Four Concepts of Security—A Human Rights Perspective

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Abstract

This article discusses how security must be understood from a human rights perspective. It is submitted that human rights law—i.e. classic civil human rights—in fact presupposes four different concepts of security: international security; negative individual security against the state; security as justification to limit human rights; and positive state obligation to offer security to individuals against other individuals. These concepts are explained, discussed and criticised individually and in combination. Reasons are given why several of the concepts insufficiently substantiate what security encompasses: not all concepts are mutually reinforcing; in some cases they even undermine each other. This implies that international human rights law fails to provide a comprehensive, balanced view of what security means from a human rights perspective. As a result, human rights law offers less substance and direction to the security discourse than it potentially should be able to; and, moreover, this is harmful to the capacity of human rights to protect the individual. Throughout the article suggestions are made to remedy these weaknesses.


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1. Introduction

Security may be described as freedom from such phenomena as threat, danger, vulnerability, menace, force and attack. The rather basic nature of this definition should not disguise the fact that there are many forms of security, of which international security, national security and human security are the most relevant to the present article, and that the exact meaning of security as such and for each subtype is both developing and continuously highly contested.¹ The definition should not conceal either that security is not an unqualified good, which in turn implies that there can be too much of it.² Furthermore, it is important to recognise that the security argument within public discourse has the capacity to easily but not necessarily trump the interests in human rights protection.³ Moreover, security can be used and is actually being used as a political, sometimes even an ideological instrument to govern and reorder society.⁴ In addition, there can be and there often is a significant difference between real and perceived insecurity and between real and perceived effectiveness of security measures. The implication of all of these and other features is that security is a fluid concept and anything but a neutral one.

This article discusses the following question. How must security be understood from a human rights perspective? In what way does this perspective clarify the essence of security? And is that perspective useful in coming to a more neutral, genuine and workable concept of security altogether, or at least to a more balanced discourse on public security? To that end it is submitted that human rights law in fact presupposes four different concepts of security. Each of these is explained, discussed and criticised where appropriate. The perspective adopted here in order to specify the four concepts is that of the classical civil fundamental rights of the first generation of human rights, which include, for example, the right to life, freedom from torture and ill-treatment, freedom from slavery, the right to liberty, a fair trial, respect for privacy and freedom of religion, expression, and assembly and association. More particularly, I refer to these rights with reference to the International Covenant on Civil and Political Rights 1966 (ICCPR)⁵ and the European Convention on Human

⁵ 999 UNTS 171.
Rights 1950 (ECHR)\textsuperscript{6} as well as the associated jurisprudence of the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR).

2. International Security through Human Rights Protection by States (Concept I)

An international order which can effectively help to secure human rights has been considered imperative for the prevention of war and thus for international security.\textsuperscript{7} In line with this view, Article 55 of the 1945 United Nations Charter articulates that universal respect for and observance of human rights and fundamental freedoms for all with no distinction as to race, sex, language or religion are conditions of stability and well-being that are necessary for peaceful and friendly relations among nations. According to the preamble and Article 1 of the 1949 Statute of the Council of Europe the same supposition is even the principal basis of this European organisation, which has been established in response to the waging of war and Nazi atrocities, followed by the threat of communism. Both the United Nations and the Council of Europe thereby give expression to the theory that securing the primacy of the individual against the over-powerful State, establishing civil and political freedom, and safeguarding democracy are important instruments to effect international peace and security.\textsuperscript{8} It follows implicitly from this theory that these conditions should be manifested at the domestic level. This is also reflected in some of the most important international general human rights treaties, which contain important human rights obligations for states. For example, the preambles of both the ICCPR and the ECHR state that human rights and fundamental freedoms are the foundation of justice and peace in the world.

Whereas first-generation human rights and security are often considered to be conflicting concepts, the present notion of security signifies that security may be brought into effect through the protection of human rights and that they are interrelated and complementary objectives. Interestingly, while for example the International Covenant and the European Convention thus serve to safeguard international security, these human rights instruments do not contain explicit state obligations or individual rights to that effect, although the right of all peoples to self-determination has some particular relevance in that respect.\textsuperscript{9} Moreover, in many instances military acts that states conduct outside
their own territory do not fall within the legal scope of human rights treaties. As a consequence, human rights law is often unable to offer much guidance relevant to international relations and confrontations either. So far, therefore, international human rights law confers only a weak meaning on what international security encompasses. That, however, does not alter the fact that human rights protection—and with it human security—may result indirectly in international security. The theory that holds that human rights protection actually produces this effect raises several questions which I address briefly: (i) Is it empirically plausible that adequate national protection of human rights supports international security? (ii) If so, how could the plausibility of what could be called the ‘human rights peace theory’ be explained? (iii) Does this concept imply that human rights protection is by definition supportive of international security? (iv) What, then, does security in the present concept mean, and what should be the implication of that?

