The Concept of Security in International Law

Hitoshi Nasu

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IN

INTERNATIONAL LAW

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To my wife, Akane, for unfailing support

and

my daughter, Claire, for being my beacon of hope

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FOREWORD

From its inception, the United States Military Academy has developed leaders of character through education, training, and instruction that includes a focused study of the humanities. General Douglas MacArthur, upon his appointment as Superintendent of the Academy in 1919, held the conviction that a well-rounded curriculum was essential to educating cadets on the "mechanics of human feeling." Today, the tradition continues with this volume, which epitomizes the ways in which West Point can meaningfully engage the global community beyond the Academy's walls.

Dr. Hitoshi Nasu's spectacular work on security policy and international law, a perfect choice for the first-ever monograph to be published by the West Point Press, is apposite under the current geopolitical conditions and global security environment in which nations operate. Conflict above and below the "use of force" threshold tests the power and resilience of international law as a system of global governance, challenging our resolve to govern human societies under the rule of law. Even (and especially) West Point cadets—Soldier-Scholars, all—will benefit immeasurably from work such as this in their critical roles as U.S. Army officers; in subsequent careers, they may rely on the security concepts found here as policymakers leading our nation.

Despite its rapid growth in the latter half of the twentieth century, international law still has not prevented the open violence which continues to occur throughout the world to this day. I hope this book provides a silver lining, as it helps identify a general theory of international law that sustains international relations even at the most difficult times. The fact that it took Dr. Nasu ten years to compile his thoughts is reflective of the rigor and care with which he has studied the "mechanics of human feeling" epitomized in the concept of security. The potential of, and problems with, international law disentangled in this book as a rationalizing tool for action offers a piece of wisdom as the nation and West Point, the premier leader development institution of the world, move into their next stages of development. I congratulate Dr. Nasu for his profound contribution to this lofty and most important endeavor.

Brigadier General Shane R. Reeves
Dean of the Academic Board
United States Military Academy
West Point, New York

PREFACE

Human beings are irrational; this is the premise upon which I approach the subject of international law and security. Modern social sciences have embraced the assumption of human rationalism as the predominant philosophical foundation for intellectual and social advancement. However, when faced with a threat to their own security, human societies are driven by fear and compelled to react under considerable uncertainty. The role and limit of international law as a means of regulating irrational behavior driven by fears in international relations has intrigued me for a long time.

Compiled in this book are the outcomes of my research, reflection, and discursive thoughts developed for over a decade. My preliminary efforts to explore the interaction of international law with the discourse of security resulted in the following publications:

- Hitoshi Nasu, "The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System," *Amsterdam Law Forum* 3, no. 3 (2011) 15–33.
- Hitoshi Nasu, "Law and Policy for Antarctic Security: An Analytical Framework," in *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives*, ed. Alan D. Hemmings, Donald R. Rothwell, and Karen N. Scott (London: Routledge, 2012) 18–32.
- Hitoshi Nasu, "The Place of Human Security in Collective Security," *Journal of Conflict & Security Law* 18 (2013) 95–129.
- Hitoshi Nasu and Kim Rubenstein, "The Expanded Conception of Security and Institutions," in *Legal Perspectives on Security Institutions*, ed. Hitoshi Nasu and Kim Rubenstein (Cambridge: Cambridge University Press, 2015) 1–24.
- Hitoshi Nasu, "Human Security and International Law: The Potential Scope for Legal Development within the Analytical Framework of Security," in *Security and International Law*, ed. Mary E. Footer et al. (Portland, OR: Hart Publishing, 2016) 25–42.
- Hitoshi Nasu, "The Global Security Agenda: Securitization of Everything?" in *The Oxford Handbook of International Law of Global Security*, ed. Robin Geiß and Nils Melzer (Oxford: Oxford University Press, 2021) 37–53.

While these studies helped deepen my understanding of the field, this book marks an entirely new venture fundamentally distinct from previous contributions. Instead of exploring the potential and limits of international law in meeting specific security challenges, it aims to build a general theory of international law that rationalizes derogatory action on account of security and its conceptual evolution.

The goal was set. Then came the hardest part of this venture: deciding the methodological approach and fixing the parameters of research. Of all the different possibilities—from a theoretical approach drawing on various traditions of legal philosophy to a socio-legal study of ideological variety within existing legal institutions—I made a pragmatic choice to focus on jurisprudence as developed through the practice of international adjudication. This decision is partly based on the availability and accessibility of international legal materials produced by international judicial and treaty monitoring institutions. But I must also admit my educational background and teaching experience in common law jurisdictions influenced the approach of my work. The idea that "the life of the law has not been logic; it has been experience" appears to me fitting to describe my intention behind this choice.[1]

The analysis developed in this book draws on the materials and publications I was able to find by December 31, 2021. It is by no means intended to be a comprehensive coverage of scholarship produced in the field of international security law. Nor does it represent the best of wisdom benefiting humanity. I nonetheless hope this book contributes to documenting an aspect of humanity's experience in dealing with fear and uncertainty while maintaining the international legal order for managing political confrontation and socio-cultural diversity among nations.

West Point, NY
January 2022

1 O. W. Holmes, *The Common Law* (Boston: Little, Brown, and Company, 1881) 1.

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In the preparation of this work, I have benefitted from inspiration and insight shared by many friends and scholars in the field. I particularly thank the late Professor Ivan A. Shearer, Professor Donald R. Rothwell, and Professor Takashi Tsugeyama as my mentors for their encouragement to pursue my interest in the field of international security law. I am also indebted to Associate Professor David Letts, Professor Wolff Heintschel von Heinegg, Associate Professor Kubo Mačák, Professor Rob McLaughlin, Professor Michael N. Schmitt, Professor Sean Watts, and Professor Nigel D. White for their collegiality, friendship, and intellectual stimulation through occasional conservations on a variety of topics. I am grateful to Sir Adam Roberts for directing me to the writings of Thomas Hobbes, which helped shape my philosophical understanding of the subject.

In addition, I must express my special thanks to Professor Simon Chesterman, Professor Erika de Wet, Associate Professor Machiko Kanetake, Professor Marko Milanovic, and anonymous reviewers for their comments on earlier versions of the text. Nor can I fail to mention specifically the research assistance of Ms. Amanda Neilson and Ms. Kamilya Nelson in gathering and sifting through countless cases. I also appreciate the support provided at different stages of research by librarians at the Australian National University, National University of Singapore, University of Exeter, and the United States Military Academy at West Point.

Last, but not least, I would not have been able to publish this work without encouragement and support from Brigadier General Shane R. Reeves, Colonel Winston S. Williams, and Professor Rob Barnsby. Colonel Jordon E. Swain, Frank Rogers, Joe Haley, Monica Doebel, and Titus Ledbetter provided an excellent editorial support for polishing the text at the final stages of its preparation. I thank them all for facilitating the publication process. However, errors and omissions are mine alone.

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Statute of the Permanent Court of International Justice, Dec. 16, 1920 (entered into force Aug. 20, 1921) 6 LNTS 380.

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United Nations General Assembly Resolution 38/188 H "Independent Commission on Disarmament and Security Issues" (Dec. 20, 1983).

United Nations General Assembly Resolution 50/54 "Review of the Procedure Provided for under Article 11 of the Statute of the Administrative

LIST OF ABBREVIATIONS

All ER	All England Law Reports
ALR	Australian Law Reports
ASEAN	Association of Southeast Asian Nations
CETS	Council of Europe Treaty Series
CLR	Commonwealth Law Reports (Australia)
CTS	Consolidated Treaty Series, ed. Clive Parry (Oceana Publications, 1969–81)
ECHR	European Commission of Human Rights
ECOWAS	Economic Community of Western African States
ECR	European Court Reports
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EU	European Union
GAOR	General Assembly Official Records
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HCJ	High Court of Justice (Israel)
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia

ILC	International Law Commission
ILM	International Legal Materials
ITLOS	International Tribunal for the Law of the Sea
LNTS	League of Nations Treaty Series
NZLR	New Zealand Law Reports
OJ	Official Journal of the European Union
PCIJ	Permanent Court of International Justice
PRC	People's Republic of China
RIAA	Reports of International Arbitral Awards
SCOR	Security Council Official Records
SCR	Supreme Court Reports (Canada)
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNTS	United Nations Treaty Series
US	United States of America
UST	United States Treaties and Other International Agreements
TIAS	Treaties and Other International Acts Series (US)
TS	Treaty Series (US)
VCLT	Vienna Convention on the Law of Treaties
WHA	World Health Assembly
WHO	World Health Organization
WTO	World Trade Organization

INTRODUCTION

Security is a protean concept.[1] It is capable of adapting flexibly as subjective perceptions of reality change, or social conditions and practices evolve.[2] The conceptual flexibility reflects diverse origins of the terminology. The modern English word "security" originates from the Greek word *asphaleia*, in the sense of "stability and assurance from danger." Thucydides used it in the Melian dialogue as part of the Athenian rhetoric for demanding the submission of Melos in denial of its independent and neutral status.[3] Another origin is found in the Latin word *securitas*, which for Cicero meant an "absence of anxiety and fear" as a subjective condition for one's happiness.[4] Modern concepts of security are all rooted in those different terminological origins, oscillating between the subjective state of mind and objective conditions of risk to acquired values.[5]

Despite its conceptual ambiguity, security became a prominent theme in the European discourse of political philosophy during the Age of Reason.[6] For Thomas Hobbes, the idea of security was central to his political theory that characterized the natural condition of humanity as the *bellum omnium contra omnes* (war of all against all) in the absence of law and political power.[7] Deterrence based on fear and threat defines security in such a state of nature, which Hobbes regarded as a prerequisite to the exercise of the law of nature and, hence, the preservation of peace.[8] John Locke considered security to be an absence of unjust violence as the basis for his vision of political authority.[9] Many of the classical

1 *Secretary of State for the Home Department v. Rehman* [2000] 3 All ER 778, para. 35 (UK Court of Appeals).
2 Arnold Wolfers, "'National Security' as an Ambiguous Symbol," *Political Science Quarterly* 67 (1952) 481, 484–85.
3 Thucydides, *History of the Peloponnesian War*, ed. Benjamin Jowett (Oxford: Clarendon Press, 1881) bk. V ch. 97.
4 Cicero, *Tusculan Disputations*, trans. C. D. Yonge (New York: Harper & Brothers, 1877) bk. V ch. XIV.
5 For details, see John T. Hamilton, *Security: Politics, Humanity, and the Philosophy of Care* (Princeton, NJ: Princeton University Press, 2013) 51–63; Lucia Zedner, *Security* (Abingdon: Routledge, 2009) ch. 1; J. Frederik M. Arends, "From Homer to Hobbes and Beyond—Aspects of 'Security' in the European Tradition," in *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century*, ed. Hans Günter Brauch et al. (Berlin: Springer, 2008) 263.
6 For details, see Rhonda Powell, *Rights as Security: The Theoretical Basis of Security of Person* (Oxford: Oxford University Press, 2019) 46–49; Aziz Rana, "Who Decides on Security?" *Connecticut Law Review* 44 (2012) 1417, 1426–36; James Spigelman, "The Forgotten Freedom: Freedom from Fear," *International and Comparative Law Quarterly* 59 (2010) 543, 547–49; Mark Neocleous, *Critique of Security* (Edinburgh: Edinburgh University Press, 2008) 13–32; Emma Rothschild, "What is Security?" *Daedalus* 124, no. 3 (1995) 53, 60–65.
7 Thomas Hobbes, *Leviathan: Or the Matter, Forme, Power of a Common-Wealth Ecclesiasticall and Civill* (London: Andrew Crooke, 1651) pt. 1 ch. XIII.
8 Thomas Hobbes, *De Cive* (London: R. Royston, 1651) ch. V para 3.
9 John Locke, *Two Treatises of Government*, ed. Thomas Hollis (London: A. Miller et al., 1764) bk. II §§ 8, 11,

liberalists, on the other hand, conceptualized security as a personal condition or belief for the enjoyment of political liberty,[10] economic development,[11] and happiness.[12] The concept of security was thus used both in a positive (safety and stability) and negative (absence of fear) sense in its origins.

Even though the term "security" finds its roots in European political discourse, the diverse ideas of security are also prevalent in other parts of the world.[13] The different usages of the term laid philosophical foundations for the flexible and dynamic evolution of the concept as new societal challenges emerged. In traditional international law, security meant the physical protection of national territory and population from the destructive effects of warfare by military means.[14] However, the modern discourse of security has diversified to reflect contemporary public concerns in a wide range of areas, such as economy, trade, food, energy, resources, health, and the environment.[15] The United Nations (UN), originally established "to save succeeding generations from the scourge of war" among other aims,[16] has indeed expanded the scope of its activities for the maintenance of international peace and security.[17]

The concept of security has also adapted to meet the challenges of globalization by incorporating into political discourse new ideas from different philosophical traditions. In 1994, the UN Development Programme adopted the concept of human security in its Human Development Report, drawing attention to real sources of insecurity from

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10 Charles Louis de Secondat de Montesquieu, *De l'esprit des lois*, ed. Laurent Versini (Paris: Gallimard, 1995) bk. XII ch. II ("*La liberté politique consiste dans la sûreté, ou du moins dans l'opinion que l'on a de sa sûreté*").

11 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. R. H. Campbell and A. S. Skinner (Oxford: Oxford University Press, 1976) 284, 412, 540; Adam Smith, *The Theory of Moral Sentiments*, ed. Dugald Stewart (London: Henry G. Bohn, 1853) 311.

12 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907) ch. III para. 1, ch. VII para. 1.

13 See Hans Günter Brauch et al., eds., *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century* (Berlin: Springer, 2008) pt. III.

14 Hans Kelsen, *Collective Security under International Law* (Washington DC: US Government Printing Office, 1957) 1 (defining security as "the protection of men against the use of force by other men"). See chapter 1.III for further analysis.

15 See, for example, Shahar Hameiri and Lee Jones, *Governing Borderless Threats: Non-Traditional Security and the Politics of State Transformation* (Cambridge: Cambridge University Press, 2015); Mely Caballero-Anthony, ed., *An Introduction to Non-Traditional Security Studies: A Transnational Approach* (London: SAGE Publications, 2015); Ashok Swain, *Understanding Emerging Security Challenges: Threats and Opportunities* (Abingdon: Routledge, 2013).

16 Charter of the United Nations preamble para. 1, June 26, 1945 (entered into force Oct. 24, 1945) 59 Stat. 1031, TS No. 993, 1 UNTS XVI.

17 See Simon Chesterman, Ian Johnstone, and David M. Malone, *Law and Practice of the United Nations: Documents and Commentary*, 2nd ed. (Oxford: Oxford University Press, 2016) pt. 3.

which people around the world suffered.[18] In 2003, the Association of Southeast Asian Nations (ASEAN) enunciated the principle of comprehensive security as "having broad political, economic, social and cultural aspects,"[19] which has been incorporated into the regional norm with the adoption of the 2007 ASEAN Charter.[20] Similarly, the African Union has embraced a broad, multi-dimensional concept of security that "encompasses both the traditional, state-centric notion of the survival of the state and its protection by military means from external aggression, as well as the non-military notion which is informed by the new international environment and the high incidence of intra-state conflict."[21]

The geographical context for security has further expanded to the high seas, polar regions, outer space, and cyberspace due to technological advances enabling human exploration and exploitation beyond territorial limits. The concept of security will inevitably continue to evolve and intrude into various issue areas and geographical domains as the public perception of fear changes and as the technology advances. However, its impact on, and challenges to, international law are yet to be fully understood. The subjective values underpinning the conceptual evolution of security have the potential to undermine the development of international law as a political project,[22] impeding its quest for objectivity—or a shared perception of being objective[23]—and universality.

The dynamic nature of the political construct of security does not bode well with the role of international law to provide justifiable solutions to normative problems through the application of legal rules, independent of political considerations and natural morality.[24] The tension identified here is not about realist critiques of the efficacy

18 UN Development Programme, *Human Development Report* (New York: UN, 1994) 22–40. See also UNGA Res. 60/1 "2005 World Summit Outcome" (Sep. 16, 2005) para. 143.

19 Declaration of ASEAN Concord II section A para. 2 (Oct. 7, 2003), reprinted in 43 ILM 18.

20 Charter of the Association of Southeast Asian Nations art. 1(8), Nov. 20, 2007 (entered into force Dec. 15, 2008) 2624 UNTS 223. For details, see Hitoshi Nasu et al., *The Legal Authority of ASEAN As a Security Institution* (Cambridge: Cambridge University Press, 2019) 31–35.

21 Solemn Declaration on a Common African Defence and Security Policy para. 6 (Feb. 28, 2004).

22 Martti Koskenniemi, "The Fate of Public International Law: Between Techniques and Politics," *Modern Law Review* 70 (2007) 1, 1–3, 29–30. For a theoretical dilemma between objectivity and normativity, see Miodrag A. Jovanović, *The Nature of International Law* (Cambridge: Cambridge University Press, 2019) 78–127; Emmanuel Voyiakis, "International Law and the Objectivity of Value," *Leiden Journal of International Law* 22 (2009) 51–78; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005) ch. 1.

23 For theoretical reflections on the objectivity of international law, see especially Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford: Oxford University Press, 2012) 41–43, 52–55.

24 Koskenniemi, *From Apology to Utopia*, *supra* note 22, 24. Cf. Jan Anne Vos, *The Function of Public International Law* (The Hague: TMC Asser, 2013); Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1995) 1–11.

of international law as a normative discourse, to which various responses have been provided elsewhere.[25] Rather, it is more intrinsic to the internal structure and operation of international law that performs a social function as an independent system of governance in international relations.[26]

It is feared, on the one hand, that the continued expansion of security in political discourse may undermine norms and rules of international law in the absence of objective criteria to accommodate conceptual changes within the framework of international law. This concern arises because security is often considered the antithesis of the rule of law and civil liberty, legitimizing a trade-off for the suspension or violation of rules and the deprivation of freedom.[27] For Carl Schmitt, sovereignty represents an unlimited authority capable of suspending the entire legal order in a state of exception when it considers that there is an extreme emergency.[28] However, Schmitt's crude view of power against the liberal ideal of the rule of law has been challenged in contemporary liberal democracies.[29] As Jeremy Waldron has warned, the rhetorical image of balance between law and security involves false connotations,[30] which may unnecessarily limit the normative force of international law as a rational mechanism for managing international affairs.

On the other hand, the rigidity of legal instruments as the means of regulating international relations militates against their flexible adaptation in response to the conceptual evolution of security. There are inherent difficulties, as Alexander Hamilton envisaged in designing the American constitutional framework, with foreseeing or defining "the extent and variety of national exigencies, or the corresponding extent

25 See especially James Crawford, *Chance, Order, Change: The Course of International Law* (The Hague: Hague Academy of International Law, 2014) 31–49; Mary E. O'Connell, *The Power and Purpose of International Law: Insights into the Theory and Practice of Enforcement* (Oxford: Oxford University Press, 2008); Ian Brownlie, *The Rule of Law in International Affairs* (The Hague: Martinus Nijhoff, 1998) ch. 1.

