that rights might (also) empower states, one might wonder why states should have

[8] Fiona de Londras, *The Practice and Problems of Transnational Counter-terrorism* (Cambridge University Press 2022 [forthcoming]) 119.
[9] Jeremy Waldron, 'Security as a Basic Right (After 9/11)' in Charles R. Beitz and Robert E. Goodin (eds), *Global Basic Rights* (Oxford University Press 2009) 218.
[10] See Chapter 5, section 6.
[11] As noted in Chapter 4, section 4 with respect to the right to the good of security, the rhetorical strength of rights can be hijacked by states to legitimise their actions.

another concept in their arsenal, security, that not only duplicates rights in relation to their content, but also doubles the state's ability to pursue power-enhancing aims. If rights often do already a good job (also) in legitimising state repressive action, the argument can be made that states should be deprived of another concept that similarly legitimises this action, without however being able to set limits on it.

Even though human rights have often been hijacked by states to pursue hegemonic projects, the human rights regime remains a frame of critique of power and can be re-directed towards counter-hegemonic strategies. As Perugini and Gordon observe,

> [i]nsofar as human rights are always translated and retranslated, human rights can always be reappropriated and resignified in a way that counters domination and crafts the subject of human rights differently. Human rights can always be redefined in a way that mobilizes people to struggle for emancipatory rather than oppressive projects.[12]

The issue of how to make sure that rights will remain a power-constraining force and will not be used as a power-enhancing substitute for security is beyond the scope of this work. As repeatedly stressed, rejecting security should be a starting position, not an end in itself. It is supposed to be the beginning of a conversation on how to (re)imagine a world not obsessed with rights-vs-security as well as rights-with-security. This would open up possibilities to better understand the limits of the state action to protect human rights, and how to make sure that such an action will be geared towards this end only.

For example, if security were to be eschewed, it would be possible to argue that, if balancing is unavoidable, it should happen not between rights and an amorphous concept of security, but between different rights at stake. Since balancing rights is not the same as balancing rights and

[12] Nicola Perugini and Neve Gordon, *The Human Right to Dominate* (Oxford University Press 2015) 128.

public interests,[13] it is fundamental to investigate more in detail how potentially conflicting obligations[14] should be dealt with by the state, and how they should be reconciled. This might require also a much more sophisticated understanding of "the protection of rights" as public interest (or, in human rights language, "legitimate aim").

Additionally, if security were to be eschewed, it would be possible to enquire more in detail into the content of some rights, especially so called third-generation rights (such as the right to a clean environment, the right to development, the right to peace and so on), in order to better specify what sort of obligations upon the state they entail for them to be more than just a generic statement about the importance of some values.[15] This enquiry will be facilitated once we dispose of some security-related duplicates, such as environmental security, climate security and so on.

Of course, getting rid of security is not an easy endeavour, because security is such a commonly employed word in political and ordinary talks, as well as being a term widely used in the law, that the hope that the term will disappear rests perhaps on a chimerical aspiration. As noted in Chapter 5, section 4, once a frame is instilled in our minds by continuous repetition, it becomes normal language, and negating a frame simply activates the frame. This is how security has managed to prosper undisturbed throughout the years, thanks also to the help of those who have often naïvely supported the idea that an expansive notion of security would have been sufficient for security to benefit individuals, rather than the state. The expansion of security, in fact, has just reinforced the security frame, and perpetrated the illusion that security is a necessary concept, and as such distinct from human rights.

[13] See, for some insights on the issue, Jeremy Waldron, 'Rights in Conflict' (1989) 99 Ethics 503.
[14] In fact, balancing competing rights entails balancing potentially competing obligations: ibid 503.
[15] I have touched upon this line of critique of third-generation rights in the context of the right to the good of security: see Chapter 4, section 4.

However, these hurdles do not have to drive us towards a pessimistic attitude towards the prospect that the security frame might, sooner or later, disappear. Perhaps it is just a matter of summoning the courage to take a leap forward and admit that our lives might be better off without the cumbersome presence of some concepts. In this respect, it might be helpful to find guidance in Antonio Gramsci's wise exhortation to approach the task of challenging the status quo and of seeking to transform reality with "the pessimism of the intellect, optimism of the will".[16]

[16] The exact quote from Gramsci is "I'm a pessimist because of intelligence, but an optimist because of the will": Antonio Gramsci, *Letters from Prison* (Frank Rosengarten ed, Raymond Rosenthal tr, Columbia University Press 2011) 18. The version quoted here was popularised by Romain Rolland, who paraphrased Gramsci: Francesca Antonini, 'Pessimism of the Intellect, Optimism of the Will: Gramsci's Political Thought in the Last Miscellaneous Notebooks' (2019) 31 Rethinking Marxism 42.

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