A. Empirical Plausibility

The theory that adequate effectuation of first generation human rights within autonomous states is imperative for international security has drawn much less attention than the much older ‘democratic peace thesis’, which holds that democracies rarely go to war with one other. That thesis is widely accepted as an empirical fact. With that it seems to constitute indirect, empirical confirmation that human rights protection is relevant to international security, since democratic states—at least those with the highest levels of...
democracy—are generally much less inclined to violate human rights than other states. Further confirmation of the ‘human rights peace theory’ follows from analysis of historical data showing that states that systematically abuse human rights at home are also those most likely to engage in international aggression, that states with average or good human rights records are unlikely to engage in international aggression and that states which respect human rights may still engage in international interventions, at least in part to protect the human rights of citizens in a state that seriously and systematically abuses the rights of its own citizens. On the basis of this analysis Burke-White observes that far more important than whether a state is ‘democratic’ is whether it protects the basic rights of all its citizens through a form of constitutional liberalism, by which he means the tradition that seeks to protect an individual’s autonomy and dignity against coercion by the state, church or society. This observation is supported by analysis which finds that states that respect human rights at home tend to have more peaceful interactions with other states that respect human rights and that this also applies to states that are non-democratic. The ‘human rights peace theory’ moreover accords with the observation that security between states has increasingly come to depend on security within those states. Although the causes of internal conflicts and wars are complex, that observation is relevant here because research shows that violations of civil and political rights are identifiable as direct triggers of conflict. Especially violations of personal integrity or security rights—including indiscriminate killings, systematic torture, disappearances or wide-scale imprisonment—provide a clear link to escalation within a state.

B. Possible Explanations of the Causal Link

Given that the suggested connection between human rights protection and international security seems indeed causal, the question that arises is how this causal link may be accounted for. One possible explanation is that states...
founded on individual human rights are fundamentally against war. The argument that states which abide by human rights are highly pacifist is problematic, however, since the evidence is that they do go to war, just not with other states that respect human rights. Another explanation is that the institutionalisation of human rights protection imposes constraints on inter-state aggression because it implies that the people in the state can speak out about the state’s political decisions and because human rights limit the state’s possibilities to instrumentalise its citizens for war-like ends. Indeed, there is no doubt that this places political limits on the authorities’ possibilities to decide to go to war and thus would seem to be relevant here, but it cannot fully explain the plausibility of the ‘human rights peace theory’ since military invasions are not infrequently supported by a majority of the people in a state that respects human rights. It is also conceivable that a government willing to limit its powers and seek non-violent alternatives when dealing with a domestic conflict is likely to follow similar policies abroad. Since the chance that the pursuit of such alternatives will be successful depends on all the states involved in the conflict, this could explain why states that respect human rights will not go to war with each other and that war occurs when at least one of the parties does not offer its citizens adequate human rights protection. A final explanation for the plausibility of the ‘human rights peace theory’ that should be mentioned here is that communities within states that respect human rights tend also to support the human rights of individuals in other states, as a consequence of which the policy articulated by the authorities may be one which also respects human rights abroad, even demanding their protection there. This explanation too clarifies why states that respect human rights may nevertheless engage in acts of international aggression against states that violate human rights, viz., for the protection of human rights abroad.

C. The Concept’s Internal Tensions

Particularly the last explanation makes it clear that, whereas high standards of human rights protection within the internal affairs of a state may be imperative for international security, application of these same standards in external affairs may possibly even pose a threat to peaceful relations between states because the protection of human rights elsewhere may constitute a reason for

18 Burke-White, supra n 13 at 254, referring to Doyle, ‘Liberalism and World Politics’ (1986) 80 American Political Science Review 1151 at 1151.
19 Burke-White, supra n 13 at 265–6.
20 See with further references Sobek et al., supra n 13 at 527–8.
21 Burke-White, supra n 13 at 266–7.
22 Ibid. at 268.
the application of military force against another state.\textsuperscript{23} Thus, in the relationship between international security and human rights the latter not only figures as a means to achieve the former; within that relationship human rights are also a goal by themselves which could command priority over immediate international security. Short-term international security may thus be breached with a view to guaranteeing instant protection of individual human rights or human security.

That this is a practical possibility has been shown many times since the Second World War and is also manifest today. That it is also a legal option follows from the internationally recognised concept of humanitarian intervention and its promising successor, the Responsibility to Protect (R2P).\textsuperscript{24} The R2P comprises three non-sequential and equally important pillars: (i) each individual state has the enduring responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement; (ii) the international community has the responsibility to assist states to meet those obligations through cooperation, international, regional and sub-regional organisations and arrangements, civil society and the private sector; (iii) the international community has the responsibility to respond collectively in a timely and decisive manner when a state is manifestly failing to provide such protection.\textsuperscript{25} The last pillar may ultimately entail intervention through the use of military force and therewith leaves room for the possibility that states—or actually the international community—will interfere with short-term international security.

However, at the same time the R2P aims to prevent the actual occurrence of this threat to international security, as the R2P—much more than the older concept of humanitarian intervention—stresses the primary responsibility of the state and the international community to prevent gross human rights violations.\textsuperscript{26} Moreover, the threat that the possibility of humanitarian intervention carries with it may have a preventive effect, because it may work as an incentive for states to secure human rights for its citizens in order to avert


\textsuperscript{26} Report of UN Secretary-General Ban Ki-moon, Implementing the Responsibility to Protect, 12 January 2009, A/63/677, at 2; and Bellamy, supra n 25 at 143.
So the threat to short-term international security posed by the third pillar of the R2P may not only meet individual human rights or human security interests but possibly also long-term international security. In this respect, human rights protection could still be seen as being at least de facto instrumental to international security.