26 Philip Allott, "The Concept of International Law," *European Journal of International Law* 10 (1999) 31.

27 See Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: Oxford University Press, 2007) 26–30. Cf. Ian Loader and Neil Walker, *Civilizing Security* (Cambridge: Cambridge University Press, 2007) 195–233.

28 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago, IL: University of Chicago Press, 2005) 6–7, 12–13.

29 See, for example, Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Portland, OR: Hart Publishing, 2018) ch. 4; Neocleous, *supra* note 5, 69–75; Evan J. Criddle and Evan Fox-Decent, "Human Rights, Emergencies, and the Rule of Law," *Human Rights Quarterly* 34 (2012) 39, 74–79; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) 35–54; Oren Gross, "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy," *Cardozo Law Review* 21 (2000) 1825 and literature cited therein.

30 Jeremy Waldron, "Security and Liberty: The Image of Balance," *Journal of Political Philosophy* 11 (2003) 191. See also Oren Gross, "Security vs. Liberty: On Emotions and Cognition," in *The Long Decade: How 9/11 Changed the Law*, ed. David Jenkins, Amanda Jacobsen, and Anders Henriksen (Oxford: Oxford University Press, 2014) 45.

and variety of the means which may be necessary to satisfy them."[31] Oscar Schachter describes international law as "a product of political and social forces" and "an instrument to meet changing ends and values."[32] Yet one may wonder whether the existing rules and institutions of international law are flexible enough to address new security threats.[33]

One of the legal mechanisms for accommodating the conceptual evolution of security is the plea of fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, which is set forth in Article 62 of the Vienna Convention on the Law of Treaties.[34] However, as the International Court of Justice observed in the *Gabčíkovo-Nagymaros Project*, its negative and conditional wording indicates that the plea can only be applied in exceptional cases for the sake of stability in treaty relations.[35] As this judgment illustrates, the existing framework of international law is not as flexible as one might hope to address a host of new threats that emerge in the vicissitudes of time.[36]

It is this twisted relationship between the protean concept of security and the rigid framework of international law that will be unravelled in the present study. By examining how the concept of security interacts with various rules of international law, this book aims to identify general criteria that delineate the legally valid recourse to the concept of security within the framework of international law. This general schema constitutes an overarching limit to which legal control extends over the conduct of states and international institutions in the security realm, without prejudice to the operation of various legal requirements specific to each rule. In other words, it is a common denominator of rule-specific requirements for valid claims of security in the legal discourse.

The central question explored in this book is whether international law affords general criteria that can be applied to regulate the exercise of sovereign authority *extra legem sed intra jus* (outside the protection of the rule but within the province of law). As such, the

31 Alexander Hamilton, "The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union," in *The Federalist Papers*, ed. Ian Shapiro et al. (New Haven, CT: Yale University Press, 2009) no. 23, 115.

32 Oscar Schachter, "International Law in Theory and Practice," *Recueil des Cours* 178 (1982) 9, 26.

33 Nigel White, "Security Agendas and International Law: The Case of New Technologies," in *Security and International Law*, ed. Mary E. Footer et al. (Portland, OR: Hart Publishing, 2016) 3, 13.

34 Vienna Convention on the Law of Treaties art. 62, May 23, 1969 (entered into force Jan. 27, 1980) 1155 UNTS 331. It reads, in relevant part: "A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty…"

35 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 1997 ICJ Rep. 7, 65 para. 104.

36 See Christina Binder, "Stability and Change in Times of Fragmentation: The Limits of *Pacta Sunt Servanda* Revisited," *Leiden Journal of International Law* 25 (2012) 909.

focus of the inquiry is the practice of international adjudication (both judicial ruling and quasi-judicial treaty monitoring) in which derogatory measures on security grounds are interpreted, defended, and arbitrated within the system of international law. Is the concept of security necessarily an antithesis of the rule of law, defying legal control by means of international adjudication? Or are there any judicial criteria according to which the validity of security-based pleas can be evaluated in the legal realm? Such criteria must be generally applicable regardless of the legal context in which the concept of security is invoked and despite various constraints imposed on the process of adjudication for practical, structural, or institutional reasons.

This inquiry is not designed to address specific security issues in discrete areas of international law, such as international peace and security law,[37] the law of the sea,[38] international investment law,[39] international human rights law,[40] or the law of armed conflict.[41] Nor does it engage with moral or political constraints upon the exercise of prerogative powers beyond the province of the law.[42] This research builds partly upon previous contributions to the study of international law and security,[43] but it is fundamentally distinct in that it explores a general theory of international law for

37 Nicholas Tsagourias and Nigel D. White, *Collective Security: Theory. Law and Practice* (Cambridge: Cambridge University Press, 2013); Alexander Orakhelashvili, *Collective Security* (Oxford: Oxford University Press, 2011); Serge Sur, *International Law, Power, Security and Justice: Essays on International Law and Relations* (Portland, OR: Hart Publishing, 2010) pt. III; Richard Burchill, Nigel D. White, and Justin Morris, eds., *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (Cambridge: Cambridge University Press, 2005); Kelsen, *supra* note 12.

38 Malcolm D. Evans and Sofia Galani, eds., *Maritime Security and the Law of the Sea: Help or Hindrance?* (Cheltenham: Edward Elgar, 2020); James Kraska and Raul Pedrozo, *International Maritime Security Law* (The Hague: Martinus Nijhoff, 2013); Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011); Natalie Klein, Joana Mossop, and Donald R. Rothwell, eds., *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Abingdon: Routledge, 2010).

39 Sebastián Mantilla Blanco, *Full Protection and Security in International Investment Law* (Berlin: Springer, 2019).

40 Benjamin J. Goold and Liora Lazarus, eds., *Security and Human Rights*, 2nd ed. (Portland, OR: Hart Publishing, 2019); Powell, *supra* note 5; Dorothy Estrada-Tanck, *Human Security and Human Rights under International Law: The Protections Offered to Persons Confronting Structural Vulnerability* (Portland, OR: Hart Publishing, 2016); Piet Hein van Kempen, "Four Concepts of Security—A Human Rights Perspective," *Human Rights Law Review* 13 (2013) 1.

41 Marco Sassòli, "The Concept of Security in International Law Relating to Armed Conflicts," in *Security: A Multidisciplinary Normative Approach*, ed. Cecilia M. Bailliet (The Hague: Martinus Nijhoff, 2009) 7–22.

42 Cf. Clement Fatovic and Benjamin A. Kleinerman, eds., *Extra-Legal Power and Legitimacy: Perspectives on Prerogative* (Oxford: Oxford University Press, 2013); Clement Fatovic, *Outside the Law: Emergency and Executive Power* (Baltimore, MD: Johns Hopkins University Press, 2009); Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006) ch. 3; Giorgio Agamben, *State of Exception*, trans. Kevin Atell (Chicago, IL: University of Chicago Press, 2005).

43 See, for example, Robin Geiß and Nils Melzer, eds., *The Oxford Handbook of the International Law of Global Security* (Oxford: Oxford University Press, 2021); Mary E. Footer et al., eds., *Security and International Law* (Portland, OR: Hart Publishing, 2016); Jonas Ebbesson et al., eds., *International Law and Changing Perceptions of Security: Liber Amicorum Said Mahmoudi* (Leiden: Brill, 2014).

rationalizing derogatory measures on account of security, rather than the potential and limit of international law in meeting contemporary security challenges.

To that end, this book engages in a systematic analysis of the normative impact that the concept of security and its evolution has had on the development and operation of international law within the analytical framework of security set out in chapter 1. This analytical framework illuminates the conceptual depth and width of an overall construct of security, with which the existing rules of international law selectively interact. The distorted concept of security in the normative discourse of international law is inherent in its sovereignty-based structure as the basis for the operation of international adjudication reviewed in the subsequent analysis. A range of jurisprudence derived from the practice of international courts, tribunals, and treaty monitoring institutions will be examined to determine the extent to which international law can accommodate or adapt itself to the conceptual evolution of security.

Chapter 1 introduces the analytical framework of security to provide the conceptual foundation for developing a coherent legal consideration of security issues across the field of international law. It draws on the theory of securitization, which was originally developed by the Copenhagen School of security studies. This theory provides the basis for dissecting the concept of security with respect to: (i) the referent object of security; (ii) the scope of security threats; and (iii) the means to achieve security. The analytical framework itself is devoid of normative significance or implications. However, its relationship with international law presents normative questions regarding the rule of law in international relations.

Chapter 2 examines how the concept of security is applied in the body of international law by reviewing relevant rules of customary international law and treaties where security interests are expressly protected or implicitly considered. It demonstrates the centrality of national security, which is inextricably woven into the fabric of international law. By contrast, the protection of other security interests, such as the security of person and human security, is context specific and limited in scope. Such selective and distorted application of security in the normative discourse of international law sets the condition upon which general criteria for determining the validity of security-based pleas must be formed.

With the centrality of national security in focus, chapters 3 through 5 examine how the concept of security has been addressed in the practice of international adjudication. Chapter 3 considers three different ways in which the concept of security has been used to preclude or restrain international adjudication: as a jurisdictional bar, non-justiciability,

and judicial impropriety. The mixed jurisprudence discussed in this chapter highlights the inherent tension that tests the readiness of adjudicators when a security-based plea is invoked. On the one hand, the imperative interest of security demands discretion be reserved for national authorities and international organizations. The public interest of accountability, on the other hand, demands legal control and constraint on the exercise of such discretion.

The same tension is inherent to the legal construction of security in the context of treaty interpretation, which is the focus of chapter 4. This chapter considers whether the legal construction of security is a viable mechanism for ensuring objectivity in international adjudication against the subjective perception of security that flexibly changes and evolves over time. In particular, this chapter critically evaluates the potential scope for restrictive and evolutive interpretation of the legal text associated with the concept of security as it expands through the political process of securitization. The ability of international law to accommodate the changing perception of security through interpretation does not necessarily compromise its normative role in regulating the exercise of derogatory powers, which forms the subject of the next chapter.

Chapter 5 explores regulatory requirements that generally apply when the concept of security is invoked as the means of justifying derogatory measures that would otherwise be found unlawful. In particular, this chapter focuses on the burden of proof, necessity, and proportionality, which are internally embedded in various rules of international law as balancing principles. Central to this inquiry is the extent to which and the manner in which these principles operate as a regulatory mechanism to facilitate an objective assessment in balancing the choice of derogatory measures, based on the subjective perception of security, against other interests protected under international law.

The last aspect of interaction between the concept of security and international law, which will be discussed in chapter 6, concerns security institutions. The development of security institutions contributes to normalcy and the containment of derogatory response to security threats, as illustrated by the UN collective security system. However, with the conceptual evolution of security, these institutions find the need or an opportunity to adjust themselves to meet new challenges. An institutional development resulting therefrom may well affect the intricate balance of competing interests that has been sustained within current legal frameworks. This chapter addresses the tension that arises from the institutional evolution to address contemporary security threats within the legal limit of institutional competence. It does so by examining the extent to which international institutions may expand their

powers and competence in the imperative interest of security and whether the rule of law in international relations extends to the operation of international institutions by imposing legal constraint on their expansion in response to the evolving security environment.

This book concludes by identifying general criteria for delineating legally valid recourse to the concept of security, drawing on the preceding analysis of the normative impact that the concept of security and its evolution has had on the development and operation of international law. Consideration will also be given to the implications of those criteria for the future development of international law within the analytical framework of security. While uncertainty remains as to the general acceptability of those criteria in practice, their incorporation into the normative discourse of international law will facilitate greater uniformity in the future development of jurisprudence as the concept of security continues to evolve.

1

THE ANALYTICAL FRAMEWORK OF SECURITY

I. Introduction: The Theory of Securitization

International law does not provide any definite meaning of security that applies across the field. However, scholarly debates have advanced our theoretical and conceptual understanding of security. These debates contribute to an intellectual foundation for building an analytical framework in which the constitutive elements of security are brought to light.

The analytical framework of security contributes to the coherent legal consideration of security issues across the field of international law. It also facilitates a critical evaluation of existing jurisprudence that has been developed to address a particular security concern prevailing at the time of its formation. In the absence of a general definition of security in international law, any attempt to understand it in a specific legal context offers an incomplete picture with certain societal priorities. An analytical framework helps us understand how each fragment of security portrayed in a specific context relates to each other in the constellation of security constructs.

The conceptual analysis of security owes largely to the development of security studies over the last few decades.[1] In particular, the theory of securitization is central to the modern understanding of security as an elastic, diverse, and context-dependent concept rather than a fixed, defined notion.[2] The Copenhagen School theorized the process of securitization by conceptualizing security as a self-referential practice that constitutes a shared understanding of an existential threat and the collective response to

1 For an overview of the modern development in security studies, see, for example, Keith Krause and Michael C. Williams, "Security and 'Security Studies': Conceptual Evolution and Historical Transformation," in *The Oxford Handbook of International Security*, ed. Alexandra Gheciu and William C. Wohlforth (Oxford: Oxford University Press, 2018) 14–28; Barry Buzan and Lene Hansen, *The Evolution of International Security Studies* (Cambridge: Cambridge University Press, 2009).

2 See generally Ralf Emmers, "Securitization," in *Contemporary Security Studies*, ed. Alan Collins, 5th ed. (Oxford: Oxford University Press, 2018) 173; Thierry Balzacq, *Securitization Theory* (Abingdon: Routledge, 2011); Rita Taureck, "Securitization Theory and Securitization Studies," *Journal of International Relations and Development* 9 (2006) 53.

it.[3] Drawing on the speech act in language theory, this school conceived securitization as the process involving the presentation of an issue as an existential threat by a securitizing actor (the securitization move) and its acceptance by the relevant audience as such.[4]

The emergence of this theory marked a departure from the traditional security discourse as the narrow focus on national security and military powers became increasingly considered inadequate in the post-Cold War era.[5] The theory has broadened the conceptual parameters of security, free from any specific object to be secured (such as the sovereign state) or a specific type of threat (such as military threats).[6]

Drawing on aspects of the securitization theory, this chapter develops a three-dimensional analytical framework of security that comprises: (i) the referent object of security; (ii) the scope of security threats; and (iii) the means to achieve security.[7] This framework is discussed below to illuminate how each of these constitutive elements is manifested in international law. The chapter ends with a preliminary observation regarding the normative impact of securitization on the rule of law in international relations, identifying indeterminacy and universality as two challenges that the conceptual evolution of security poses to the operation of international law.

II. The Referent Object of Security

According to the theory of securitization, the self-referential practice to construct a shared understanding of an existential threat involves three units: referent objects (which are "things that are seen to be existentially threatened and that have a legitimate claim to survival"); securitizing actors (who securitize issues); and functional actors (who affect the dynamics of decision-making).[8] The notion of referent object, as an analytical construct that captures different values for survival, is axiomatic to the

3 See especially Barry Buzan, Ole Wæver, and Jaap de Wilde, *Security: A New Framework for Analysis* (Boulder, CO: Lynne Rienner, 1998); Ole Wæver, "Securitization and Desecuritization," in *On Security*, ed. Ronnie D. Lipschutz (New York: Columbia University Press, 1995) 46.

4 For details, see Buzan, Wæver, and de Wilde, *supra* note 3, 23–45.

5 Barry Buzan, *People, States and Fear* (London: Macmillan, 1991) 29. On its significance for broader areas of international relations theory, see Michael C. Williams, "Words, Images, Enemies: Securitization and International Politics," *International Studies Quarterly* 47 (2003) 511; Bill McSweeny, "Identity and Security: Buzan and the Copenhagen School," *Review of International Studies* 22 (1996) 81.

6 Krause and Williams, *supra* note 1, 22.

7 Cf. Nigel D. White and Auden Davies-Bright, "The Concept of Security in International Law," in *The Oxford Handbook of the International Law of Global Security*, ed. Robin Geiß and Nils Melzer (Oxford: Oxford University Press, 2021) 19; Rhonda Powell, *Rights as Security: The Theoretical Basis of Security of Person* (Oxford: Oxford University Press, 2019) ch. 3; David A. Baldwin, "The Concept of Security," *Review of International Studies* 23 (1997) 5, 12–17.

8 Buzan, Wæver, and de Wilde, *supra* note 3, 36.

conceptual understanding of security and therefore forms an aspect of the three-dimensional framework of security presented in this chapter.

There is no normative limit to what may be construed as a referent object. However, there is a theoretical limit derived from its premise that places the survival of a collective unit—the politics of existential threat—as the defining core of security studies.[9] In international law, such collective units manifest themselves in various international instruments and institutions through which the protection of security interests are expressed or practiced. There are four potential collective units germane to international law and practice that capture different values for survival. These units are associated with: (i) national security; (ii) international security; (iii) human security; and (iv) regime security.

A. National Security

The referent object of security has traditionally been the protection of sovereign territory (defense of the realm) from foreign interference, such as armed invasion, espionage, and sabotage.[10] For example, a comprehensive study of concepts of security, carried out by a group of governmental experts under the United Nations (UN) General Assembly mandate,[11] defined security as "a condition in which States consider that there is no danger of military attack, political pressure or economic coercion, so that they are able to pursue freely their own development and progress."[12] As will be discussed in chapter 2, national security occupies the place of prominence within the state-centric structure of international law.

Although the notion of national security is inextricably woven into the fabric of international law, what constitutes the state or nation as a referent object of security under international law is debatable. The object of national security can be variably conceived as the government in power, political regime, or the nation as a whole. For example, one may argue that national security can be invoked to justify restrictions on human rights "only if the interest of the whole nation is at stake," and not "in the sole interest of a government, regime or power group."[13] In reality, however, it is

9 Ibid., 27.

10 See, for example, Michael Supperstone, *Brownlie's Law of Public Order and National Security*, 2nd ed. (London: Butterworths, 1981) 246–55; David Williams, *Not in the Public Interest: The Problem of Security in Democracy* (London: Hutchinson, 1965) ch. 1.

11 UNGA Res. 38/188 H "Independent Commission on Disarmament and Security Issues" (Dec. 20, 1983).

12 Report of the Secretary-General: Concepts of Security, UN Doc. A/40/553 (1986) para. 3.

13 Alexander Kiss, "Permissible Limitation on Rights," in *The International Bill of Rights,* ed. Louis Henkin (New York: Columbia University Press, 1981) 290, 296–97. See also Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. A/71/373 (Sep. 6, 2016) para. 18.

the government authorities, whether authoritarian regimes or liberal democracies, that assess and determine what constitutes harm to the public interest.

The conceptual ambiguity associated with the notion of national security reflects the inherent tension that has arisen from the paradigmatic shift in modern political discourse. The idea of security has shifted its focus from personal liberty to the preservation of statehood as a collective good, into which individual security has been subsumed.[14] The Janus-faced nature of statehood, as both a source of security and insecurity for populations, has continued to cause tensions in international law. Such tensions emerge, for example, where the government of a nation asserts state sovereignty and the principle of non-intervention in facing allegations of atrocities committed against the own population or declares a public emergency in justification for the exercise of derogatory powers under human rights treaties.[15] As will be discussed in chapter 3, the maintenance of international legal order by means of international adjudication must meet its ultimate challenge when national authorities have reserved discretionary powers to themselves for the protection of their own security.

B. International Security

The international community is an amorphous notion.[16] Within the current framework of international law, the idea of international community as a referent object of security is an imagined construct.[17] The international community is not a separate juridical entity endowed with international legal personality.[18] Nonetheless, the protection of its interest finds legal expression in various international instruments. It may therefore constitute a

14 See Emma Rothchild, "What Is Security?" *Daedalus* 124, no. 3 (1995) 53, 60–65.

15 For further discussion, see chapter 2.II and chapter 5.

16 The idea of international community has been variably understood in literature. See, for example, Carlo Focarelli, *International Law as a Social Construct: The Struggle for Global Justice* (Oxford: Oxford University Press, 2012) 151–53; Russell Buchan, "A Clash of Normativities: International Society and International Community," *International Community Law Review* 10 (2008) 3, 14–16; Don Greig, "'International Community', 'Independence' and All That… Rhetorical Correctness?" in *State, Sovereignty, and International Governance*, ed. Gerard Kreijen et al. (Oxford: Oxford University Press, 2002) 521, 530–31; Georges Abi-Saab, "Whither the International Community?" *European Journal of International Law* 9 (1998) 248, 248–50; Bruno Simma and Andreas L. Paulus, "The 'International Community': Facing the Challenge of Globalization," *European Journal of International Law* 9 (1998) 266, 269–76; Bruno Simma, "From Bilateralism to Community Interest in International Law," *Recueil des Cours* 250 (1994) 217, 256–58; Hermann Mosler, *The International Society as a Legal Community* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1980) 1–16.

17 See Dino Kritsiotis, "Imagining the International Community," *European Journal of International Law* 13 (2002) 961.

18 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16, 241 para. 33 (Judge Fitzmaurice dissenting opinion).

referent object of security even as an abstract notion.

The idea of international community as a referent object of security emerged with the development of collective security mechanisms. The UN is central to these mechanisms, with its role as a global institutional platform designed to protect the interest of the international community.[19] However, the security interest of the sovereign state is not entirely subsumed into the interest of the international community when it is represented in this political regime. Rather, the security interest of the international community is constructed as an amalgamation of national security interests shared among states when it is so recognized by the UN, primarily through the Security Council, where collective views are formed and expressed.[20] Conceived as such, it is more akin to what Hedley Bull described as an international society, in which "a group of states [are] conscious of certain common interests and common values" and "conceive themselves to be bound by a common set of rules in their relations with one another."[21]

The interest of the international community in a broader sense also constitutes an object of protection in the International Law Commission's formulation adopted in the context of the responsibility of states and international organizations for internationally wrongful acts. For example, an essential interest of the international community is recognized as a potentially conflicting interest to be balanced against when the state invokes the plea of necessity.[22] The formulation adopted by the International Law Commission is inclusive, encompassing not only states but also various other entities, such as the UN, European Communities, and the International Committee of the Red Cross.[23]

In its Draft Articles on the Responsibility of International Organizations, the Commission went even further by recognizing the legal capacity of the international organization to invoke the plea of necessity when it is the only means to safeguard against a grave and imminent peril an essential interest of the international community as a whole.[24] This statement clearly goes beyond what is currently understood to be the law,[25] but does

19 See, for example, UNGA Res. 60/1 "World Summit Outcome" (Sep. 16, 2005) paras. 3, 38, 88, and 139.
20 Charter of the United Nations art. 24, June 26, 1945 (entered into force Oct. 24, 1945) 59 Stat. 1031, TS No. 993, 1 UNTS XVI.
21 Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 4th ed. (New York: Columbia University Press, 2012) 13.
22 Articles on Responsibility of States for Internationally Wrongful Acts art. 25(1)(b), UNGA Res. 56/83, Annex (Dec. 12, 2001); Draft Articles on the Responsibility of International Organizations art. 25(1)(b), UN Doc. A/66/10 (2011) para. 87.
23 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) 40–41.
24 Draft Articles on the Responsibility of International Organizations art. 25(1)(a), UN Doc. A/66/10 (2011) para. 87.
25 James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013) 309.

not suggest that any international organization may act in the interest of the international community. The international organization might be able to do so only to the extent that it is authorized, in accordance with the principle of speciality under international law,[26] to perform such a function. This specific authority must not be confused with the institutional pursuit of its own interests, which may or may not coincide with an essential interest of the international community as a whole.[27] As will be discussed in chapter 6, this distinction has implications for the substantive legal limit to institutional evolution through an expansive exercise of institutional powers.

C. Human Security

In its practice, the UN has moved beyond traditional, state-centric security paradigms by introducing human security into policy discourse.[28] Although there is no definite meaning of human security,[29] it forms part of the conceptual evolution of security with a human- or people-centered approach. The common understanding reached among states is that human security encompasses the "right of people to live in freedom and dignity, free from poverty and despair…with an equal opportunity to enjoy their rights and fully develop their human potential."[30] Human security places the protection and empowerment of individuals at the center of interlinkages among security, development, and human rights to address varied conditions of insecurity across countries and communities.[31]

In the discourse of security studies, human security is understood as a shift in the referent object of security to human beings, moving away from traditional state-centric security paradigms. In other words, human security is designed, in part, to facilitate the deepening of security, placing human beings at the center of security analysis and

26 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 ICJ Rep. 66, 78 para. 25; *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion, 1927 PCIJ Rep. Series B No. 14, 64 para. 179.

27 Draft Articles on the Responsibility of International Organizations, with Commentaries, *Yearbook of the International Law Commission* II, pt. 2 (2011) 46, 75 para. 4.

28 See Report of the Secretary-General: Human Security, UN Doc. A/64/701 (2010); Kofi A. Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All* (New York: UN, 2005) para. 78; Secretary-General's High-Level Panel on Threats, Challenges and Change, "A More Secure World: Our Shared Responsibility," UN Doc. A/59/565 (2004) 23; UNGA Res. 55/2 "United Nations Millennium Declaration" (Sep. 8, 2000); UN Development Programme, *Human Development Report* (New York: UN, 1994) 22.

29 For various definitions of human security, see Report of the Secretary-General: Human Security, *supra* note 28, 4–6. See generally Shireen Daft, *The Relationship between Human Security Discourse and International Law: A Principled Approach* (Abingdon: Routledge, 2017) and literature cited therein.

30 UNGA Res. 66/290 "Follow-up to Paragraph 143 on Human Security of the 2005 World Summit Outcome" (Sep. 10, 2012) para. 3(a); UNGA Res. 60/1 "2005 World Summit Outcome" (Oct. 24, 2005) para. 143.

31 Report of the Secretary-General: Follow-up to General Assembly Resolution 64/291 on Human Security, UN Doc. A/66/763 (Apr. 5, 2012) paras. 16–21.

policy-making.[32] However, the notion is not free from the premise of collectivity upon which the modern discourse of security has been built. This premise of collectivity militates against any reductionism that human security is sometimes perceived to implicate with the focus on the individual as a potential referent object.[33] Conceived as such, human security is inherently a construct of public interest concerned with the security of human beings as members of the community, rather than each individual's personal security.

Although human security can be seen as a subset of the human-centered approach to international law,[34] it is a distinct concept because human security addresses human interests squarely within the paradigm of security. As will be discussed in chapter 2, the security of person is afforded legal protection only in a limited fashion under international law. The respect for and protection of physical integrity, human rights, and human dignity of individual persons could be an effective means to address human security issues. Yet it does not necessarily elevate individual persons to the focus of protection from an existential threat at the same level as national security.

This is not to say that collective interests are prioritized over those of the individual. Such a proposition has the risk of blurring the line between human security and national security. Indeed, the notion of human security was employed in a twisted sense in the context of counter-terrorism policy in Australia and Canada. Former Australian Attorney-General Philip Ruddock referred to human security as a rationale for Australia's controversial counter-terrorism legislation as follows:

> Human security is a broad concept focused on the individual or community, rather than the state. Human security rests upon security for the individual citizen, which requires not only the absence of violent conflict, but also respect for human rights and fundamental freedoms…
>
> While it is accepted that any tightening of security arrangements will impact on certain rights, a more useful debate is to consider whether tightening security arrangements is in the interests of protecting fundamental human rights as a whole.[35]

32 Peter Hough, *Understanding Global Security* (Abingdon: Routledge, 2004) 8–10.

33 Barry Buzan, "A Reductionist, Idealistic Notion That Adds Little Analytical Value," *Security Dialogue* 35 (2004) 369.

34 See, for example, Dorothy Estrada-Tanck, *Human Security and Human Rights under International Law: The Protections Offered to Persons Confronting Structural Vulnerability* (Portland, OR: Hart Publishing, 2016) chs. 2–3; Barbara von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Portland, OR: Hart Publishing, 2007) 62–70; Hisashi Owada, "Human Security and International Law," in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, ed. Ulrich Fastenrath et al. (Oxford: Oxford University Press, 2011) 505, 512–17; Gerd Oberleitner, "Human Security: A Challenge to International Law?" *Global Governance* 11 (2005) 185.

35 Philip Ruddock, "A New Framework: Counter-Terrorism and the Rule of Law," *The Sydney Papers* 16 (2004) 113, 116–17.

Human security is described here as a necessary precondition to the exercise of human rights in the community at large, which must be weighed in favor of restricting human rights of certain individuals.[36]

What we see in this line of argument is reliance on the normative goal of human security as a justification for depriving certain individuals of their fundamental rights and freedoms. The notion of human security is only given limited consideration in this context, without appreciating the wider dimensions of security—including a range of means available to address security threats, as will be discussed in section IV of this chapter. If human security is merely understood as a replacement for national security, it adds very little to the classic national security debate, which is often misconceived as shifting the balance between security and liberty.[37] When, on the other hand, human security is conceived as a distinct concept, it has the potential for the normative development of international law, as will be explored in chapter 2, section IV.B.

D. Regime Security

Tensions often arise in international relations due to geopolitical changes, economic competition, and rapid technological advances. Such tensions could be elevated to a security threat to the international legal order when global power balance shifts to the extent that a defiant state frustrates an orderly compliance with the existing rules of international law as they are currently codified and institutionalized.

In recent years, there have been numerous events that are symptomatic of such a shift. For example, Russia annexed Crimea notwithstanding the UN General Assembly's call for non-recognition of any alternation to the status of Crimea.[38] The People's Republic of China has been making expansive territorial and maritime claims in the South China Sea contrary to the findings made regarding the contested maritime features by the Arbitral Tribunal established pursuant to Annex VII of the Law of the Sea Convention.[39] Malicious cyber activities have been increasing with covert support or direction by recalcitrant states to

36 See, for example, Simon Bronitt, "Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform," in *Fresh Perspectives on the "War on Terror,"* ed. Miriam Gani and Penelope Mathew (Canberra: ANU Press, 2008) 65, 68–69; Irwin Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy," in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, ed. Ronald J. Daniels, Patrick Macklem, and Kent Roach (Toronto: University of Toronto Press, 2001) 111, 112.

37 See, for example, Kate Moss, *Balancing Liberty and Security, Human Rights, Humans Wrongs* (London: Palgrave Macmillan, 2011); Oren Gross, "The Process of Balancing," *Tulsa Law Review* 45 (2009) 733; Jeremy Waldron, "Security and Liberty: The Image of Balance," *Journal of Political Philosophy* 11 (2003) 191.

38 UNGA Res. 68/262 "Territorial Integrity of Ukraine" (Mar. 27, 2014).

39 *South China Sea Arbitration (Philippines v. PRC)*, PCA Case No. 2013-19, Award (July 12, 2016).

deny their responsibility for an internationally wrongful act.[40] These events have generated profound reaction among states as a challenge to rules-based international order.[41] This shows the potential to characterize the stability of a legal regime itself as a referent object of security, distinct from other collective units discussed above.

However, caution must be exercised against classifying the stability of a legal regime as a referent object of security. This is because, to some extent, the existing rules of international law reflect, or are perceived to reflect, the norms and preferences that powerful states had set when those rules were created.[42] It means that strict enforcement of the existing rules of international law could be interpreted as imposing the prevailing power balance by established great powers against the rise of new powers that challenge the balance. For example, the Antarctic treaty regime could usefully be designated as a referent object of security to address various issues that arise from the unresolved territorial claims.[43] This securitization may in turn assist those states that maintain territorial claims to Antarctica, reinforcing their status under the regime.[44]

While the legal regime tends to be resilient against political rhetoric,[45] the securitization of this regime adds little normative value as a protection from forcible unilateral change or sabotage. The security of a legal regime does not command any particular interpretation that favors or contributes to its stability beyond what might be

40 G7 Declaration on Responsible States Behavior in Cyberspace para. 7 (Apr. 11, 2017); Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, UN Doc. A/70/174 (July 22, 2015) para. 13; Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, UN Doc. A/68/98 (June 24, 2013) para. 24.

41 See, for example, UN GAOR, 73rd session, 6th plenary meeting, UN Doc. A/73/PV.6 (Sep. 25, 2018) 46 (Finland); UN GAOR, 73rd session, 7th plenary meeting, UN Doc. A/73/PV.7 (Sep. 25, 2018) 19 (Slovenia), 28 (Gambia), 36–37 (Bosnia and Herzegovina), 41–42 (Japan); UN GAOR, 73rd session, 8th plenary meeting, UN Doc. A/73.PV.8 (Sep. 26, 2018) 10 (Estonia), 45–46 (UK); UN GAOR, 73rd session, 9th plenary meeting, UN Doc. A/73.PV.9 (Sep. 26, 2018) 8 (Ukraine), 16 (Kenya), 22 (Poland); UN GAOR, 73rd session, 10th plenary meeting, UN Doc. A/73/PV.10 (Sep. 27, 2018) 31 (EU), 50 (Jamaica), 55 (New Zealand); UN GAOR, 73rd session, 11th plenary meeting, UN Doc. A/73/PV.11 (Sep. 27, 2018) 46–47 (Liechtenstein); UN GAOR, 73rd session, 12th plenary meeting, UN Doc. A/73/PV.12 (Sep. 28, 2018) 46 (Cambodia), 59 (Denmark); UN GAOR, 73rd session, 13th plenary meeting, UN Doc. A/73/PV.13 (Sep. 28, 2018) 26 (Ireland), 48 (Iceland); UN GAOR, 73rd session, 14th plenary meeting, UN Doc. A/73/PV.14 (Sep. 29, 2018) 20 (Suriname), 24 (Singapore), 46 (Pakistan); UN GAOR, 73rd session, 15th plenary meeting, UN Doc. A/73/PV.15 (Sep. 29, 2018) 3 (Czech Republic); UN GAOR, 73rd session, 16th plenary meeting, UN Doc. A/73/PV.16 (Oct. 1, 2018) 17 (Thailand), 27 (Sweden), 31 (Canada).

42 Shirley V. Scott, "A Rules-Based Order for the Asia-Pacific: Identifying Opportunities for Australia-Japan Cooperation," in *Strengthening Rules-Based Order in the Asia-Pacific* (Canberra: Australian Strategic Policy Institute, 2014) 16, 16.

43 See Donald R. Rothwell, "The Antarctic Treaty as a Security Construct," in *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives*, ed. Alan D. Hemmings, Donald R. Rothwell, and Karen N. Scott (Abingdon: Routledge, 2012) 33.

44 See Alan D. Hemmings, "Security beyond Claims," in Hemmings, Rothwell, and Scott, eds., *supra* note 43, 70.

45 James Crawford, "The Current Political Discourse Concerning International Law," *Modern Law Review* 81 (2018) 1.

permissible under the conventional rule of treaty interpretation.[46] Indeed, the formulation of a legal test that relies upon the security and predictability of the multilateral trading system as paramount to all other concerns did not receive much support within the World Trade Organization.[47] The state-centric structure of international law militates against the securitization of a legal regime, particularly when it is intended to restrict a sovereign state's choice of security measures or to expand the authority of an international organization and the scope of its activities.

III. The Scope of Security Threats

Traditionally, the concept of security has been narrowly defined in military terms with the primary focus on the protection of national territory from military threats (defense of the realm). Prior to the Second World War, this essentially meant avoidance of war.[48] With the establishment of the UN, the military-oriented concept of security underpinned the foundational principle of contemporary international law outlawing the threat or use of force in international relations.[49] Thus, when Hans Kelsen published *Collective Security under International Law* in 1957, he confined the scope of his study to "the protection of men against the use of force by other men."[50] This narrow concept of security is also reflected in national security legislation in many countries, which authorizes various repressive measures with a view to the defense of the realm.[51] National security from external military attacks and threats has widely been recognized as the ultimate *raison d'être* of the sovereign state.

However, the scope of security threats has broadened as a greater variety of disruptive and destructive events, such as the nuclear arms race, terrorism, the oil crises of the 1970s, and large-scale environmental degradation, started unfolding during the Cold

46 See chapter 4.

47 See *US – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body* (Oct. 12, 1998) WT/DS58/AB/R, 42–43 para. 116. See also statements made by Australia and the European Communities at ibid., 25 para. 71.

48 See, for example, Martin D. Dubin, "Toward the Concept of Collective Security: The Bryce Group's 'Proposals for the Avoidance of War' 1914–1917," *International Organization* 24 (1970) 288; Bruce Williams, *State Security and the League of Nations* (Baltimore, MD: Johns Hopkins Press, 1927); Frances Kellor, *Security against War* (London: Macmillan, 1924).

49 UN Charter, *supra* note 20, art. 2(4).

50 Hans Kelsen, *Collective Security under International Law* (Washington, DC: US Government Printing Office, 1957) 1.

51 See, for example, Internal Security Law 1991 (Argentina) Law No. 24.059; National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 (Australia); National Security Act 1980 (India); National Security Law 2000 (Latvia); Security Offences (Special Measures) Act 2012 (Malaysia) Act No. 747; National Security Law 2015 (PRC); Human Security Act 2007 (Philippines) Act No. 9372; Internal Security Act 1960 (Singapore); Internal Security Act 2008 (Thailand); Law on National Security 2004 (Vietnam) Law No. 32/2004/HQ11.