So the actual and legal possibility of applying diplomatic, political, economic, military of other force against another state in order to protect the human rights of its citizens does exist. Under particular circumstances states not only have the right but, according to the R2P, even the responsibility to operate in such a fashion to protect against gross human rights violations. On a larger scale and not necessarily on the basis of the R2P, the goal of international security might be a good reason for states to try to force other states to respect and protect human rights within their domestic legal order. As a consequence of the actual and legal possibility to do so, there is always a risk that states may misuse the human rights argument with a view to securing other interests they have, or states may pursue unrealistic idealist goals or perform inadequately when that force is applied. Moreover, it should be stressed that using force against states—even when it is aimed at securing human rights—will usually impose considerable human, economic and institutional costs on the affected areas, in both the short term as well as the long term. Since the result will be the impairment of human rights, some even argue that military interventions are in principle antithetical to human rights. In any case, it is clear that a possible result of interventions may be that human security, national security and international security will actually all be harmed rather than being secured.


28 See, for example, Cunliffe, ‘Dangerous Duties: Power, Paternalism and the “Responsibility to Protect”’ (2010) 36 Review of International Studies 79; Bellamy, ‘Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq’ (2005) 19 Ethics and International Affairs 31 especially at 38–42; and Hoffmann and Nollkaemper, ibid. at 364–5.


D. Individual Human Rights as Standard for International Security

In view of the risk just described it is crucial to recognise that the present concept of security signifies that human rights protection by states is not only instrumental to international security but also imperative and thus fundamental to it. The concept therewith implies that the interest of protecting individual human rights not only provides criteria that must be applied when deciding if or how pressure or force should be applied against a state that violates human rights; it also comprehends the standard regulating how international security must be achieved and safeguarded. Specifically, through the protection of human rights, since in this concept international security in its ultimate form presumes adequate national security for each state and adequate human security for each individual. So unsurprisingly this concept implies that the referent for international security ultimately is the individual.

Although the realisation of this ultimate form of international security is unattainable, striving to fulfil it may serve as a useful ideal considering the plausibility of the ‘human rights peace theory’ and the fundamental value of human rights. In order to achieve that ambition to the fullest extent possible it is imperative to determine which human rights violations under what conditions constitute the greatest risk to internal national security and/or international security. This will offer the possibility to further improve national, regional and international human rights monitoring mechanisms as well as the international relations policy of states and international organisations with a view to the early detection and addressing of these particular violations or their causes. Further empirical research and theoretical analysis in this field is therefore essential. Meanwhile, the foregoing does not mean that full human rights protection will suffice for international security or any of the other forms of security. These are all dependent on many more factors, such as economic security, energy security, environmental security and security against terrorism and serious crime. But since adequate human rights fulfilment is a necessary condition for international security in this concept, it also sets the fundamental boundaries within which the other conditions for international security have to be achieved.

3. Negative Individual Security Against the State
(Concept II)

Liberty constitutes a categorical core fundament of human rights. This is not just dogmatically the case; it also follows from the historical fact that human rights have their origin in defence of the liberty of the individual against

oppression and the iniquitous exercise of power by the sovereign and later the state. In line with this it is central to civil human rights that the authorities must abstain from interfering with the liberty of the individual—or more precisely, they must refrain from interfering with the individual’s fundamental rights and freedoms which serve to protect that liberty. These human rights thus first of all imply a negative obligation on the part of the authorities. It is undisputed that every fundamental right at least presupposes such a negative obligation of the state, so the conclusion must be that all human rights—and thus not only civil rights—intend to offer individuals security against the power of the state. In case of civil human rights it is even their primary purpose. Negative security against the state is the essence of the present human rights concept of security. Given that the power of the state as such is infinite, this concept is of great importance to curtail and control that power. At the same time, however, it is also limited in its scope. Whereas human rights might make a fundamental contribution to human security, they certainly do not cover it fully, if only because human rights imply a legal-normative approach and relate to the judicial relationship between the individual and the state, while human security is a much more open—and vague—concept. For example, it also encompasses policy, planning and strategy, and relates to all kinds of issues which human rights law has only limited capacity to resolve, such as the distribution of wealth and resources, shaping the economy, international relations, global warming, natural disasters and well-being in general. Even if one takes into account that human rights law currently also entails positive obligations (see Section 5 for the fourth concept of security) the concept of human security is thus much broader still. Human rights and human security do nevertheless have in common that the individual is regarded as the principal referent for security.

Apart from the present concept’s broad notion of security (all human rights intend to offer individuals negative protection against the power of the state), human rights law also entails negative security in a more narrow and at the same time more explicit sense. For example, Article 9 of the ICCPR and


33 Cf. Christie, ‘Critical Voices and Human Security: To Endure, To Engage or To Critique?’ (2010) 41 Security Dialogue 169 at 169–90, who explains that the concept of human security has lost critical potential because the language of human security has become so broad that it appears to offer a little something to everyone.

Article 5 of the ECHR state that everyone ‘has the right to liberty and security of person’. However, it is rather unclear what security and the corresponding negative obligation not to violate it mean exactly in this context. The jurisprudence of the HRC suggests that the right to negative security under Article 9 of the ICCPR implies that the authorities should refrain from actions that might lead others to endanger the physical security of individuals. So in the case of Jayawardene v Sri Lanka the right to security was found to be violated because allegations made by the president against the applicant led to death threats by others and put the applicant’s life at risk. Even less clear is the meaning of the right under Article 5 of the ECHR. The European Court signals that security must be understood in the context of physical liberty and, for example, arbitrary arrest or detention and informal disappearances. In the Court’s case law, however, the right to security is completely interwoven with the right to liberty and does not seem to have any practical relevance of its own. As a result the negative right to security is at the very most only of marginal importance within the concept of negative security.