War.[52] This trend has accelerated since the end of the Cold War. In 1992, the Security Council acknowledged that "non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."[53] The UN Secretary-General's High-Level Panel in its 2004 report, *A More Secure World: Our Shared Responsibility*, further identified economic and social threats and transnational organized crime as global security threats.[54] The UN Secretary-General's 2005 Report, *In Larger Freedom*, adds to the list poverty and deadly infectious disease on the grounds that these can have equally catastrophic consequences.[55] A range of non-traditional security issues have also been addressed in other international forums, such as the African Union,[56] the Association of Southeast Asian Nations (ASEAN),[57] and the Organization for Security and Co-operation in Europe.[58]

The emergence of securitization at the end of the Cold War, as an alternative theory to the traditional concept of security, dovetailed the expansion of security discourse in practice, with the recognition of non-traditional security issues. The introduction of human security into policy discourse in the 1990s has also facilitated proliferation of the security agenda, most notably in the Security Council.[59] The shifting of referent object to human beings has indeed been instrumental to the understanding that various security threats are mutually reinforcing and interconnected because of their causal effect. For example, violent conflicts can cause poverty due to a reduction in food production or vice versa, often spreading across national borders into a wider region.[60]

The securitization of a wider range of issues beyond the traditional military domain represents the changing perception of threats and risks, especially due to technological advances and greater social vulnerability generated as a result.[61] The broadening of the

52 See Report of the Secretary-General: Concepts of Security, *supra* note 12, paras. 4–5. See also Hitoshi Nasu, "Law and Policy for Antarctic Security: An Analytical Framework," in Hemmings, Rothwell, and Scott, eds., *supra* note 43, 18, 20–24; Jessica Tuchman Mathews, "Redefining Security," *Foreign Affairs* 68, no. 2 (1989) 162; Richard H. Ullman, "Redefining Security," *International Security* 8 (1983) 129.

53 UN SCOR, 47th session, 3046th meeting, UN Doc. S/PV.3046 (Jan. 31, 1992) 142.

54 Secretary-General's High-Level Panel on Threats, Challenges and Change, *supra* note 28, 23.

55 Annan, *supra* note 28, para. 78.

56 Solemn Declaration on a Common African Defence and Security Policy paras. 6, 10 (Feb. 28, 2004).

57 Charter of the Association of Southeast Asian Nations art. 1(8), Nov. 20, 2007 (entered into force Dec. 15, 2008) 2624 UNTS 223; Declaration of ASEAN Concord II section A, para. 2 (Oct. 7, 2003), reprinted in 43 ILM 18.

58 Charter for European Security paras. 4–5, 31–32 (Nov. 19, 1999), reprinted in 39 ILM 255. See also David J. Galbreath, *The Organization for Security and Co-operation in Europe* (Abingdon: Routledge, 2007).

59 See Hitoshi Nasu, "The Place of Human Security in Collective Security," *Journal of Conflict & Security Law* 18 (2013) 95.

60 UN Human Security Unit, *Human Security in Theory and Practice: Application of the Human Security Concept and the United Nations Trust Fund for Human Security* (New York: UN, 2009) 7–8; UN Development Programme, *supra* note 28, 22–23.

61 See Ulrich Beck, *Risk Society: Towards a New Modernity* (London: SAGE Publications, 1992).

security paradigm based on the community's perception then reinforces the power of this concept as perceived in political circles.[62] The expansion of security discourse has thus increased its agenda-setting power in policy-making.

However, the potential for unlimited expansion of security discourse has raised concerns regarding the overstretch of the concept itself.[63] The distinction between the nation's survival from an immediate threat and the imperative need to address less-than-immediate threats remains tenuous.[64] This conceptual ambiguity has left doors open to proliferation of the security agenda.

Nevertheless, there are practical reasons why the security agenda cannot be unlimited—particularly in the field of non-traditional security, where challenges to survival arise from misalignment in political, economic, legal, or societal structures. For example, the international protection of intellectual property rights in the trade regime has created structural obstacles for food security, disrupting traditional agricultural practices and displacing rural smallholders to the advantage of transnational businesses and seed patenting companies.[65] These issues arising from structural failures are not amenable to resolution by traditional means of combating security threats.

As will be discussed in chapter 4, the conceptual expansion of security is also subject to interpretive constraints within the existing framework of international law. The legal resilience against the conceptual expansion of security is evident in the prohibition of a threat or use of force. The extension of this principle to political and economic pressures remains elusive due to limited support.[66] Its application in the cyber domain, on the other hand, has received wide support among states,[67] although debates remain regarding the threshold requirements for a

62 See David P. Fidler, "Governing Catastrophes: Security, Health and Humanitarian Assistance," *International Review of the Red Cross* 89 (2007) 247, 257–59.

63 See S. Neil MacFarlane, "A Useful Concept That Risks Losing its Political Salience," *Security Dialogue* 35, no. 3 (2004) 368; Roland Paris, "Human Security: Paradigm Shift or Hot Air?" *International Security* 26, no. 2 (2001) 87, 89; Daniel Deudney, "The Case against Linking Environmental Degradation and National Security," *Millennium* 19, no. 3 (1990) 461.

64 Robert E. Osgood and Robert W. Tucker, *Force, Order, and Justice* (Baltimore, MD: The Johns Hopkins Press, 1967) 275–77.

65 See, for example, Dilan Thampapillai, "The Food and Agricultural Organization and Food Security in the Context of International Intellectual Property Rights Protection," in *Legal Perspectives on Security Institutions*, ed. Hitoshi Nasu and Kim Rubenstein (Cambridge: Cambridge University Press, 2015) 269; Ying Chen, *Trade, Food Security, and Human Rights: The Rules for International Trade in Agricultural Products and the Evolving World Food Crisis* (Farnham: Ashgate, 2014) chs. 3–6.

66 See, for example, Oliver Dörr and Albrecht Randelzhofer, "Article 2(4)," in *The Charter of the United Nations: A Commentary*, ed. Bruno Simma et al., 3rd ed. (Oxford: Oxford University Press, 2012) vol. I, 200, 208–10; Belatchew Asrat, *Prohibition of Force under the UN Charter: A Study of Art. 2(4)* (Uppsala: Iustus Förlag, 1991) 113–21.

67 UNGA Res. 73/27 "Developments in the Field of Information and Telecommunication in the Context of International Security" (Dec. 5, 2018) preamb. para. 16; Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security,

cyber operation to constitute a use of force.[68] As will be examined in chapter 6, securitization in the practice of international institutions struggles with normative constraints imposed upon institutional competence under international law. These normative considerations, together with resource constraints, necessarily limit the extent to which, and the way in which, a matter can be securitized on their agenda.

IV. The Means to Achieve Security

The theory of securitization is premised upon the assumption that securitization necessarily involves emergency action that violates rules to ensure the referent object's survival.[69] According to the theory, securitization aims to proffer collective justification for a breach of the rules, inevitably causing tension with the normative foundations and values underlying them.[70] The counter-terrorism debate illustrates such a disruptive role of securitization in relation to international human rights law by advancing, for example, that the preventative detention of suspected terrorists is a permissible deprivation of civil liberty for the protection of national security.[71] However, this does not give the entire picture of securitization and its normative effect, particularly its potential to expand the range of options available to address securitized issues. Such a narrow understanding of the normative impact of securitization tends to be skewed toward the hostile relationship between security and law.

In addition to the expansion of referent objects (from the traditional focus on the sovereign state to non-state objects) and threats (from the traditional focus on military threats to non-traditional threats), the process of securitization may expand the range of options available to address security issues, including those legally justifiable. The holistic and multi-sectoral approach to security is indeed emphasized in human security literature.[72] Many states maintain the position that human security is to be achieved within the existing framework of international law.[73] Various ideas have also been put forward to complement the UN collective

UN Doc. A/70/174 (July 22, 2015) para. 26.

68 See Michael N. Schmitt, ed., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge: Cambridge University Press, 2017) 331–37. Cf. Mary E. O'Connell, "Cyber Security without Cyber War," *Journal of Conflict and Security Law* 17 (2012) 187.

69 Buzan, Wæver, and de Wilde, *supra* note 3, 24–25.

70 For discussion of moral justifications for securitization and its normative limits, see Rita Floyd, *The Morality of Security: A Theory of Just Securitization* (Cambridge: Cambridge University Press, 2019).

71 See generally Diane Webber, *Preventive Detention of Terror Suspects: A New Legal Framework* (Abingdon: Routledge, 2016); Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: Oxford University Press, 2007); Christian Walter et al., eds., *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin: Springer, 2004).

72 See also Report of the Secretary-General: Follow-up to General Assembly Resolution 64/291 on Human Security, *supra* note 31, para. 36(c).

73 See the remarks made during the General Assembly debate regarding human security: UN GAOR, 66th

security system with alternative security approaches, such as common security, cooperative security, and comprehensive security.[74] The multi-dimensional concept of security cannot be grasped fully without appreciating the broad range of security measures embedded in the fabric of international law.

A range of security measures available under international law carry different normative values.[75] The concept of security represents three normative values that are associated with various rules of international law: protective, justificatory, and empowering values. The protective value of security concerns the safeguarding of security interests from restrictions under international law, whereas the justificatory value resides in the concept of security when it is invoked to challenge or deviate from norms. These normative values of security are preserved in the formation or implementation of norms, while the empowering value of security is norm-creating in character, driving the development of rules and institutions as the means to eliminate or reduce threats.

First, the protection of security interests is an integral part of international law. As will be discussed in chapter 2, there are numerous rules of customary international law and treaty provisions that are designed to protect national security interests. While the security interest is thus protected under international law, the protean nature of the concept brings uncertainty to the legal effect and ambit of such protection. The fundamental question is, as will be examined in chapters 3 and 4, to what extent the existing rules of international law can accommodate dynamic changes to the security environment without radically transforming the scope of obligations, while maintaining the stability and normative foundation of international law.[76]

Second, international law provides various legal grounds for justifying derogatory measures that would otherwise be deemed unlawful, such as the right of self-defense,[77] the plea of necessity,[78] and derogation from certain obligations under human rights treaties.[79]

session, 112th plenary meeting, UN Doc. A/66/PV.112 (June 4, 2012) 3 (EU), 6 (Egypt), 7 (Cuba, Mexico), 8 (Venezuela), 10 (Australia), 12 (Russia), 15 (India), 19–20 (Syria).

74 For details, see Hitoshi Nasu, "The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System," *Amsterdam Law Forum* 3, no. 3 (2011) 15, 30–32.

75 See Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford: Oxford University Press, 2012) 357–79; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008) 180–82.

76 Cf. *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 1997 ICJ Rep. 6, 65 para. 104 (referring to the stability of treaty relations as a rationale for restricting the plea of fundamental change of circumstances to exceptional circumstances).

77 UN Charter, *supra* note 20, art. 51.

78 Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 22, art. 25; Draft Articles on the Responsibility of International Organizations, *supra* note 22, art. 25.

79 International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966 (entered into force Mar. 23, 1976) 999 UNTS 171; American Convention on Human Rights art. 27, Nov. 22, 1969 (entered into force July 18, 1978) 1144 UNTS 123; Convention for the Protection of Human Rights and Fundamental Freedoms art. 15,

These grounds for justification are, in essence, considered as legalizing extra-legal response for the preservation of security interests as agreed among states. Nevertheless, as will be discussed in chapter 5, tensions arise when these grounds are invoked to defend the security interest of a state based on its subjective perception of threats, which may not accord with objective assessment made by a third party.

Third, various mechanisms have been created under international law to empower international institutions to address shared security concerns. For example, the UN Charter provides institutionalized mechanisms to address an undefined range and variety of threats to the maintenance of international peace and security.[80] The nuclear non-proliferation regime establishes mechanisms for preventing the proliferation of nuclear weapons, and facilitating the development of peaceful nuclear energy technology, by institutionalizing the asymmetric obligations between designated nuclear-weapon states and non-nuclear-weapon states.[81] The World Health Organization seeks to address a range of global public health security issues, irrespective of their origin or source, that present or could present significant harm to human health.[82] With the expansion of the security agenda, various international institutions have broadened the scope of their activities to engage with contemporary security issues.

There are also institutions that are not originally designed or competent to address security issues but have evolved to incorporate them through operational activities. For example, the European Union (EU) has developed joint maritime surveillance and patrol capabilities to implement European integrated border management as a shared responsibility between the Union and national authorities by securitizing and prioritizing border control over humanitarian action, such as search and rescue at sea.[83] Several regional institutions in Africa, such as the Organization of African Union, the Economic Community of Western African States, and the Southern African Development Community, have engaged in peacekeeping operations without a clear legal basis for the deployment of

Nov. 4, 1950 (entered into force Sep. 3, 1953) 213 UNTS 221, as last amended by Protocol 14, CETS No. 194.

80 UN Charter, *supra* note 20, arts. 24 and 39.

81 Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 (entered into force Mar. 5, 1970) 21 UST 483, TIAS No. 6839, 729 UNTS 161.

82 Revision of the International Health Regulations art. 1, May 23, 2005 (entered into force June 15, 2007) 2509 UNTS 79.

83 See Daniel Ghezelbash et al., "Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia," *International & Comparative Law Quarterly* 67 (2018) 315, 323–27; Violeta Moreno-Lax, "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm," *Journal of Common Market Studies* 56 (2018) 119; Sarah Léonard, "EU Border Security and Migration into the European Union: FRONTEX and Securitisation through Practices," *European Security* 19 (2010) 231; Jef Huysmans, "The European Union and the Securitization of Migration," *Journal of Common Market Studies* 38 (2000) 751.

troops.[84] Originally established to protect national and regional stability in Southeast Asia from external interference at the height of the Cold War, ASEAN has gradually redefined its authority to address various transnational security challenges.[85]

As autonomous legal entities, these institutions may evolve by finding the need or an opportunity to adjust themselves to address new security threats or securitized issues. The greater role that these institutions assume through institutional evolution may well be seen as a natural extension of operational activities engaged in response to changing security paradigms. However, such institutional evolution could stretch the institutional competence beyond the parameters originally envisaged, with the potential to compromise the legitimacy and effectiveness of institutional authority. As will be examined in chapter 6, various legal techniques have been devised to enable international institutions, based on the state-centric structure of international law, to operate with a sufficient degree of flexibility in response to evolving security threats.

While the legal mechanisms thus created are designed to provide stability in international relations, these normative values of security compete with other values—such as personal liberty, fairness, sustainable development, and humanity—that permeate the system of international law. This tension is derived from the asymmetric power structure that exists between sovereign states and other actors with their own security interests. This structure is, *ipso facto*, a manifestation of the monopoly of violence by national authorities, which underpins the normative foundation of international law as a sovereignty-based legal system. The system of international law built upon it privileges one form of security interests—national security—in the formation and operation of rules, including the power to challenge their normativity.

The long-standing thesis of realism in international relations—albeit simplistic and powerful—has emphasized power politics at the center of security considerations, with the focus on military powers as a means of defending and enhancing national security. However, within the analytical framework of security it depicts only a narrow portion of security construct. As Ken Booth has cogently observed:

> 'Security' means the absence of threats. Emancipation is the freeing of people (as individuals and groups) from those physical and human constraints which stop them carrying out what

84 For detailed analysis, see Hitoshi Nasu, "Institutional Evolution in Africa and the 'Peace-Keeping Institution'," in *Legal Perspectives on Security Institutions*, ed. Hitoshi Nasu and Kim Rubenstein (Cambridge: Cambridge University Press, 2015) 167, 170–80.

85 For detailed analysis, see Hitoshi Nasu et al., *The Legal Authority of ASEAN as a Security Institution* (Cambridge: Cambridge University Press, 2019).

> they would freely choose to do. War and the threat of war is one of those constraints, together with poverty, poor education, political oppression and so on. Security and emancipation are two sides of the same coin. Emancipation, not power or order, produces true security. Emancipation, theoretically, is security.[86]

While international law is instrumental to the maintenance of rules-based international order, the stability of international relations alone is not sufficient to address tensions arising from dynamic changes to the security environment and the perception of threats. The normative expanse of international law in the broader construct of security is dependent upon the extent to which the instruments of international law, based on the state-centric structure, can be harnessed to develop and control mechanisms that protect competing security interests at multiple levels from diverse threats to the survival of humanity.

V. Securitization and the Rule of Law

As a theory to grasp the processes and dynamics of emergency decision-making, securitization is not designed to constitute a normative practice that provides ethical and moral grounds for political agendas and actions.[87] Nevertheless, the theory is tainted with a normative bias against securitization. Buzan, Wæver, and de Wilde are unequivocal in stating that "security should be seen as negative, as a failure to deal with issues as normal politics."[88] The assumption that underpins this normative bias is that securitization necessarily calls for emergency action or special measures with less legal constraint and accountability, as opposed to politicization that leaves political choice in making policy decisions. Yet a broader construct of security envisaged above within the three-dimensional framework encompasses a variety of referent objects of security, sources of instability, and security measures that are reserved, justified, or institutionalized under international law.

Conceived as such, securitization is not necessarily an antithesis of the rule of law, even though the growth of the national security state has alarmed commentators for its impact on the rule of law in domestic legal settings.[89] At its core, the rule of law is an

86 Ken Booth, "Security and Emancipation," *Review of International Studies* 17 (1991) 313, 319.

87 The Copenhagen School, however, appears to be hopeful that the theory could be used to "maneuver the interaction among actors and thereby curb security dilemmas": Buzan, Wæver, and de Wilde, *supra* note 3, 31.

88 Ibid., 29.

89 See, for example, Karen J. Greenberg, ed., *Reimagining the National Security State* (Cambridge: Cambridge University Press, 2019); Shirin Sinnar, "Rule of Law Tropes in National Security," *Harvard Law Review* 129 (2016) 1566; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006). Cf. Matthew C. Waxman, "National Security Federalism in the Age

appraisive concept pertaining to the legal restriction on coercive powers exercised by the sovereign, with the non-discriminatory application of clear, public and prospective rules.[90] It is the concept widely used to evaluate the state of affairs within a political regime as the antithesis to an arbitrary exercise of powers.[91] However, its relevance to international law has received mixed reaction in academic literature.[92]

The process of securitization can be arbitrary in the sense that "something is a security problem when the elites declare it to be so."[93] However, the fact that something is securitized in a haphazard manner does not necessarily mean that sovereign powers are arbitrarily exercised. As will be reviewed in chapter 2, international law provides various legal grounds upon which states may determine what constitutes a threat to them and various legal mechanisms to address the securitized issue. There is no general restriction under international law on the process of securitization within or by any state.

If this were to be the only function it performs in relation to securitization, international law would be reduced to a mere instrument of security policy pursued freely by states. As an enabler of security policy, legal instruments would be relied upon merely to legalize derogatory measures as new issues are securitized. However, the rule of law, if it is meant to govern international relations as a system of law, demands that those instrumental rules must not contravene certain fundamental principles as the basis for their valid application.[94] The concept of the rule of law is not a synonym for "law" but

of Terror," *Stanford Law Review* 64 (2012) 289 (emphasizing the role of vertical inter-governmental arrangements for political accountability); Thomas I. Emerson, "National Security and Civil Liberty," *Yale Journal of World Public Order* 9 (1982) 78, 79 (observing different normative reactions depending on whether a national security interest justifies alteration of constitutional principles).

90 See especially Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) 114–26.

91 See, for example, John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011) 270–73; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009) 219–20; Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" *Law and Philosophy* 21 (2002) 137, 153–54; Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969) 234.

92 For various debates regarding the international rule of law drawing on or in comparison with the rule of law as it exists in national legal systems, see Denise Wohlwend, *The International Rule of Law: Scope, Subjects, Requirements* (Cheltenham: Edward Elgar, 2021) 1–7, 158–63 and literature cited therein; David Lefkowitz, *Philosophy and International Law: A Critical Introduction* (Cambridge: Cambridge University Press, 2020) ch. 5; Machiko Kanetake, "The Interfaces between the National and International Rule of Law: A Framework Paper," in *The Rule of Law at the National and International Levels: Contestations and Deference*, ed. Machiko Kanetake and André Nollkaemper (Portland, OR: Hart Publishing, 2016) 11.

93 Ole Wæver, "Securitization and Desecuritization," in *On Security*, ed. Ronnie D. Lipschutz (New York: Columbia University Press, 1995) 46, 54–55.

94 Terry Nardin, "Theorising the International Rule of Law," *Review of International Studies* 34 (2008) 385, 400. While acknowledging that international law constitutes a set of rules, Hart found no basic rule providing general criteria of validity for the rules of international law: H. L. A. Hart, *The Concept of Law*, 2nd ed.

presupposes non-instrumental principles as the basis of laws, limiting the extent to which the concept of security can be invoked to validate the law.

The application of the rule of law to international relations has been variably conceived in literature.[95] For the purpose of this inquiry, the rule of law is only a hypothesis to which jurists are led by observing that international law approximates a system of public order between states. This hypothesis must be tested by examining whether an objective assessment has been pursued in the practice of international adjudication, based on non-instrumental principles as general criteria, for validating instrumental rules invoked in the imperative interest of security. The rule of law can be realized at the international level if such general criteria are identified through the judicial pursuit of objectivity as the basis for regulating the process and impact of securitization within the system of international law.

There are two fundamental challenges to this quest for rule of law criteria: universality and the indeterminacy of rules. The search for non-instrumental principles would be a corrupt exercise if it failed to have regard to the colonial history of international law and Third World anxieties associated with it. Driven by the history of Western colonization over the centuries, Third World countries maintain the strong sense of skepticism toward any West-sponsored enterprises promoting liberal values.[96] Brian Tamanaha considers the greatest barrier to the realization of the rule of law under international law is "a material danger that the international legal regime will be perceived by the rest of the world as a Western invention and tool that primarily serves to perpetuate the advantages held by the West."[97]

Even a broader concept of security, of which human security forms part, is not immune to this risk. Any new idea of security or the response to it has the potential for criticism as setting a donor-driven agenda, rather than what Third World societies truly value or require.[98] The deontological pursuit of universality in finding the non-

(Oxford: Oxford University Press, 1994) 227–37.

95 See, for example, Kostiantyn Gorobets, "The International Rule of Law and the Idea of Normative Authority," *Hague Journal on the Rule of Law* 12 (2020) 227; Robert McCorquodale, "Defining the International Rule of Law: Defying Gravity?" *International & Comparative Law Quarterly* 65 (2016) 277; James Crawford, *Chance, Order, Change: The Course of International Law* (The Hague: Hague Academy of International Law, 2014) 353; Simon Chesterman, "An International Rule of Law?" *American Journal of Comparative Law* 56 (2008) 101, 130–31.

96 See generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

97 Tamanaha, *supra* note 90, 136.

98 See Priyankar Upadhyaya, "Human Security, Humanitarian Intervention, and Third World Concerns," *Denver Journal of International Law and Policy* 33 (2004) 71, 86–89.

instrumental principles of international law has this challenge to overcome by embracing the trans-civilizational perspective to the structural problems of international law.[99]

A further challenge to the finding of non-instrumental principles arises from the indeterminacy of rules. In a narrow sense of the word, as Alexander Orakhelashvili articulates it, the rule is indeterminate when the relevant terms cannot be defined in an objectively intelligible way, but inherently imply a need for appreciation on which reasonable parties may differ.[100] Martti Koskenniemi, on the other hand, finds indeterminacy more broadly in semantic ambiguity and contestability of rules and principles, which tend to be either over-inclusive or under-inclusive depending on the relationship with their underlying reasons and to other rules and principles.[101]

The essentially amorphous and dynamic nature of security drives states to use the indeterminacy of rules in the narrow sense by incorporating discretionary language into the rules that are designed to protect, justify, or authorize security measures. States may also exploit indeterminacy in a broader manner by manipulating the interpretation and application of the rules.[102] However, the rule of law is premised on the idea that questions of legal right and responsibility should ordinarily be resolved by application of the law, rather than an exercise of discretion. It further demands that a discretion should ordinarily be defined narrowly and its exercise capable of reasoned justification.[103] The indeterminacy of rules thus militates against the realization of the rule of law.

The challenge that securitization poses to international law is, therefore, not so much whether it reduces legal constraint by calling for emergency action or special measures as to what extent international law can restrict an arbitrary exercise of sovereign powers as a consequence of securitization. In the absence of any epistemological theory on legal methods to validate security claims,[104] the instrumentalist view of international law is likely to prevail and denies any role for international law in regulating the process and impact of securitization. Instead, it reinforces the realist critique that states merely employ legal language to protect, justify or authorize security measures to address any

99 See Yasuaki Onuma, "A Transcivilizational Perspective on International Law," *Recueil des Cours* 342 (2009) 77, 130–37.

100 Orakhelashvili, *supra* note 75, 533.

101 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005) 36–41, 590–96.

102 Ruti G. Teitel, "Humanity's Law: Rule of Law for the New Global Politics," *Cornell International Law Journal* 35 (2002) 355, 387.

103 Lord Bingham, "The Rule of Law," *Cambridge Law Journal* 66 (2007) 67, 72.

104 Wouter Werner, "International Law: Between Legalism and Securitization," in *Security: Dialogue Across Disciplines*, ed. Philippe Bourdeau (Cambridge: Cambridge University Press, 2015) 196, 197.

issues as they become securitized. However, a broader understanding of security in respect of referent objects, threats, and the means to achieve security, as set out above, does not bode well with the instrumental view of international law. It fails to explain how competing security interests are to be balanced within the existing framework of international law that has been established.

The realization of the rule of law with a view to regulating the process and impact of securitization within the system of international law depends on whether there are any universally valid, non-instrumental criteria that set limits to the exercise of discretion in the protection of security interests or in justifying or authorizing security measures. These criteria will also help us understand how different institutions and adjudication mechanisms contribute to the balancing of competing security interests in dealing with the indeterminacy of rules in an objective manner. The remainder of the book explores these criteria, within the analytical framework of security set out in this chapter, to delineate legally valid recourse to the concept of security.

2

LOCATING SECURITY

I. Introduction

Security is, first and foremost, a protective concept when it is incorporated into the instruments of international law. A security interest, when commonly pursued by states, may be afforded legal protection under customary international law through the development of state practice and the associated *opinio juris*. A security interest, when shared among states, may facilitate the development of a new treaty or the inclusion of an exception to the international agreement for the preservation of that interest. The incorporation of a security interest—whether national security, human security, or the security of other objects—into a legal instrument for the purpose of legal protection essentially sets out the relationship between that security interest and other competing interests, according to the perception of threats dictated by the political, economic, and social exigencies that existed at the time of adoption.

The state-centric structure of international law means that national security occupies a prominent place in the legal protection of security interests. As such, the notion of national security is inextricably woven into the fabric of international law. This chapter reviews how national security is legally protected under customary international law (section II) and treaties (section III.A) or through treaty interpretation in cases where protection is not explicitly provided (section III.B). The chapter then shows, by contrast, the limited scope in which other security interests are afforded legal protection by examining legal and structural barriers, with a particular focus on the security of person (section IV.A) and the right to security (section IV.B).

II. National Security in Customary International Law

Self-preservation is the ultimate objective of statehood. Before the emergence of a collective security system, self-preservation represented the sovereign interest that

each state had the intent to protect by resorting to measures of self-help.[1] Even under the modern system of collective security established by the United Nations (UN), the protection of national security has remained "an accepted and legitimate exercise of state sovereignty."[2]

However, an unrestricted pursuit of self-preservation by means of self-help is fundamentally incompatible with the realization of the rule of law in international relations. As Sir Hersch Lauterpacht observed, the original function of any law is "the preservation of peace through the exclusion of self-help."[3] The fate of international law, as a political project aimed at translating the diplomacy of states into the administration of legal rules and institutions,[4] has therefore depended on the extent to which states consider their sovereign interest of self-preservation better secured by committing themselves to a system of international law.

National security is a policy construct of societal threat perceptions. As such, general protection of national security does not exist under customary international law. Yet the specific interests of national security are afforded legal protection. For example, self-preservation from military threats is protected under customary international law by prohibiting the use or threat of force in international relations,[5] while upholding the concomitant right of self-defense exercisable in the event of an armed attack.[6] As the International Court of Justice observed in *Nicaragua*, "it is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests. But the concept of essential security interests certainly extends beyond the concept of an armed attack."[7] In *DRC v. Uganda*, the Court indeed dismissed security threats arising from the political vacuum in the neighbouring country or an unspecified danger of instability as evidence of an armed attack to justify forcible response.[8] Likewise, the plea of distress can only be invoked in cases where a threat to national

1 C. G. Fenwick, "National Security and International Arbitration," *American Journal of International Law* 18 (1924) 777, 779.
2 *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Counter-Memorial of Australia, 2014 ICJ Pleadings para. 2.10.
3 Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933) 402.
4 Martti Koskenniemi, "The Fate of Public International Law: Between Technique and Politics," *Modern Law Review* 70 (2007) 1, 1–3.
5 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, 1986 ICJ Rep. 14, 98–101 paras. 187–90 [hereinafter *Nicaragua* judgment].
6 Ibid., 94 para. 176, 102–3 para. 193.
7 Ibid., 117 para. 224.
8 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 2005 ICJ Rep. 168, 222 para. 143.

security involves a danger to human life in the charge of a state official, while the state of necessity is restricted to situations where a grave and imminent peril is posed to an essential interest of the state, its people, or of the international community as a whole.[9]

Cardinal to the protection of national security under customary international law is the principle of non-intervention. This principle emerged in the nineteenth century as the antithesis to the right of intervention, which powerful states exercised, from time to time, against weaker states in different forms.[10] Under this principle, states are prohibited from intervening, directly or indirectly, in the internal or external affairs of another state that are reserved for its domestic jurisdiction.[11] Thus, national security interests are legally protected from foreign intervention to the extent that relevant matters fall within the state's domestic jurisdiction.

The term "domestic jurisdiction" originates from the English translation of the French text (*la compétence exclusive*) of the Covenant of the League of Nations,[12] which was designed to exclude the competence of the League Council to deal with disputes arising from a domestic question.[13] The concept of domestic jurisdiction denotes the sovereign authority to adjudicate matters domestically within the national legal system, rather than subjecting itself to an exercise of jurisdiction conferred upon an international tribunal. As such, it also constitutes a procedural bar to the exercise of jurisdiction by international courts and tribunals, which is addressed in chapter 3.[14] However, this notion

9 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission* II, pt. 2 (2001) 26, 79 and 83. See also James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013) 303, 308–10.

10 For early historical analysis, see P. H. Winfield, "The History of Intervention in International Law," *British Year Book of International Law* 3 (1922–23) 130; Ellery C. Stowell, *Intervention in International Law* (Washington DC: John Byrne & Co., 1921) 317–55.

11 Helsinki Final Act of the Conference on Security and Co-operation in Europe principle VI (Aug. 1, 1975), reprinted in 14 ILM 1292; UNGA Res. 2625 (XXV) "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" (Oct. 24, 1970); UNGA Res. 2131 (XX) "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty" (Dec. 21, 1965) para. 1; Convention on Rights and Duties of States art. 8, Dec. 26, 1933 (entered into force Dec. 26, 1934) 165 LNTS 19.

12 Treaty of Peace pt. I art. 15(8), June 28, 1919 (entered into force Jan. 10, 1920) 225 CTS 188 ("*une question que le droit international laisse à la compétence exclusive*").

13 See Alfred Zimmern, *The League of Nations and the Rule of Law 1918–1935* (London: Macmillan, 1936) 244–45; J. L. Brierly, "Matters of Domestic Jurisdiction," *British Year Book of International Law* 6 (1925) 8, 9; David Hunter Miller, *The Geneva Protocol* (London: Macmillan, 1925) 64–65.

14 On the distinction between the substantive and procedural aspects of this notion, see Gaetano Arangio-Ruiz, "The Plea of Domestic Jurisdiction Before the International Court of Justice: Substance or Procedure?" in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, ed. Vaughan Lowe and Malgosia Fitzmaurice (Cambridge: Cambridge University Press, 1996) 440, 452–58; Gerald Fitzmaurice, "The General Principles of International Law: Considered from the Standpoint of the Rule of Law," *Recueil des Cours* 92 (1957) 1, 61–64; C. H. M. Waldock, "The Plea of Domestic Jurisdiction Before International Legal Tribunals," *British Year Book of International Law* 31 (1954) 96, 111–14.

of domestic jurisdiction as a procedural bar to the exercise of international jurisdiction does not necessarily have the same meaning as the domain reserved for each state under the principle of non-intervention.

Referring to the domestic jurisdiction clause of the Covenant, the Permanent Court of International Justice observed in its advisory opinion on *Nationality Decrees*, "The words 'solely within the domestic jurisdiction' seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law. As regards such matters, each State is sole judge."[15] According to the Court, the question as to whether a certain matter is or is not, in principle, regulated by international law is "a relative question; [which] depends upon the development of international relations."[16] This relativist position is premised upon the idea of dichotomy between international jurisdiction (as the basis for international adjudication and treaty monitoring) and domestic jurisdiction, leaving no room for international concerns incapable of international adjudication or monitoring.[17] This means that the scope of domestic jurisdiction may be eroded over time as the corpus of international law grows.[18] It is also conceivable, however, that its scope increases as the threats to national security expand, with a greater variety of security measures falling outside the corpus of international law.

Alternatively, under the customary principle of non-intervention, certain matters can be considered within the domestic jurisdiction of a state regardless of the reach of international law. The International Court of Justice signalled such reading in *Nicaragua* by defining domestic jurisdiction as the domain "in which each State is permitted, by the principle of State sovereignty, to decide freely."[19] More specifically, the International Criminal Tribunal for the Former Yugoslavia observed in *Prosecutor v. Blaškić* that "customary international rules do protect the national security of States by prohibiting every State from interfering with or intruding into the domestic jurisdiction, including national security matters, of other States."[20] According to this view, a wide range of

15 *Nationality Decrees in Tunis and Morocco*, Advisory Opinion, 1923 PCIJ Rep. Series B No. 4, 23–24.
16 Ibid.
17 For critical analysis, see Brierly, *supra* note 13. Cf. Gaetano Arangio-Ruiz, "*Le domaine reserve – L'organisation internationale et le rapport entre droit international et droit interne*," *Recueil des Cours* 225 (1990) 9, 36; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford: Oxford University Press, 1963) 77–81; Lawrence Preuss, "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction," *Recueil des Cours* 74 (1949) 547, 627–30, 636–42.
18 James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019) 438–39.
19 *Nicaragua* judgment, *supra* note 5, 108 para. 205.
20 *Prosecutor v. Blaškić*, Case No. ICTY-95-14AR108*bis*, Judgment on the Request for the Republic of Croatia

national security measures such as police operations, intelligence gathering, and the restriction of access to critical infrastructure are reserved in the realm of domestic jurisdiction.[21]

Within this reserved domain, states enjoy freedom in deciding what constitutes a threat to national security and how they might respond to the threat without foreign intervention, so long as it is compatible with their obligations under international law. In the jurisprudence of the International Court of Justice, the principle of non-intervention protects the national security interest of a state only against coercive interference that amounts to a derogation of its sovereignty.[22] Thus, interference in civil strife by providing financial and logistical support constitutes an intervention prohibited under this principle, whereas economic pressure such as the suspension of economic aid does not.[23]

However, the precise remit of action that amounts to an intervention remains unsettled.[24] This is especially so where interference is merely designed to disrupt the political or economic system of another state or to reduce its effectiveness, rather than causing the target state to change its policy or decision. With the expansion of national security interests, it remains to be seen how state practice and associated *opinio juris* might evolve to shape the precise boundaries of the principle.

National security can play a normative role as the driving force in the development of customary international law. In the maritime context, for example, the idea of delimiting the territorial sea originated from the cannon shot rule, which provided a doctrinal justification for the breadth of the territorial sea based on the distance to which artillery could reach.[25] The doctrine was derived from diplomatic practice in the context of maritime neutrality in time of war, which subsequently merged with the Scandinavian practice of fixing a territorial coastal belt measured by mileage.[26] The canon shot rule

for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997) para. 64.

21 See *Droit international appliqué aux opérations dans le cyberespace* (*Ministère des Armées*, *République Française*, 2019) 7.

22 *Nicaragua* judgment, *supra* note 5, 108 para. 205; *Asylum Case (Colombia v. Peru)*, Judgment, 1950 ICJ Rep. 266, 274–75.

23 *Nicaragua* judgment, *supra* note 5, 124 para. 242, 126 para. 245.

24 See, for example, Sean Watts, "Low-Intensity Cyber Operations and the Principle of Non-Intervention," *Baltic Yearbook of International Law* 14 (2015) 137, 146–49; Maziar Jamnejad and Michael Wood, "The Principle of Non-Intervention," *Leiden Journal of International Law* 22 (2009) 345, 368–77; Lori Fisler Damrosch, "Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs," *American Journal of International Law* 83 (1989) 1, 3–4.

25 Cornelius van Bynkershoek, *De Dominio Maris Dissertatio*, trans. Ralph van Deman Magoffin (Oxford: Oxford University Press, 1923).

26 See Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas: A Brief History* (Annapolis, MD: Naval Institute Press, 1972) 40–71; H. S. K. Kent, "The Historical Origins of the Three-Mile Limit," *American Journal of International Law* 48 (1954) 537; Wyndham L. Walker, "Territorial Waters: The Canon Shot Rule," *British Year Book of International Law* 22 (1945) 210.

was thus instrumental to the emergence of the three-nautical-mile limit to the territorial sea under customary international law.