That negative security against the power of the state is of fundamental importance does not alter the fact that it also constrains the possibilities for states to offer individuals protection and security through the criminal justice system, anti-terrorism mechanisms and many other legal and operative instruments. For instance, criminal law procedure must meet the standards of, for example, freedom from torture and ill-treatment (limits to interrogation), the right to liberty (limits to arrest and detention), the right to respect for privacy (limits to the use of police and investigative powers) and the right to a fair trial (limits to investigation, prosecution and trial). Thus, when the authorities are fighting crime or terrorism, this will constitute a conflict between different security interests. As a result, a restriction of the authorities’ powers cannot simply be qualified as impeding security. On the contrary, whereas the threatening violation of security that is put forward to infringe human rights might never materialise, once embarked upon, that infringement will nevertheless constitute a loss of security in any case. These are important observations for they signify the importance of human rights even for those who only adopt a security perspective. Moreover, the recognition of negative human rights protection against the state as an aspect of security shifts the

37 See, for example, Trechsel, ibid. at 409–12, who is of the opinion that the reference to security might as well be eliminated from Article 5 ECHR; Harris, O’Boyle, Bates and Buckley, Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights, 2nd edn (Oxford: Oxford University Press, 2009) at 132–3.
balance within the overall security concept to a more neutral position: in this view, the state is not primarily recognised as an impartial guardian of individuals’ security but as a subjective party that is part of the problem. This concept thus teaches us that the state is a security problem in and of itself. There is, however, also a drawback to this approach as it may be abused to neutralise the importance of human rights constraints: if everything is security then security always triumphs whatever the state does or does not do. Thus, while recognising that human rights protection contributes to security, this does not mean to suggest that trading one form of security for another is a zero-sum game because negative human rights security would be only as important as any other security goal. In fact, such an approach would ignore that both human rights and security are not goals in themselves but only a means to protect the liberty of the individual. However, whereas negative human rights obligations as such never infringe on liberty, other forms of security usually do, the consequence of which is that it is necessary to be much more cautious when applying them than when securing negative human rights.

When it is recognised that liberty is the ultimate goal of security, the question arises as to the maximisation and thus distribution of liberty. It is important to acknowledge that in large measure the security of the individual depends on the security of others, as a result of which effective security must be security for all. Consequently, the maximisation of security at a given moment by offering it to most and withholding it from some—for example, by curtailing their human rights security—might eventually undermine security for everyone and lead at least to sub-maximum security. Since the human rights security concept discussed here is limited to negative security and, seen directly, concerns only the relationship between individuals and the state, it is clear that this concept is unfit to serve as a total security model within a state. Negative human rights security is nevertheless an essential condition for achieving an enduring maximisation of security. The concept does set the boundaries within which the maximisation of security for all must be developed and applied. With that the concept prevents security from being economically maximised by an unfair, unequal or immoral distribution of its costs. Negative human rights thus restrain the possibilities to shift the burdens of security to specific individuals or groups within the whole population. By doing that it offers an important safeguard against undermining security for all and thus also against obstructing the maximisation of security. Negative human rights security against the state indirectly, therefore, also results in negative security against all others.

4. Security as Justification to Limit Human Rights
(Concept III)

Relative to most human rights, the interests of security constitute a legitimate aim to limit or infringe them. This applies first of all in respect of national security. Not only may most human rights be derogated from in time of public emergency which threatens the life of the nation, even under more normal circumstances human rights law offers the authorities possibilities to restrict the range of rights or the exercise thereof on account of national security interests. At least when security is understood in a broader sense, most human rights by far, furthermore, either implicitly (for example, through a margin of appreciation granted to the authorities) or explicitly (for example, through express limitation clauses) allow for the restriction of these rights on the basis of other security interests. Examples of such interests are public safety, prevention of disorder or crime or more specifically the defence of any person against unlawful violence or prevention against reoffending, health threats or more specifically preventing the spread of infectious diseases, morals, the economic well-being of the country, and/or the fundamental rights and freedoms of others.

Clearly, in order to be able to operate an adequate criminal law system and implement other security measures, the authorities must—under specific conditions and if necessary—have the possibility to infringe certain, but not all, human rights. However, many human rights limitation grounds are interpreted and applied rather broadly and some of them de facto even function as catch-all clauses. Moreover, although the scope and meaning of a few limitation clauses can fairly precisely be distilled from the case law of human rights monitoring bodies—see notably the case law of the European Court on the limitation grounds relative to the right to liberty in Article 5 of the ECHR—none of them are specified through precise definitions in either human rights treaties or the associated case law. In addition, both the HRC and the European Court have hardly ever concluded that the objective of a human rights restriction did not have a legitimate aim within the meaning of the treaty’s limitation clause. Instead, they typically review whether the interference was necessary and proportionate to the supposed legitimate aim. Human rights law is thus at most casuistic in its clarification and by far most