Due to the security-oriented nature of the doctrine, the canon shot rule inevitably met the demand for further extension as the range of modern ordnance expanded.[27] Technological advances caused tension between the national security interest of the coastal states and the interest of maritime powers in maintaining freedom of navigation. These competing national security interests of maritime and coastal states had to be reconciled through contemporary maritime practice as they engaged in the drafting of the UN Convention on the Law of the Sea.[28] The different navigational rights that have been codified as a result, such as the right of innocent passage and transit passage, are widely considered to have crystallized into customary international law.[29] Nevertheless, tensions have persisted due to divergent state practice, with a number of coastal states denying the passage of foreign warships without prior authorization or notification.[30]

With the dynamic evolution of threat perceptions, a normative gap may emerge between the lawful standard of behavior that the state considers obtaining under customary international law and the judicial standard that has developed in the process of an identification of customary international law. Such a gap is found in the controversy as to whether the right of self-defense can be exercised against non-state actors posing military threats.[31] In the jurisprudence of the International Court of Justice, the existence of an inherent right of self-defense is recognized only in the case of armed attack by one state against another.[32] Yet an increasing number of states have adopted an expansive

27 *North Atlantic Coast Fisheries Case (Great Britain v. US)*, Award (Sep. 7, 1910) XI RIAA 167, 205 (Luis M. Drago dissenting).

28 UN Convention on the Law of the Sea, Dec. 10, 1982 (entered into force Nov. 16, 1994) 1833 UNTS 3. See James Kraska, "The Law of the Sea Convention: A National Security Success – Global Strategic Mobility through the Rule of Law," *George Washington International Law Review* 39 (2007) 543; W. L. Schachte Jr., "The History of the Territorial Sea from a National Security Perspective," *Territorial Sea Journal* 1 (1990) 143; David L. Larson, "Security Issues and the Law of the Sea: A General Framework," *Ocean Development & International Law* 15 (1985) 99; W. Michael Reisman, "The Regime of Straits and National Security: An Appraisal of International Lawmaking," *American Journal of International Law* 74 (1980) 48.

29 J. Ashley Roach, "Today's Customary International Law of the Sea," *Ocean Development & International Law* 45 (2014) 239.

30 See Stuart Kaye, "Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction," in *The Law of the Sea: Progress and Prospects*, ed. David Freestone, Richard Barnes, and David Ong (Oxford: Oxford University Press, 2006) 347, 353–56; K. Hakapää and E. J. Molenaar, "Innocent Passage – Past and Present," *Marine Policy* 23 (1999) 131, 143.

31 See, for example, Mary E. O'Connell, Christian J. Tams, and Dire Tladi, *Self-Defence against Non-State Actors* (Cambridge: Cambridge University Press, 2019); Monica Hakimi, "Defensive Force against Non-State Actors: The State of Play," *International Law Studies* 91 (2015) 1.

32 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Rep. 135, 194 para. 139; however, there were significant objections to this qualification as expressed by Judge Higgins at 215 para. 33; Judge Kooijmans at 230 para. 35; Judge Buergenthal at 242 para. 6. Cf. *Armed Activities in the Congo*, *supra* note 8, 223 para. 147 (where the Court avoided addressing the question).

view of the right to encompass the use of force in self-defense against non-state actors,[33] especially when the territorial state from which they are operating is unwilling or unable to prevent such attacks.[34] This normative dissonance creates an indeterminacy of the rule itself, which militates against the judicial pursuit of objectivity as the basis for realizing the rule of law in international relations.

There are also difficulties with the pursuit of objectivity in the application of customary international law through adjudication when the essential security interests of a state are at stake. In the *Nuclear Weapons* advisory opinion, the Court discussed the national policy of nuclear deterrence, which was invoked to claim that states reserved the use of nuclear weapons "in the exercise of the right of self-defense against an armed attack threatening their vital security interests."[35] Without pronouncing upon the validity of the policy itself, the Court observed that it "cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake."[36]

It remains to be settled whether the protection of national security interests can manifest as an independent, overriding right to the survival of the nation under international law. Judge Guillaume, in his separate opinion, observes that states enjoy a kind of "absolute defense" (*excuse absolutoire*), for "no system of law, whatever it may be, could deprive one of its subjects of the right to defend its own existence and safeguard its vital interests."[37] However, the Court could not reach a definitive conclusion regarding the legality of the use of nuclear weapons in extreme circumstances where

33 See, for example, Order of the Second Senate (Sep. 17, 2019) 2 BvE 2/16, para. 50 (Federal Constitutional Court); Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, UN Doc. S/2016/523 (June 9, 2016); Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/946 (Dec. 10, 2015); Law of War Manual, revised ed. (Office of the General Counsel, US Department of Defense, 2016) § 1.11.5.4; Military Manual on International Law Relevant to Danish Armed Forces in International Operations (Danish Ministry of Defence and Defence Command Denmark, 2016) 36; Resolution 1 of Twenty-Fourth Meeting of the Consultation of Ministers of Foreign Affairs "Terrorist Threats to the Americas" (Sep. 21, 2001) OAS Doc. RC.24/RES.1/01. See also various views expressed in the Arria-formula meeting convened by Mexico, annexed to Letter dated 8 March 2021 from the Permanent Representative of Mexico to the United Nations addressed to the President of the Security Council, UN Doc. S/2021/247 (Mar. 16, 2021).

34 See, for example, Jutta Brunnée and Stephen J. Toope, "Self-Defence against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?" *International & Comparative Law Quarterly* 67 (2018) 263; Elena Chachko and Ashley Deeks, "Which States Support the 'Unwilling and Unable' Test?" *Lawfare* (Oct. 10, 2016), available at https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test.

35 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226, 254 para. 66.

36 Ibid., 263 para. 96.

37 Ibid., 290.

the very survival of a state is at stake.[38] The inability of the Court to reach a definitive conclusion could be construed as indicating either that the law itself is uncertain,[39] or as will be discussed in chapter 3, there is an inherent limit to the judicial authority in adjudicating a general question involving the imperative interest of security.

III. National Security in Treaties

States may preserve their national security interest by agreement in the form of a treaty provision. The various formulations of such a clause reflect the national security concerns that prevailed at the time when the treaty was negotiated and adopted. However, as the perception and condition of security change over time, states may find it necessary to address new security threats that were not envisaged or shared among states before. In such cases, relevant treaty provisions may nonetheless be construed to imply the protection of national security through treaty interpretation. There are difficulties in drawing a line between the implicit protection of national security within the realm of interpretive plausibility and the expansive interpretation grounded in policy consideration.

A. Express Protection

The sovereign prerogative to protect its own security is expressly recognized in various treaties. However, the express protection of national security falls short of establishing an inherent right to invoke national security against any treaty obligations.[40] It is rather a manifestation of the protective value of security in delimiting the scope of obligations imposed upon contracting parties. The ways in which the protective value of security is expressed in legal instruments are diverse. Some are generally expressed, whereas others are more specific with reference to particular security threats.

Within its own territory, the state may designate areas in which the entry of foreign nationals on a diplomatic mission or a consular post is prohibited or regulated for national security reasons, notwithstanding the obligation to otherwise ensure their freedom of movement and travel.[41] Within its territorial sea, the coastal

38 Ibid., 263 para. 97 and para. 2(E) of its *dispositif* at 266 para. 105.
39 Ibid., 558 (Judge Koroma dissenting opinion).
40 See Theodore Christakis, "*L'État avant le droit? L'exception de "sécurité nationale" en droit international*," *Revue Générale de Droit International Public* 112 (2008) 5, 29–31; Susan Rose-Ackerman and Benjamin Billa, "Treaties and National Security," *New York Journal of International Law and Politics* 40 (2008) 437, 443, 460–89.
41 Vienna Convention on Diplomatic Relations art. 26, Apr. 18, 1961 (entered into force Apr. 24, 1964) 23

state is entitled to take the necessary steps to prevent passage of foreign ships when the passage is prejudicial to the peace, good order or security of that state.[42] The coastal state may also designate areas to suspend the passage of foreign ships within the territorial sea or archipelagic waters if the coastal state considers that such suspension is essential for the protection of its security.[43] Further, states reserve the right to stop any private telegram or cut off any other private telecommunications "which may appear dangerous to the security of the State."[44]

A more specific expression of national security protection is found in various trade agreements. Article XXI of the 1994 General Agreement on Tariffs and Trade (GATT), as well as Article XIV *bis* of the General Agreement on Trade in Services (GATS) and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), provides:

> Nothing in this Agreement shall be construed:
>
> (a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent a Member 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 a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[45]

An identical or similarly worded provision is also found in numerous bilateral and regional trade agreements.[46]

Earlier trade and investment treaties, by contrast, received a more basic formulation

UST 3227, TIAS No. 7502, 500 UNTS 95; Vienna Convention on Consular Relations art. 34, Apr. 24, 1963 (entered into force Mar. 19, 1967) 21 UST 77, TIAS No. 6820, 596 UNTS 261.

42 Law of the Sea Convention, *supra* note 28, arts. 19(1) and 25(1).

43 Ibid., arts. 25(3) and 52(2).

44 Constitution of the International Telecommunication Union art. 34, Dec. 22, 1992 (entered into force July 1, 1994) TIAS No. 97-1026, 1825 UNTS 330.

45 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 (entered into force Jan. 1, 1995) 1867 UNTS 154; Annex 1A, 1867 UNTS 187 [hereinafter GATT]; Annex 1B, 1869 UNTS 183 [hereinafter GATS]; Annex 1C, 1869 UNTS 299 [hereinafter TRIPS Agreement].

46 For example, Agreement between Japan and Brunei Darussalam for an Economic Partnership art. 8(3), June 18, 2007 (entered into force July 31, 2008) 2781 UNTS 3; Australia–Chile Free Trade Agreement art. 22.2, July 30, 2008 (entered into force Mar. 6, 2009) 2694 UNTS 3; Free Trade Agreement, Mexico–Israel, art. 11-03, Apr. 10, 2000 (entered into force July 1, 2000) 2128 UNTS 3.

of security exception.[47] A good example is Article XI of the 1991 US–Argentina bilateral investment treaty, which drew attention in a series of controversial arbitration cases.[48] It merely provides, "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests."[49] The heightened risk of large-scale terrorism since 2001 is reflected in more recent trade agreements, excepting measures "taken so as to protect critical public infrastructure including communications, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructures."[50]

Human rights treaties, by and large, have moved away from a general exception clause for the protection of national security.[51] It is rather specifically enumerated as one of the permissive grounds for restricting human rights such as the freedom of movement, expression, association, and peaceful assembly.[52] Similarly, the Refugee Convention recognizes that states have the right to expel refugees on account of national security

47 For example, Treaty of Amity, Economic Relations and Consular Rights, Iran–US, art. XX(1)(d), Aug. 15, 1955 (entered into force June 16, 1957) 8 UST 899, TIAS No. 3853, 284 UNTS 93; Treaty of Friendship, Commerce and Navigation, Nicaragua–US, art. XXI(1)(d), Jan. 21, 1956 (entered into force May 24, 1958) 9 UST 449, 367 UNTS 3; Treaty of Friendship, Commerce and Navigation, Israel–US, art. XXI(1)(d), Aug. 23, 1951 (entered into force Apr. 3, 1954) 5 UST 550, 219 UNTS 237.

48 *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sep. 5, 2008); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sep. 28, 2007); *Enron Corporation Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007); *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005).

49 Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment art. XI, Nov. 14, 1991 (entered into force Oct. 20, 1994) TIAS No. 94-1020.

50 For example, Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area ch. 15 art. 2, Feb. 27, 2009 (entered into force Jan. 1, 2010 for Australia, Brunei Darussalam, Malaysia, Myanmar, New Zealand, the Philippines, Singapore and Vietnam; Mar. 12, 2010 for Thailand; Jan. 1, 2011 for Lao People's Democratic Republic; Jan. 4, 2011 for Cambodia; Jan. 10, 2012 for Indonesia) 2672 UNTS 3; Comprehensive Economic Partnership, Japan–India, art. 11(3), Feb. 16, 2011 (entered into force Aug. 1, 2011) 2862 UNTS 3.

51 Cf. African Charter on Human and Peoples' Rights art. 27(2), June 27, 1981 (entered into force Oct. 21, 1986) 1520 UNTS 217 ("The rights and freedoms of each individual shall be exercised with due regard to… collective security, morality and common interest"); ASEAN Human Rights Declaration para. 8 (Nov. 18, 2012) ("The exercise of human rights and fundamental freedoms shall be subject only to… the just requirements of national security…").

52 International Covenant on Civil and Political Rights arts. 12(3), 13, 14(1), 19(3), 21, 22(2), Dec. 16, 1966 (entered into force Mar. 23, 1976) 999 UNTS 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms arts. 6(1), 8(2), 9(2), 10(2), 11(2), Nov. 4, 1950 (entered into force Sep. 3, 1953) 213 UNTS 221 [hereinafter European Convention on Human Rights]; Protocol 4 art. 2(3), Sep. 16, 1963 (entered into force May 2, 1968) 1496 UNTS 263, ETS No. 46; Protocol 7 art. 1, Nov. 22, 1984 (entered into force Nov. 1, 1988) 1525 UNTS 195; American Convention on Human Rights arts. 13(2)(b), 15, 16(2), 22(3), Nov. 22, 1969 (entered into force July 18, 1978) 1144 UNTS 123; Arab Charter on Human Rights arts. 24(7), 26(2), 32(2), 35(2), May 23, 2004 (entered into force Mar. 15, 2008), reprinted in *International Human Rights Reports* 12 (2005) 893.

or public order if the decision is reached in accordance with due process of law.[53] It is permissible to do so even if they are lawfully settled, although such action must be justified if they are returned to places where their life or freedom would be threatened.[54]

These permissive grounds for restricting human rights must be distinguished from the regime of derogation in time of public emergency. Under each human rights treaty, states have preserved their sovereign prerogative to derogate from their obligation to respect human rights—with the exception of non-derogable rights—in time of public emergency threatening the life of the nation.[55] As will be discussed in chapter 5, the concept of security in the latter context engages its justificatory value for the adoption of derogatory measures necessary to address public emergencies.

In international armed conflict, a state may restrict certain rights and privileges to which protected civilians would otherwise be entitled if they are definitely suspected of or engaged in activities hostile to the security of the state or the occupying power.[56] States are also authorized to take measures of control and security in regard to protected civilians as may be necessary as a result of war.[57] Such discretionary measures include a ban on the carrying of arms or any change in place of residence without permission, prohibition of access to certain areas, restrictions of movement, assigned residence, and internment, as long as the fundamental rights of the individuals concerned are not affected.[58] However, protected civilians are not to be placed in assigned residence or interned unless the security of the state makes it absolutely necessary or, in the case of belligerent occupation, unless the occupying power considers it necessary for imperative security reasons.[59]

States are also protected from furnishing information or producing documents in various international proceedings if they consider that the disclosure of information would prejudice their national security.[60] It is debatable whether states can avail

53 Convention Relating to the Status of Refugees art. 32, July 28, 1951 (entered into force Apr. 22, 1954) 189 UNTS 137.

54 See chapter 5 for further analysis.

55 ICCPR, *supra* note 52, art. 4; European Convention on Human Rights, *supra* note 52, art. 15; American Convention on Human Rights, *supra* note 52, art. 27; Arab Charter on Human Rights, *supra* note 52, art. 4. On the interpretation of public emergency, see chapter 4.II, and on the justification for derogation, see chapter 5.

56 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 5, Aug. 12, 1949 (entered into force Oct. 21, 1950) 6 UST 3516, TIAS No. 3365, 75 UNTS 287 [hereinafter Geneva Convention IV].

57 Geneva Convention IV, *supra* note 56, art. 27(4).

58 Jean S. Pictet, ed., *Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) 207 [hereinafter 1958 ICRC Commentary].

59 Geneva Convention IV, *supra* note 56, arts. 42(1), 78(1). See chapter 5 for judicial assessment of this justification for civilian internment.

60 Rome Statute of the International Criminal Court arts. 72, 93(4), July 17, 1998 (entered into force July 1, 2002) 2187 UNTS 3; GATT, *supra* note 45, art. XXI(a); GATS, *supra* note 45, art. XIV *bis* 1(a); TRIPS

themselves of such protection before any international judicial forum, including the proceedings at the International Court of Justice, where such protection is not expressly provided. In the absence of treaty-based protection, the question turns to whether the non-disclosure of information on national security grounds constitutes, in one form or another, a general principle of law that applies to the Court's proceedings.[61] The prevalence of state secrets privilege across different jurisdictions and legal systems, with a degree of uniformity,[62] indicates a potential case for it and, as will be discussed in chapter 3, section IV.D, may cause the Court to exercise judicial deference.

B. Implicit Protection

Even in the absence of an express provision, the concept of security may assert its protective value by creating room for accommodating security interests through treaty interpretation. Such room may be identified in different interpretive methods relevant to a particular treaty provision, such as its context, the object and purpose of the treaty, and subsequent agreement or practice among contracting parties.[63] The protection of national security can be implied when the application of those interpretive methods allows for the adoption of security measures in conformity with the rule. The role of security in this context is therefore derived from the construction of the rule, which must be distinguished from evolutive interpretation. As will be discussed in chapter 4, the latter is driven by the conceptual expansion of security as an internal element of the rule itself.

For example, there is no express reference to the protection of national security as an exception to "arbitrary arrest and detention" prohibited under Article 9 of the International Covenant on Civil and Political Rights.[64] However, the ill-defined provision has left room for the UN Human Rights Committee to adopt a flexible interpretation. In *Schweizer v. Uruguay*, the Committee acknowledges that "administrative detention

Agreement, *supra* note 45, art. 73(a); Law of the Sea Convention, *supra* note 28, art. 302.

61 Statute of the International Court of Justice art. 38(1)(c), June 26, 1945 (entered into force Oct. 24, 1945) 59 Stat. 1055, TS No. 993.

62 See Hitoshi Nasu, "State Secrets Law and National Security," *International & Comparative Law Quarterly* 64 (2015) 365.

63 Vienna Convention on the Law of Treaties arts. 31, 32, May 23, 1969 (entered into force Jan. 27, 1980) 115 UNTS 331.

64 During the drafting of the Covenant, the reference to security was contemplated as a legitimate ground for justifiable arrest and detention, but the idea was rejected due to the concerns that any attempt to enumerate exceptions might not be exhaustive: UNCHR (6th Session), Summary Record of 146th Meeting, UN Doc. E/CN.4/SR.146 (Apr. 12, 1950) 3–15; UNCHR (6th Session), Summary Record of 147th Meeting, UN Doc. E/CN.4/SR.147 (Apr. 17, 1950) 3–12.

may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner."[65] In *Ahani v. Canada*, the Committee observes that administrative detention on grounds of national security "does not result ipso facto in arbitrary detention."[66]

Likewise, the Committee has accommodated the protection of national security in interpreting "arbitrary or unlawful interference" with the right to privacy prohibited under Article 17 of the Covenant in the absence of an express exception on such grounds. In *Ilyasov v. Kazakhstan*, the Committee took into account the evaluation of "risks to the State party's national security, public order (*ordre public*), public health or morals or the rights and freedoms of others."[67] Martin Scheinin, acting as the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, observed that "States appear to be content that the framework of article 17 is flexible enough to enable necessary, legitimate and proportionate restrictions to the right to privacy by means of permissible limitations, including when responding to terrorism."[68]

The right to detain asylum seekers on national security grounds is also implicitly recognized in the context of the 1951 Refugee Convention. Under Article 31(2) of the Convention, contracting parties may restrict the freedom of movement as necessary, but there is no express statement on the possible grounds for such restrictions.[69] Nevertheless, the protection of national security has been recognized in practice as a legitimate ground for imposing necessary restrictions on liberty.[70] The question of whether the deprivation of liberty is necessary on national security grounds has instead turned into the assessment of whether the detention is arbitrary.[71]

65 *Schweizer v. Uruguay*, Communication No. 66/1980, UN Doc. CCPR/C/OP/2 (Oct. 12, 1982) 90 para. 18.1.

66 *Ahani v. Canada*, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002 (June 15, 2004) para. 10.2.

67 *Ilyasov v. Kazakhstan*, Communication No. 2009/2010, UN Doc. CCPR/C/111/D/2009/2010 (July 23, 2014) para. 7.4.

68 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. A/HRC/13//37 (Dec. 28, 2009) para. 15.

69 Cf. Refugee Convention, *supra* note 53, art. 9 (regarding provisional measures in the interests of national security).

70 See, for example, UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (Feb. 1999) 4 (Guideline 3); Gregor Noll, "Article 31," in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, ed. Andreas Zimmermann (Oxford: Oxford University Press, 2011) 1242, 1270–72.

71 See, for example, *Saadi v. UK*, Application No. 13229/03, ECtHR (Grand Chamber) Judgment (Jan. 29, 2008) paras. 67–74; *C v. Australia*, Communication No. 900/1999, UN Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2002) para. 8.4; *A v. Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (Apr. 30. 1997) para. 7.6.

Caution must be exercised not to confuse this interpretive role of security with the consideration of security interests as a matter of policy. In *US – Shrimp*, for example, the Dispute Settlement Panel of the World Trade Organization (WTO) took into consideration the WTO's broad policy objective in interpreting the general exceptions provided for in Article XX of GATT, holding that a trade-restrictive measure could not be justified when it would "threaten the security and predictability of the multilateral trading system."[72] In its submission as a third party, the European Communities cautioned that such an approach would make trade concerns paramount to all others.[73] The WTO Appellate Body ultimately rejected the Panel's broad formulation as an interpretive rule in the appraisal of trade-restrictive measures under Article XX.[74]

However, there is a fine line between the implicit protection of national security within the realm of interpretive plausibility and the policy consideration of security interests, as illustrated in a series of counter-terrorism cases brought before the European Court of Human Rights. The British government advanced the position that even in cases where the protection of national security is absent from the text of the rule itself, it must be considered in the interpretation of the rule. In *Chahal v. UK*, for example, the British government argued an "implied limitation" to freedom from inhuman and degrading treatment as a justification "to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds."[75] A similar argument was employed in the *Belmarsh Prison* case in relation to the deprivation of liberty, which, in the British government's view, "had to be interpreted so as to strike a balance between the interests of the individual and the interests of the State in protecting its population from malevolent aliens."[76]

In *Chahal*, the majority judgment denied any room for balancing the risk of ill-treatment against the interests of national security, upholding the absolute nature of the prohibition of torture and inhuman or degrading treatment where substantial grounds had been shown for believing that an individual would face a real risk of ill-treatment.[77] The joint dissents, however, adopted a different view insofar as the risk involved an extra-territorial dimension, stating as follows:

> A Contracting State which is contemplating the removal of someone from its jurisdiction to that

72 *US – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Panel* (May 15, 1998) WT/DS58/R, para. 7.44.
73 *US – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body* (Oct. 12, 1998) WT/DS58/AB/R, para. 71. See also Australia's claim at ibid., para. 57.
74 Ibid., para. 116.
75 *Chahal v. UK*, Application No. 22414/93, ECtHR (Grand Chamber) Judgment (Nov. 15, 1996) para. 76.
76 *A and Others v. UK*, Application No. 3455/05, ECtHR (Grand Chamber) Judgment (Feb. 19, 2009) para. 148.
77 *Chahal v. UK*, *supra* note 75, paras. 78–81.

> of another State may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination. Where, on the evidence, there exists a substantial doubt as to the likelihood that ill-treatment in the latter State would indeed eventuate, the threat to national security may weigh heavily in the balance. Correspondingly, the greater the risk of ill-treatment, the less weight should be accorded to the security threat.[78]

Here, the balancing argument finds its place in the interpretive gap created as a result of extending the prohibition of torture and inhuman or degrading treatment to the realm of probability.

The prohibition of torture and inhuman or degrading treatment is absolute in the sense that there is no exception to justify such ill-treatment within its own jurisdiction. Yet, this does not necessarily mean eliminating all risks of ill-treatment that might take place elsewhere. A broad reading of the prohibition, conditioned upon speculative factual assessment, has created an interpretive gap in which the national security interest finds room for re-asserting itself in recovering the balance of interests struck when the commitment was originally made.

The "substantial grounds" test that the majority judgment adopted regarding the belief that the person would be in danger of being subjected to ill-treatment is drawn from the Convention against Torture.[79] This test provides a degree of safeguard against the erosion of the prohibition.[80] However, this approach is not immune from subjective appreciation due to difficulties in measuring risks.[81] Indeed, the joint dissents in *Chahal* did not share the view that the real risk of ill-treatment was substantiated and, instead, required a higher degree of foreseeability.[82]

Having lost the policy option to deport foreign nationals posing a threat to national security when substantial grounds existed for a real risk of ill-treatment, the British government turned to the deprivation of their liberty.[83] The Anti-Terrorism, Crime and

78 Ibid., Joint Partly Dissenting Opinion of Judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev, and Levits, para. 1.

79 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984 (entered into force June 26, 1987) 1465 UNTS 85; *Soering v. UK*, Application No. 14038/88, ECtHR (Plenary) Judgment (July 7, 1989) para. 88.

80 See *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, para. 89 (S. Ct.).

81 Alexander Orakhelashvili, "Threat, Emergency and Survival: The Legality of Emergency Action in International Law," *Chinese Journal of International Law* 9 (2010) 345, 380.

82 *Chahal v. UK*, *supra* note 75, Joint Partly Dissenting Opinion of Judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev, and Levits, paras. 2–9.

83 The alternative option that has been pursued is to secure diplomatic assurances that remove the substantial grounds for believing a real risk of ill-treatment. See, for example, Rumyana Grozdanova, "The United

Security Act 2001 was thus enacted to introduce an extended power to arrest and detain a foreign national.[84] This power was applied, upon the national security certificate issued by the Home Secretary, where the criminal prosecution of terrorist suspects was not possible due to insufficient evidence, nor was their removal due to a real risk of ill-treatment in the country of destination.

This legislative measure raised further questions as to whether the detention of foreign nationals under such circumstances would qualify as an exception to the right to liberty under Article 5(1) of the European Convention on Human Rights.[85] In the European Court's jurisprudence, exceptional grounds enumerated for the deprivation of liberty under this provision have been interpreted as exhaustive,[86] leaving no room for justification based on national security.[87] One of the exceptions, set forth in sub-paragraph (f), allows national authorities to restrict the liberty of foreign nationals "with a view to deportation or extradition." The question was whether this ground could have justified the detention of foreign nationals for an extended period due to national security concerns.

The European Court addressed this question in the aforementioned *Belmarsh Prison* case and rejected the British government's balancing argument based on threats to national security.[88] The judgment distinguished this case from *Chahal*, where no violation of the right to liberty was found despite his imprisonment for over six years on national security grounds. This is because in the latter case, deportation proceedings were actively and diligently pursued, whereas the present case was primarily concerned with the legality of detention.[89]

In *Chahal*, the Court concluded that "in view of the exceptional circumstances of the case and the facts that the national authorities have acted with due diligence throughout the deportation proceedings against him and that there were sufficient guarantees against the arbitrary deprivation of his liberty, this detention complied with the requirements of

Kingdom and Diplomatic Assurances: A Minimalist Approach towards the Anti-Torture Norm," *International Criminal Law Review* 15 (2015) 369 and literature cited therein.

84 Anti-Terrorism, Crime and Security Act 2001 (UK) ss. 21–23.

85 At the same time, the British government lodged a derogation notice, which will be discussed in chapter 5.

86 See, for example, *A and Others v. UK*, *supra* note 76, para. 163; *Saadi v. UK*, *supra* note 71, para. 43; *Ireland v. UK*, Application No. 5310/71, ECtHR (Plenary) Judgment (Jan. 18, 1978) para. 194.

87 Cf. *Hassan v. UK*, Application No. 29750/09, ECtHR (Grand Chamber) Judgment (Sep. 16, 2014) paras. 96–105; *Al-Waheed and Mohammed (Serdar) v. Ministry of Defence* [2017] AC 821, 857–71 paras. 40–68 (Lord Sumption).

88 *A and Others v. UK*, *supra* note 76, para. 171. See also *Baisuev and Anzorov v. Georgia*, Application No. 39804/04, ECtHR (Third Section) Judgment (Dec. 18, 2012) para. 60.

89 *A and Others v. UK*, *supra* note 76, para. 169.

Article 5 para. 1(f)."[90] The "sufficient guarantees" that the Court referred to consisted of the advisory panel procedure undertaken by experienced judicial figures and their undisclosed report concerning the national security assessment of the applicant—the procedure that was no better than the Special Immigration Appeals Commission, which was set up in response to the Court's judgment in *Chahal*.[91] It thus suggests that the detention of individuals for an extended period of time because of national security concerns is justifiable as long as their deportation proceedings are actively and diligently pursued—the option that the Court dismissed in the *Belmarsh Prison* case when substantial grounds are shown for believing that the individual would face a real risk of ill-treatment.[92]

It is notable that the drafters of the International Covenant and the European Convention did not classify the right to liberty as a non-derogable right,[93] envisaging difficulties in situations of war and major disasters.[94] In the draft text, there was a specific reference to national security as a permissible ground for detention, which failed to attract sufficient votes for adoption. The outcome of this drafting process is that the state may justify detention by declaring a public emergency under the regime of derogation, but otherwise not on national security grounds. On the other hand, an interpretive solution that has been reached through the development of subsequent jurisprudence is that detention on national security grounds will not necessarily fall foul of the prohibition, as long as there are sufficient guarantees against the arbitrary deprivation of liberty. Indeed, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities noted that national security grounds "should not be used as a pretext for imposing *arbitrary* limitations or restrictions on the exercise of human rights and freedoms" (emphasis added).[95]

There are two aspects of notable significance to this limited concession granted for the protection of national security interests in the international human rights jurisprudence. First, even though national security is not expressly provided as one of the exceptional grounds for the deprivation of liberty, the sovereign state's protective interest in detaining those who

90 *Chahal v. UK*, *supra* note 75, para. 123.
91 On the procedures before the Commission, see *A and Others v. UK*, *supra* note 76, paras. 91–93.
92 Ibid., paras. 167–68.
93 Article 27(2) of the American Convention, by contrast, has added "the judicial guarantees essential for the protection of such rights" to the list of non-derogable rights, which has been interpreted to encompass habeas corpus: *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion OC-8/87 (Jan. 30, 1987) IACtHR Series A No. 8 paras. 27–42.
94 UNCHR (6th Session), Summary Record of the 196th Meeting, UN Doc. E/CN.4/SR.196 (May 26, 1950) 6–7.
95 The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights: A Contribution to the Freedom of the Individual under Law, prepared by Erica-Irene A. Daes, UN Doc. E/CN.4/Sub.2/432/Rev.2 (1983) 177 para. 1028.

pose a threat to national security has found its place in an expansive interpretation of Article 5, paragraph 1(f), of the European Convention.[96] In other words, the state's national security interest has been incorporated into the interpretive criteria of a permissible ground for the deprivation of liberty, rather than serving as an independent ground for justifying it. Second, by adopting such an expansive interpretation, the recourse to administrative detention on national security grounds has been kept within the existing legal framework concerning the deprivation of liberty, with all the rights guaranteed for detainees having to be respected.

However, such an expansive interpretation to accommodate the national security interest is open to criticism. Article 5(1) of the International Covenant on Civil and Political Rights provides:

> Nothing in the present Covenant 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 recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

An equivalent clause is found in Article 17 of the European Convention on Human Rights. These clauses contain two distinct limits to interpretive plausibility: (i) no individual or group may use the human rights provisions as a shield for activities which will undermine the rights and freedoms of other people as guaranteed in the instrument; (ii) no state may restrict rights and freedoms to an extent greater than that the instrument allows.[97]

The second limitation is further expanded upon as a rule against *détournement de pouvoir* in Article 18 of the European Convention.[98] It reads, "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."[99] A strict application of these safeguard rules would arguably militate against any expansive interpretation of the permissible grounds for the deprivation of liberty or the purposes for which those grounds

96 The foundation for this expansive interpretation rested in earlier jurisprudence indicating that the mere intention to remove the person would suffice to justify arrest and detention, even if the removal did not eventuate or turned out to be unlawful: see Stefan Trechsel, "Liberty and Security of Person," in *The European System for the Protection of Human Rights*, ed. Ronald St. J. Macdonald, Franz Matscher, and Herbert Petzold (The Hague: Martinus Nijhoff, 1993) 277, 312–13.

97 Daes, *supra* note 95, 130 para. 346; Thomas Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations," in *The International Bill of Rights: The Covenant on Civil and Political Rights*, ed. Louis Henkin (New York: Columbia University Press, 1981) 72, 86–89.

98 See J. E. S. Fawcett, *The Application of the European Convention on Human Rights*, 2nd ed. (Oxford: Clarendon Press, 1987) 320–22; Francis G. Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1975) 202–4.

99 Article 30 of the American Convention on Human Rights also provides: "The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with the laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."

are prescribed. In the jurisprudence of the European Court, a deprivation of liberty has been found in breach of Article 18 in cases where an ulterior motive was established beyond reasonable doubt as the predominant reason for the arrest or detention.[100]

Concern may also be raised that the deprivation of liberty on national security grounds even for the purposes of removal or deportation of foreign nationals amounts to a de facto derogation and thus undermines the legal protection originally afforded to the right to liberty. Indeed, the UN Human Rights Committee recognizes the risk that national authorities may abuse the extended detention powers on national security grounds and elaborates on various requirements for the exercise of such powers as follows:

> If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases.[101]

These requirements, as will be discussed in chapter 5, essentially replicate those that apply when a state justifies derogatory measures during a state of public emergency.

IV. Other Security Interests

While the protection of national security is pervasive and entrenched in the field of international law, there are also rules that are considered to protect the security interest of other referent objects discussed in chapter 1. For example, the interest of the international community in the maintenance of international peace and security underpins the system of collective security established under the UN Charter.[102] The maintenance of diplomatic relations, including the privileges and immunities accorded to diplomatic agents and premises, has also been characterized as "vital for the security and well-being of the complex international community of the present day."[103]

The reach of international law has extended to the protection of other security interests

100 For a comprehensive survey and analysis of relevant cases, see *Merabishvili v. Georgia*, Application No. 72508/13, ECtHR (Grand Chamber) Judgment (Nov. 28, 2017) paras. 265–317.

101 HRC, General Comment No. 35: Article 9 (Liberty and Security of Person), UN Doc. CCPR/C/GC/35 (Dec. 16, 2014) para. 15.

102 Charter of the United Nations arts. 1(1), 24, 39, 48, June 26, 1945 (entered into force Oct. 24, 1945) 59 Stat. 1031, TS No. 993, 1 UNTS XVI. See chapter 6 for further analysis.

103 *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, Judgment, 1980 ICJ Rep. 3, 43 para. 92.

in specific contexts, such as the full protection and security of investment,[104] the security of peaceful shipping,[105] the security of personal data,[106] the security of persons,[107] and under the 1949 Geneva Conventions, the security of medical establishments, prisoners of war, the population under belligerent occupation, and civilian internees.[108] Further, the occupying power is authorized to undertake total or partial evacuation inside the occupied territory "if the security of the population or imperative military reasons so demands."[109]

The protection of those security interests generally takes the form of an obligation on the part of sovereign states. In other words, the sovereign state represents a potential threat to the protection of these interests, as well as an agency to recognize and guarantee them. This means that the extent to which these interests represent an internationally recognized value to be secured depends on how the obligation is interpreted and applied in practice. There are legal and structural barriers to the general protection of these interests, limiting the role that the security of person, and the right to security in general, plays in international law.

A. The Security of Person

Article 3 of the Universal Declaration of Human Rights enshrines that "[e]veryone has the right to life, liberty and the security of person."[110] Article 9(1) of the International Covenant on Civil and Political Rights refers to the security of person in a narrower context as follows:

> Everyone has the right to liberty and security of persons. No one shall be subjected to

104 For details, see Sebastián Mantilla Blanco, *Full Protection and Security in International Investment Law* (Berlin: Springer, 2019).

105 Convention VIII Relative to the Laying of Automatic Submarine Contact Mines art. 3, Oct. 18, 1907 (entered into force Jan. 26, 1910) 36 Stat. 2332, TS No. 541, 205 CTS 331; *Nicaragua* judgment, *supra* note 5, 112 para. 215; *M/V Saiga (No. 2) (St. Vincent and the Grenadines v. Guinea)*, Judgment, 1999 ITLOS Rep. 10, 173 para. 29 (Judge Laing separate opinion).

106 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data art. 7, Jan. 28, 1981 (entered into force Oct. 1, 1985) 1946 UNTS 65.

107 See section IV.A of the present chapter.

108 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 19(2), Aug. 12, 1949 (entered into force Oct. 21, 1950) 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 23, Aug. 12, 1949 (entered into force Oct. 21, 1950) 6 UST 3316, TIAS No. 3364, 75 UNTS 135; Geneva Convention IV, *supra* note 56, arts. 49 and 127 respectively. While the term "safety" is used in the English text of some of these provisions, it has been interpreted to mean "security" as the equally authentic French and Spanish texts interchangeably use the terms "*sécurité*" or "*seguridad*" for "security" and "safety": see Marco Sassòli, "The Concept of Security in International Law Relating to Armed Conflicts," in *Security: A Multidisciplinary Normative Approach*, ed. Cecilia M. Bailliet (The Hague: Martinus Nijhoff, 2009) 7, 18.