39 See, for example, Article 4 ICCPR and Article 15 ECHR.
40 For such exceptions, see Kim v Republic of Korea (574/1994), Merits, CCPR/C/64/D/574/1994; IHRL 2100 (UNHRC 1998); 6 IHRR 930 (1999) at paras 12.4–5; and Nowicka v Poland Application No 30218/96, Merits, 3 December 2002, at para 75.
41 See with many references to jurisprudence, for example, Joseph, Schultz and Castan, supra n 36 at paras 12.24–26, 16.8–16, 17.13–19, 18.18–46, 19.4 and 19.12–14 (ICCPR); and Harris, O’Boyle, Bates and Buckley, supra n 37 at 348–9, 407, 436, 474–93 (ECHR).
of the limitation grounds only marginally help to define what national security or any other forms of security exactly encompass.\textsuperscript{42}

The concept of security as a ground to limit human rights is thus not only weakly developed in human rights law, that concept even approaches security as a fairly uncomplicated aim, the legitimacy of which is unproblematic. With that, human rights law deprives itself of the capability to fundamentally acknowledge and respond to the fact that security is actually a very complex concept that has many aspects to it which are extremely relevant to the individual’s enjoyment of liberty and human rights. One phenomenon that might be part of the more general human rights discourse but with which human rights law as such—i.e. the legal system of human rights—hardly concerns itself is that security is used by governments as an instrument to cultivate fear and govern danger.\textsuperscript{43} Precisely because human rights are primarily meant to offer individuals security against the power of the state, it is remarkable that human rights law does not provide a more substantive approach to the legitimate aim requirement in order somewhat to control and limit the politicisation or even exploitation of security.

A lack of sufficient general concern within human rights treaties and the associated case law also exists relative to most of the security paradoxes which Zedner points out when she explains how security is not an unqualified good, but that there are attendant costs to pursuing security that stand counter to its purported goals and that are an integral and probably inescapable facet of its pursuit.\textsuperscript{44} One of these is that absolute security will never be obtainable while its pursuit legitimates government action and private enterprise.\textsuperscript{45} The unattainability of absolute security naturally even applies if all human rights protection were to be abolished and if such protection were not considered as a security interest in itself. Thus, increasing the power of the state by limiting human rights will up to a certain point not necessarily increase security and beyond that point nothing will be added to actual security at all. On the contrary, just because human rights protection constitutes security in itself it will then on balance lead to a loss of security. Relevant here too is the idea that the risk from the authorities’ power declines as the risk from terrorism or other security threats rises, which should be rejected—as Waldron has aptly been pointing out.\textsuperscript{46} In fact, it seems to me that if one of

\begin{itemize}
\item \textsuperscript{43} With further references, see McGhee, supra n 3 at 57–8.
\item \textsuperscript{44} Zedner, supra n 2 at 157–73.
\item \textsuperscript{45} Ibid. at 158–60.
\end{itemize}
these risks rises the other often follows. This is not only illustrated by the intrusive preventive measures taken by many governments in response to the threat of terrorism since 9/11, but also by the empirical plausibility of the ‘human rights peace thesis’ discussed under Concept I. Another of Zedner’s paradoxes is that security promises reassurance but in fact increases anxiety and causes people to surrender their freedom to a greater extent than is objectively useful by adopting all kinds of pre-emptive measures. Consequently, even if the pursuit of security as such does not infringe human rights, it has effects that are contrary to the general purpose of human rights: securing individual liberty. This also applies to another observation Zedner makes: strategies of security lead to the further erosion of social solidarity and are inimical to the good society.

The scanty attention to the general legitimacy of security aims posed by the authorities furthermore means that human rights law is not best placed to fundamentally assess and take into consideration why, how and to what extent security is at risk, what the nature of that security risk precisely is, who it concerns and at whose and what expense it is decreased. Of course, such assessments will also have to be made when reviewing whether the human rights infringement is necessary and proportionate, but that review takes place only when the general presumption that security is at risk has already been accepted. Moreover, the review focuses on the specific case and not the security aim as such. That does not in my view mean that human rights law—such as provided for in the ICCPR and ECHR as well as in the relevant case law—should provide strict and narrow substantive criteria that can suffice as a legitimate security aim and the conditions under which it does so suffice. Considering that it is a central responsibility of the state to offer its citizens security, a responsibility under the R2P that is now even recognised as being inherent in state sovereignty, the authorities must have wide margins within which they can make political security assessments and set out security policies that are convincing to the public.

It is just that human rights law should be more to the forefront when governments are making that assessment and policy. This can be achieved by providing a general and much more substantive concept of security as a ground to limit human rights. As part of that concept human rights law needs to emphasise that the referent for security and security policy is ultimately the individual. It should furthermore provide counter-pressure to the tendency to qualify everything as a security problem and demand that governments convincingly explain that, why, whose, what kind and to what extent security is at stake and also whose security will be decreased by the security measure.

47 Zedner, supra n 2 at 163–6.
48 Ibid. at 171–3.
An additional advantage of forcing the authorities to provide a balanced and faithful account of the security problem they claim to face is that this might on their part also result in less politicised information (cf. for example, ‘the war on terror’ and ‘risk society’ rhetoric) within public security discourse. This is especially necessary because it is precisely the authorities that have a tremendous information advantage regarding the real scope and nature of security threats over most others involved in that discourse.

5. Positive State Obligation to Offer Security to Individuals (Concept IV)

The final security concept signifies that the protection of human rights requires the state to take appropriate measures to safeguard these rights from violation by others. The essence of this concept is thus the provision by the authorities of positive security for individuals within national society against individual officials and—particularly remarkable—other private parties. Human rights monitoring bodies are increasingly basing the obligation on states to offer such positive security for classic civil human rights provisions in, for example, the ICCPR and the ECHR. Many of the positive obligations they find entail duties to utilise criminal law. However, it is not only these monitoring bodies that consider criminal law highly relevant to guaranteeing security; the same applies to national authorities, who often lean significantly on its application for that purpose. At the same time, criminal law may be the most intrusive, powerful instrument that authorities can apply against individuals within society. It is for these reasons that the following focuses on positive obligations regarding criminal law.

The positive obligations that human rights monitoring bodies have been expressly formulating include duties of the state to criminalise, criminally investigate, prosecute, criminally try and punish private individuals’ conduct that conflicts with the values on which these rights are based. Thus, the HRC holds in regard to, for instance, killing, torture and inhuman treatment—including rape and female genital mutilation—and enforced disappearance, that adequate protection may entail positive obligations to criminalise such violations and to criminally investigate, prosecute, convict and adequately punish those private parties responsible. The concept of positive obligations

50 The following is largely based on Van Kempen, Repressie door mensenrechten. Over positieve verplichtingen tot aanwending van strafrecht ter bescherming van fundamentele rechten [Repression by Human Rights. On Positive Obligations to Apply Criminal Law in Order to Protect Fundamental Rights] (Nijmegen: Wolf Legal Publishers, 2008).

51 HRC, General Comment No 31: supra n 10 at para 8; see also, for example, HRC, General Comment No 6: The right to life, 30 April 1982, HR1/GEN/1/Rev.6 at 127 (2003); 1–2 IHRR 4 (1994), at para 3; Bleier v Uruguay (30/1978), Merits, CCPR/C/15/D/30/1978 at paras 11–15;
as regards criminal law, however, seems to be most developed in the case law of the European Court. In order to protect the right to life the ECtHR holds that the state has a primary duty to put in place effective criminal law provisions to deter the commission of offences against the person, and to criminally investigate breaches of the right, and prosecute, convict and punish perpetrators.52 These obligations are furthermore relevant as regards (certain) violations of, for example, the right not to suffer torture and ill-treatment (including rape and domestic violence), the right not to be enslaved (including trafficking), the right to respect for privacy, and the freedoms of expression, religion and assembly.53

An important value of these positive human rights obligations to the application of criminal law is that they empower citizens and more specifically vulnerable individuals and groups. The development of the human rights concept of positive security against other private parties significantly reinforces the capacity of these individuals and groups to force the authorities to protect them and thus to counter threats with which they are confronted within society. Moreover, the concept acknowledges that constraints on individuals’ freedom, autonomy and capabilities may not be the result of the exercise of state power alone but do in fact also follow from social forces and the conduct of private individuals, groups and organisations.54 That there is a need to empower individuals and groups and to recognise that overall individual security is an essential prerequisite for the exercise of freedom as such does not imply, however, that the obligation of states to protect individuals against others is or should be based on human rights. Such reasoning first of all ignores that not all duties of the state are or should be based on human rights. To see that it is not only relevant that the protection of citizens against serious threats was considered a central responsibility of the state long before human rights even came into existence. Equally important here is that human rights came into

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52 Osman v United Kingdom 1998-VIII; 29 EHRR 245 at paras 115–116 (killing and attempted killing by private individual).
53 See, for example, M.C. v Bulgaria 40 EHRR 20 at paras 148–153, 185–186 (rape by private individuals); Siliadin v France 43 EHRR 16 at paras 89 and 143–144 (slavery by private individuals); 97 Members of the Gldani Congregation of Jehovah’s Witnesses and Others v Georgia Application 71156/01, Merits, 3 May 2007, at paras 133–135 (private violence against religious community); and Opuz v Turkey Application No 3340/02, Merits, 9 June 2009, at paras 128–130 and 159 (domestic violence).
54 With further references to the literature, see Fredman, ‘The Positive Rights to Security’, in Goold and Lazarus, supra n 1 at 307–11.
development in defence of the liberty of the individual against the power of state authorities and not to counter threats from private parties.

Such reasoning furthermore fails to see that a human right and the value on which it is based are of a different order and different in scope. Any human right (such as the right not to suffer torture) is only a constructed legal-normative reflection of the value that underlies that right (in this case, for example, the value of humans' physical and psychological integrity). There is much that may harm the underlying value but which falls outside the scope of the right itself (e.g. accidentally stepping on someone's toe harms their physical integrity but is not in conflict with the right not to suffer torture or ill treatment). Moreover, the value exists autonomously and is thus not directed against any party in particular, while a human right by contrast is something that legally only applies between individuals and the state (and formally also between states, but—more importantly here—not between individuals). Consequently, the fact that certain conduct is contrary to the value on which a human right is based does not \textit{ipso facto} mean that this particular conduct falls within the scope of that human right or its corresponding obligations.\footnote{This seems to be disregarded by Fredman, supra n 54 at 308–11.}

That liberty constitutes a categorical core foundation of civil human rights and that social forces and the conduct of private individuals might constrain liberty does, therefore, not \textit{ipso facto} mean that these forces and such conduct legally fall within the radius of action of these human rights. It is exactly for this reason that positive obligations to apply criminal law are problematic, for at least the ICCPR and ECHR do not contain any provision that propounds an express obligation to utilise criminal law if the human right entailed in that provision is violated.\footnote{However, the American Convention on Human Rights 1969, 1144 UNTS 123; OAS 36, provides an exception in Article 13(5), where it maintains that propaganda for war and advocacy of national, racial or religious hatred that constitutes incitements to lawless violence or to similar action on discriminatory grounds 'shall be considered as offenses punishable by law'.} Other than that, some provisions in these treaties contain the more generally formulated obligations that certain conduct shall be 'prohibited by law' or, even vaguer, that the human right shall be 'protected by law'.\footnote{Prohibitions by law are required for slavery and the slave trade (Article 8 ICCPR), propaganda for war (Article 20 ICCPR), national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Article 20 ICCPR) and discrimination (Article 26 ICCPR). Protection by law is primarily demanded for the individual's life (Article 6 ICCPR and Article 2 ECHR), privacy, correspondence, honour and reputation (Article 17 ICCPR), family (Articles 17 and 23 ICCPR), children (Articles 23 and 24 ICCPR), and women and different forms of equality (Articles 23 and 26 ICCPR).} These provisions thus do not specify that criminal law should be employed to this end.

The above does not clarify whether it is desirable as such that human rights monitoring bodies are increasingly basing positive obligations to apply criminal law against private parties on classic civil human rights. The most urgent argument against the recognition of these obligations within the human
The development of these positive obligations furthermore means that the overall concept of human rights forfeits transparency: when conflicting interests are described to a relatively great extent by means of the same terminology (here: human rights) it will be less clear what is precisely at stake, which will be lost when a choice is made within that conflict. The concept thus blurs the human rights-versus-security discourse and consequently weakens the capacity of human rights to function as a counterweight to security arguments within that discourse. Another burden of the concept is that it contributes—maybe inadvertently—to the idea that criminal law is the solution to every perceived or real security problem. Moreover, positive obligations to apply criminal law limit the possibilities available to states to implement alternative security measures, in which case they are contrary to the principle that criminal law is and must be regarded as a so-called *ultimum remedium*, which means that conduct should only be criminalised and criminal law only applied as a last resort, i.e. if all other avenues are inadequate to remedy the security problem. Meanwhile the rejection of the positive security concept of human rights does not imply that the state is not responsible for protecting its citizens through the application of criminal law if necessary. It would, however, be much more attractive if this responsibility were not based on civil human rights but on some other foundation. Although it would go beyond the scope of this article to give a detailed discussion of suitable, relevant alternatives, I note, in particular, that the concept of state sovereignty would be appropriate, in my view.
Starting from the early notion that a central function of the state is to provide security to its citizens, that concept should be further developed along the lines of the most basic principle on which the R2P rests: ‘State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.’ The idea, then, is that such protection may involve guaranteeing security to citizens against criminal conduct by others.

6. Conclusion

Although security interests and individual fundamental rights interests are inextricably engaged with each other, international human rights law offers neither an unequivocal nor a clear perspective on security. In fact it presupposes at least four different concepts of security: (i) international security; (ii) negative individual security against the state; (iii) security as justification to limit human rights; and (iv) a positive state obligation to offer security to individuals against state officials and private parties. Several of these concepts are at odds with each other and some of them only offer diffuse or even vague perspectives on security. These human rights security concepts nevertheless can make a valuable contribution to political and legal discourses on security since they have an important basis in common: all these concepts imply that the referent for security ultimately is the individual. Combined, these concepts could have the potential to offer what may be called a human rights approach to security, and by doing so help to give substance and direction to the human security discourse. If only because security of the individual is a significant perspective, it is important to recognise these different concepts, for this makes it possible to evaluate their strengths and weaknesses and to assess the usefulness of each concept on its own as well as in combination.

The first two concepts principally offer an interpretation of what security in the sense of protection against the exercise of intrusive power by states may cover. Of these, the concept of negative individual security (Concept II) is not only the clearest of all, it also accords most closely with the core essence of human rights treaties such as the ICCPR and the ECHR: offering the individual direct protection against state power. Given that the power of the state as such is infinite, this concept is of great importance to curtail and control that power. It thus recognises that human rights protection is a form of security too and that the state itself constitutes a security threat. As a result, restrictions of the authorities’ powers to counter, for example, terrorism or crime cannot simply be qualified as impeding security since such restrictions also


provide for security. Even from the perspective of security it is, therefore, necessary to discuss how we can avoid a constant balancing between human rights protection and other security interests. In doing so, the security of the individual’s liberty always loses. This also implies—and it is important to see this—that the present concept of security is restricted in scope, even from the point of view of human security, which we have seen encompasses much more than only negative security against the state. With that it is clear that this concept is unfit to serve as a total security model for human security within a state. It seems imperative to me to preserve that restricted scope. Taking more of a human security approach with civil human rights, by bringing less fundamental or perhaps entirely different aspects of individual security under their protection, would in my view fundamentally blur their significance and, therefore, ultimately undermine them. In this respect, it is relevant that human rights are not only mechanisms of protection but also means of communication: when someone invokes a human right, she or he communicates a claim that implies that his or her security is fundamentally at stake, and the way in which and the extent to which this is the case. That claim—and with it human rights’ ability to offer protection—would lose significance if it no longer necessarily relates to a human’s essential being. Consequently, the catalogue of civil human rights currently protects and articulates individuals’ most primary security interests against the power of the state. With that it is making an important and clear contribution to the security discourse in general.

An indirect but nevertheless intended effect of protection at the national level against the exercise of intrusive power by states should be that it also protects individuals against inter-state violence. This brings us to the concept of international security (Concept I), which signifies that human rights protection by states at the national level is not only instrumental to international security but also imperative and thus a foundation of it. Therewith this concept connotes a useful ideal considering the plausibility of the ‘human rights peace theory’ and the fundamental value of human rights. At the same time, the concept has little substantive content since human rights law only provides weak meaning to what international security encompasses and provides hardly any direct guidelines for achieving and preserving international peaceful relations. Perhaps some might view this as a missed opportunity. However, directly applying and developing the international human rights systems as established by the ICCPR and the ECHR with a view to directing international relations would go far beyond the direct purpose and textual scope of these instruments and for that reason alone it is not desirable. Moreover, it would probably significantly increase the political pressure on these systems, thereby undermining their ability to effectively protect human rights in national law and practice. What would be desirable, however, is that these systems—that is, the bodies monitoring the human rights therein—take more explicit account of how
human rights protection (or the lack thereof) by national authorities ultimately affects international security. So, for example, relative to anti-terrorism legislation and practice, where many states have been seen to push or overstep the boundaries and where there is often great impact beyond the national borders, it could be appropriate to reflect on ramifications for international security when interpreting and applying human rights provisions. Moreover, that human rights systems such as the ICCPR and the ECHR should not engage in providing guidelines for international peaceful relations does not mean that the human rights standards they set are irrelevant at the international security level. Human rights can still be useful as leading principles for developing international mechanisms (such as the Responsibility to Protect) by other bodies that do operate in the field of international relations between states (such as the International Court of Justice). In fact, the human rights concept of international security needs more attention within the overall concept of international security. To that end it is necessary to assess how this concept could be further developed and how it relates to other international security concepts.

The last two concepts of security encompass the opposite of the first two: rather than being about protection against the state, they recognise that application of state power may provide security. These concepts thus connect to the idea that a legal system cannot be confined to only offering legal protection and controlling state power; it must also be instrumentalised to suppress crime, terrorism and other insecurities. However, in order to be able to operate an adequate criminal justice system and other security measures, authorities must—under specific conditions and if necessary—have the possibility to infringe some human rights. This given, security can be defined as a justification to limit human rights (Concept III). Since security in this sense is potentially a fundamental obstacle to the effectuation of human rights protection, one should expect human rights law to offer a comprehensive view of what security here entails. However, the concept of security as a ground to limit human rights is in fact not only very weakly developed in human rights law, the concept even approaches security as a fairly uncomplicated aim, the legitimacy of which is unproblematic. This human rights concept of security thus not only fails to contribute much to the discourse on what security encompasses in general, it also fails to force the authorities to provide a balanced and faithful account of the security problem they actually claim to face. The question is whether the other and final concept of security can compensate for this. In my view it cannot and may not, if only because the perspective of that concept is different: whereas limiting human rights for reasons of security may be considered ‘a necessary evil’, the following and final concept regards the state using its power to provide security in principle as ‘a good’.

The final security concept signifies that the protection of human rights requires the state to take appropriate measures to safeguard these rights—or
rather the interest that these rights aim to protect—from violation by others. The essence of this concept is thus the provision by the authorities of positive security of individuals against harm by other private parties or individual officials (Concept IV). Therewith the perspective is that the exercise of state power effectuates human rights protection rather than limiting it, even if the state’s measures are in fact repressive and interfere with the human rights of the individual against whom the measures are applied. Since these positive obligations to offer protection against others are mainly concerned with the most severe invasions of the individual (such killing, grievous bodily harm, rape, human trafficking, child pornography and abduction), this concept offers a substantive contribution to determining what human security means, in that it articulates what the most primary security interests of the individual against others entail. Moreover, it contributes to the empowerment of victims. Yet, the recognition of positive obligations on the state to apply repressive measures through for instance the criminal justice system against individuals constitutes a fundamental shift within the concept of human rights. This is particularly the case if these individuals are being addressed as private parties. In my view, the most alarming—but not the only—negative consequence of this shift is that civil human rights no longer serve to control and restrain the power of the state (cf. notably Concept II), but they henceforth to an important degree also legitimise and even require the use of that power (Concept IV). In that respect, the human rights law system is neutralising itself, that is, Concept II and Concept IV can be played off against each other to the cost of the individual. Thus, although the present concept fairly clearly articulates a fundamental aspect of human security and moreover helps to effectuate it, particularly the preservation of human rights and their ability to protect individuals against the state demands that the core responsibility of the state to offer its citizens security shall not be based on human rights but rather on the concept of sovereignty.

The four concepts signify that human rights and security interrelate at different levels with each other. At all these levels human rights law has important contributions to make to the security discourse. In its totality the human rights approach to security is fairly disappointing, however. This is particularly the case because several of the concepts insufficiently substantiate what security encompasses, while not all concepts are mutually reinforcing: in some cases they even undermine each other. With that, international human rights law fails to provide a comprehensive, balanced view of what security means from a human rights perspective. As a result, human rights law offers less substance and direction to the security discourse than it potentially should be able to, while moreover this unnecessarily weakens the ability of human rights to protect the individual.