109 Geneva Convention IV, *supra* note 56, art. 49(2). Cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Rep. 136, 192 para. 135 (rejecting its applicability to the deportation or transfer of the occupying power's own population into the occupied territory).

110 UNGA Res. 217 A (III) "Universal Declaration of Human Rights" (Dec. 10, 1948) art. 3.

> arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[111]

The reference to security in the context of human rights appeared in the first draft of the bill of rights submitted by the Government of Cuba without giving a clear indication as to what it was intended to mean. It also appeared in the Working Paper on the International Bill of Rights, which suggested that "the catalogue of rights might be divided into three parts: one dealing with the status of liberty, another with the status of equality and another with the status of security."[112] The status of security in this context referred to socio-economic rights such as the right to work, education, and social security.

The concept of security thus provided a structural foundation for the Universal Declaration of Human Rights, with a general clause to protect "the right to life, liberty and the security of person" by way of introducing specific human rights that followed. The US delegation suggested that the security of person be merged with freedom from arbitrary detention, but this idea was initially rejected.[113] Beyond this general point, however, there does not seem to have been any agreement on its meaning. During the debate in the Drafting Committee of the Commission on Human Rights, Lebanon and the Netherlands proposed that the term be replaced by physical (or bodily) integrity, which the French and US representatives were prepared to accept.[114] The Australian delegation observed that the meaning of physical integrity was not sufficiently clear, while the Chinese and Soviet representatives preferred personal safety.[115]

As for the International Covenant on Civil and Political Rights, the Third Committee of the UN General Assembly discussed the meaning of security of person prior to voting on the final text at the plenary. In response to the Guatemalan delegation's request for an exact definition of security of person, Eleanor Roosevelt explained as the Chair of the Commission on Human Rights that this wording had been chosen because it was more comprehensive than any other expression.[116] Chile and Venezuela voted in favor of

111 ICCPR, *supra* note 52, art. 9(1).

112 Working Paper on an International Bill of Rights, UN Doc. E/CN.4/W.4 (Jan. 13, 1947), reproduced in *The Universal Declaration of Human Rights: The Travaux Préparatoires*, ed. William A. Schabas (Cambridge: Cambridge University Press, 2013) 115.

113 Drafting Committee of the Commission on Human Rights, Summary Record of the 12th Meeting, UN Doc. E/CN.4/AC.1/SR.12 (July 3, 1947) 6–8, reproduced in Schabas, *supra* note 112, 848–49.

114 Drafting Committee of the Commission on Human Rights (2nd Session), Summary Record of the 35th Meeting, UN Doc. E/CN.4/AC.1/SR.35 (May 29, 1948) 3–4, reproduced in Schabas, *supra* note 112, 1535–36.

115 Ibid., 6–7, reproduced in Schabas, *supra* note 112, 1536.

116 UN GAOR, Third Committee, 107th Meeting, UN Doc. A/C.3/SR.107 (Oct. 19, 1948) 189–90, reproduced in Schabas, *supra* note 112, 2289.

the final text on the understanding that security of person included physical, moral and legal integrity of the individual,[117] whereas France, Guatemala and the Philippines were content with the idea that it included the notion of physical integrity.[118] Cuba, on the other hand, abstained from the vote attributing its reason to the lack of clarity.[119] Ecuador drew a distinction between physical integrity as a human right and the security of person as a duty on the part of the state toward the individual.[120]

The security of person was ultimately incorporated into Article 9 of the Covenant concerning freedom from arbitrary arrest and detention. When read in the context of the provision, its meaning can be narrowly understood as an aspect of the right to liberty or overlapping with the right to life and the prohibition of torture and cruel, inhuman, or degrading treatment.[121] Yet the fact that this notion appears alongside the right to liberty could also suggest that the security of person must have an independent meaning besides liberty.

Notwithstanding its imprecise meaning, the UN Human Rights Committee has interpreted security of person to encompass a broader range of threats beyond arbitrary arrest and detention. In *Delgado Páez v. Colombia*, for example, the Committee observed:

> 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 lives of persons under their jurisdiction, on the grounds that they are neither arrested nor 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.[122]

This observation was made in relation to various harassments and threats made against the author of the complaint due to his progressive ideas on theological and social matters. The Committee found that the security of person was violated because of the failure, or the inability, on the part of Colombian authorities to take reasonable and appropriate measures to ensure his right to security despite the knowledge of those threats.[123]

117 Ibid., 192, 193, reproduced in Schabas, *supra* note 112, 2292–93.
118 Ibid., 190, 193, reproduced in Schabas, *supra* note 112, 2289, 2293.
119 Ibid., 192, reproduced in Schabas, *supra* note 112, 2291.
120 Ibid., 193, reproduced in Schabas, *supra* note 112, 2293.
121 Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 2nd ed. (Oxford: Oxford University Press, 2019) 453.
122 *Delgado Páez v. Colombia*, Communication No. 195/1985, UN Doc. CCPR/C/39/D/195/1985 (July 12, 1990) para. 5.5.
123 Ibid., para. 5.6.

The Committee's position has since then been consistent in holding that Article 9 of the Covenant extends to the protection of personal security when there is an objective need for taking reasonable and appropriate measures even outside the context of arrest and detention.[124] The security of person is broadly envisaged as the protection of "individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained."[125]

The state has a corresponding positive obligation to "take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors."[126] The Committee explains this obligation to protect the security of person as follows:

> States parties must take both measures to prevent future injury and retrospective measures, such as enforcement of criminal laws, in response to past injury. States parties must respond appropriately to patterns of violence against categories of victims such as intimidation of human rights defenders and journalists, retaliation against witnesses, violence against women, including domestic violence, the hazing of conscripts in the armed forces, violence against children, violence against persons on the basis of their sexual orientation or gender identity, and violence against persons with disabilities. They should also prevent and redress unjustifiable use of force in law enforcement, and protect their populations against abuses by private security forces, and against the risks posed by excessive availability of firearms. The right to security of persons does not address all risks to physical or mental health and is not implicated in the direct health impact of being the target of civil or criminal proceedings.[127]

Such broader conception of the security of person beyond freedom from arbitrary arrest and detention can be considered as expanding the legal regime of human rights protection to a greater range of human security issues.

124 See, for example, *Marcellana and Gumanoy v. Philippines*, Communication No. 1560/2007, UN Doc. CCPR/C/94/D/1560/2007 (Oct. 30, 2008), para. 7.6; *Njaru v. Cameroon*, Communication No. 1353/2005, UN Doc. CCPR/C/89/D/1353/2005 (Mar. 19, 2007) para. 6.3; *Sankara v. Burkina Faso*, Communication No. 1159/2003, UN Doc. CCPR/C/86/D/1159/2003 (Mar. 28, 2006) para. 12.3; *Vaca v. Colombia*, Communication No. 859/1999, UN Doc. CCPR/C/74/D/859/1999 (Mar. 25, 2002) paras. 7.1–7.2; *Jayawardena v. Sri Lanka*, Communication No. 916/2000, UN Doc. CCPR/C/75/D/916/2000 (July 22, 2002) para. 7.2; *Chongwe v. Zambia*, Communication No. 821/1998, UN Doc. CCPR/C/70/D/821/1998 (Oct. 25, 2000) para. 5.3; *Dias v. Angola*, Communication No. 711/1996, UN Doc. CCPR/C/68/D/711/1996 (Mar. 20, 2000) para. 8.3; *Tshishimbi v. Zaire*, Communication No. 542/1993, UN Doc. CCPR/C/53/D/542/1993 (Mar. 25, 1996) para. 5.4; *Mojica v. Dominican Republic*, Communication No. 449/1991, UN Doc. CCPR/C/51/D/449/1991 (July 15, 1994) para. 5.4; *Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, UN Doc. CCPR/C/49/D/468/1991 (Oct. 20, 1993) para. 9.2.

125 HRC, General Comment No. 35, *supra* note 101, para. 9.

126 Ibid.

127 Ibid.

By contrast, the identical reference to the security of person in Article 5 of the European Convention on Human Rights has been interpreted more narrowly.[128] In *Agee v. UK*, a former intelligence officer complained that a deportation order made against him on national security grounds without due process of law constituted an arbitrary interference with the security of person. The European Commission of Human Rights rejected this claim, stating that the security of person was "concerned with arbitrary interference by a public authority with an individual's personal 'liberty'."[129] Similarly, in *Arrowsmith v. UK*, the European Commission observed that the security of person comprised "the guarantee that individuals will be arrested and detained only for the reasons and according to the procedure prescribed by law."[130] In *X v. Federal Republic of Germany*, the Commission noted that the security of person "could only be infringed if he had been threatened with arbitrary or unjustified detention."[131]

In the European jurisprudence, a broader security of non-detained persons has been dealt with through an expansive interpretation of the right to life under Article 2 of the European Convention on Human Rights.[132] The European Court has interpreted the right to life as not only enjoining the state from the intentional and unlawful taking of life, but also imposing a positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction.[133] In *Kurt v. Turkey*, however, the European Court considered that forced disappearance and alleged failure of national authorities to take reasonable steps to safeguard detained persons against the risks to their life attendant on their disappearance was an infringement of their security of person, rather than a violation of the right to life.[134]

Considering difficulties in policing modern societies, the Court has deliberately qualified the positive obligation that the state owes to protect the right to life so that it does not impose an impossible or disproportionate burden on national authorities. Thus, in *Osman v. UK*, the Court observes:

128 Trechsel, *supra* note 96, 282–84 (concluding that the reference to security of person "does not add anything to the protection of personal liberty or to any other right guaranteed by the Convention"); Fawcett, *supra* note 98, 70 (observing that "if personal liberty spells actual freedom of movement of the person, security is the condition of being protected by law in that freedom").

129 *Agee v. UK*, Application No. 7729/76, ECHR Report (Dec. 17, 1976) para. 12.

130 *Arrowsmith v. UK*, Application No. 7050/75, ECHR Report (Oct. 12, 1978) para. 64.

131 *X v. Federal Republic of Germany*, Application No. 8334/78, ECHR Decision on Admissibility (May 7, 1981) para. 3.

132 Paragraph 1 of Article 2 reads: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

133 See, for example, *L. C. B. v. UK*, Application No. 23413/94, ECtHR (Chamber) Judgment (June 9, 1998) para. 36; *McCann v. UK*, Application No. 18984/91, ECtHR (Grand Chamber) Judgment (Sep. 27, 1995) para. 151.

134 *Kurt v. Turkey*, Application No. 24276/94, ECtHR (Chamber) Judgment (May 25, 1998) paras. 122–24.

> In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person…, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[135]

This judgment articulates the duty of due diligence on the part of national authorities to protect the security of person in a more defined manner than the expansive interpretation developed by the UN Human Rights Committee. First, by grounding it in the right to life, the obligation on the part of a state is limited to life-threatening cases. Second, the duty of due diligence arises only when national authorities had the actual or constructive knowledge of a real and immediate risk to the life of an identified individual or individuals, which may be manifested in "patterns of violence against categories of victims."[136] Third, there are two factors—the operational capacity of the authorities and a reasonable expectation of success—that determine what measures are considered reasonable and appropriate under the attendant circumstances.

B. The Right to Security

As discussed in chapter 1, the concept of security has expanded with a shift in referent object to human beings in the discourse of security policy. This shift has facilitated the development of international law in limited areas, for example, with the ban on anti-personnel landmines,[137] the establishment of a permanent court for serious international crimes,[138] and the international regulation of arms trade.[139] These legal developments can be seen as a result of moving away from the traditional state-centric paradigm of international law by embracing and prioritizing human security over national security.[140]

135 *Osman v. UK*, Application No. 23452/94, ECtHR (Grand Chamber) Judgment (Oct. 28, 1998) para. 116. See also Çakici v. *Turkey*, Application No. 23657/94, ECtHR (Grand Chamber) Judgment (July 8, 1999) para. 63.

136 HRC, General Comment No. 35, *supra* note 101, para. 9.

137 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sep. 18, 1997 (entered into force Mar. 1, 1999) 2056 UNTS 211.

138 Rome Statute of the International Criminal Court, July 17, 1998 (entered into force July 1, 2002) 2187 UNTS 90.

139 Arms Trade Treaty, Apr. 2, 2013 (entered into force Dec. 24, 2014) 3013 UNTS 269.

140 See, for example, Shireen Daft, *The Relationship between Human Security Discourse and International Law: A Principled Approach* (Abingdon: Routledge, 2017) ch. 7; Zeray Yihdego, "The Arms Trade Treaty and Human Security: What Role for NSAs?" in *Human Security and International Law: The Challenge of Non-State Actors,* ed. Cedric Ryngaert and Math Noortmann (Cambridge: Intersentia, 2014) 135; Rob McRae, "Human Security in a Globalised World," in *Human Security and the New Diplomacy: Protecting People, Promoting Peace*, ed. Rob McRae and Don Hubert (Montreal: McGill-Queen's University Press, 2001) 14;

The emergence of human security in international law-making has pushed international standards of behavior into areas that were traditionally neglected by sovereign states.

Beyond these areas, the normative impact of human security has been limited due to its restricted application in practice. There is a structural constraint on the extent to which human security can be accommodated within a system of law based on the practice and consent of sovereign states. The protection of human security within the framework of international law is inevitably skewed toward what states consider to be a threat to human beings, rather than what individuals perceive to be a threat to themselves. Moreover, a threat to human security may well be addressed only in the way that states consider appropriate, rather than from the perspective of those who are actually suffering or perceiving the threat.

The concept of human security has been operationalized in the practice of the UN Security Council, for example, by authorizing peacekeeping forces to take necessary action for the protection of civilians under imminent threat of physical violence or by minimizing the negative humanitarian impact of sanctions.[141] The Security Council has also discussed a range of human security issues, such as the impact of HIV/AIDS on the maintenance of international peace and security, food security, and climate change.[142] Yet these human security issues have been addressed only to the extent that a direct link to conflict and stability can be identified.[143] The legal and political structure of the UN collective security system, which has been built upon the state-centric, military-oriented concept of security, has its limit in dealing with the broader, development-based human security agenda.

It is plausible that the concept of human security plays an interpretive role in the practice of international courts and tribunals. For example, in considering the request for the indication of provisional measures in *The Congo v. Rwanda*, Judge Koroma observed that the Court's role in maintaining international peace and security included

Richard A. Matthew, "Human Security and the Mine Ban Movement I: Introduction," in *Landmines and Human Security: International Politics and War's Hidden Legacy*, ed. Richard A. Matthew, Bryan McDonald, and Kenneth R. Rutherford (Albany, NY: State University of New York Press, 2004) 3.

141 See, for example, Hitoshi Nasu, "Peacekeeping, Civilian Protection Mandate and the Responsibility to Protect," in *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, ed. Vesselin Popovski, Charles Sampford, and Angus Francis (Tokyo: UN University Press, 2012) 117, 119–21; Enrico Carisch, Loraine Rickard-Martin, and Shawna R. Meister, *The Evolution of UN Sanctions: From a Tool of Warfare to a Tool of Peace, Security and Human Rights* (Berlin: Springer, 2017) 51–66; Jeremy M. Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007) 141–44.

142 For detailed analysis, see Hitoshi Nasu, "The Place of Human Security in Collective Security," *Journal of Conflict and Security Law* 18 (2013) 95, 105–20.

143 Hitoshi Nasu, "The Global Security Agenda: Securitization of Everything?" in *The Oxford Handbook of the International Law of Global Security*, ed. Robin Geiß and Nils Melzer (Oxford: Oxford University Press, 2020) 37, 43.

the promotion and protection of human security and the right to life, having regard to the real and serious threats that were posed to the population of the region concerned.[144] In the *Kosovo* Advisory Opinion, Judge Trindade relied upon human security in holding that states had the "duty to protect and to empower their inhabitants."[145] Such an approach could pave the way for a wider recognition of human security in legal discourse.

However, states generally understand that human security is to be achieved within the existing framework of international law and, therefore, does not impose any additional legal obligation on states.[146] Novel ideas such as the right to security that entails a positive obligation on the part of states, notwithstanding various theoretical foundations for it,[147] stay within the realm of legal hypothesis. Should human security be re-conceptualized into the right to security, a normative conflict would inevitably result between the right to security (for example, the right of the public to be free from terrorist threats) and other human rights, such as the right to liberty and fair trial (for example, the rights of suspected terrorists). The tension arising as a result would be irreconcilable and, as discussed in chapter 1, section II.C, involves the danger that human security is distorted as a means of justifying the infringement of competing human rights.[148]

The limited role of human security as a normative basis for adjusting the existing body of international law is evident in the development of the responsibility to protect doctrine. Human security originally provided a theoretical foundation for the development of this doctrine when it emerged as a policy agenda.[149] However, the doctrine has subsequently been absorbed into the traditional framework of collective security, with a particular focus on the protection of civilian populations from mass atrocities.[150] It has, since then, been

144 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, 2002 ICJ Rep. 219, 253–54.

145 *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 2010 ICJ Rep. 403, 594.

146 UNGA Res. 66/290 "Follow-up to Paragraph 143 on Human Security of the 2005 World Summit Outcome" (Sep. 10, 2012) para. 3(h).

147 See, for example, Rhonda Powell, *Rights as Security: The Theoretical Basis of Security of Person* (Oxford: Oxford University Press, 2019); Sandra Fredman, "The Positive Right to Security," in *Security and Human Rights*, ed. Benjamin J. Goold and Liora Lazarus (Portland, OR: Hart Publishing, 2007) 307; Liora Lazarus, "Mapping the Right to Security," in *Security and Human Rights*, 325.

148 For detailed analysis, see Hitoshi Nasu, "Human Security and International Law: The Potential Scope for Legal Development within the Analytical Framework of Security," in *Security and International Law*, ed. Mary Footer et al. (Portland, OR: Hart Publishing, 2016) 25, 39–41.

149 See, for example, Alex J. Bellamy and Edward C. Luck, *The Responsibility to Protect: From Promise to Practice* (Cambridge: Polity Press, 2018) ch. 1; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, DC: Brookings Institution Press, 2008) 34–35; International Commission on Intervention and State Responsibility, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001) 15.

150 Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge: Cambridge University Press, 2017) 32.

addressed as an independent security agenda, distinct from the notion of human security which maintains the broad policy focus concerning multi-dimensional insecurities that people are facing.[151]

The specific security interest, shared among states, in the protection of civilian populations from mass atrocities has engaged an empowering value of security by expanding the scope in which the UN Security Council may exercise its collective enforcement powers.[152] The responsibility to protect doctrine has converged into the Security Council's responsibility for the maintenance of international peace and security as the institutional mechanism through which the international community plays its role to address mass atrocities.[153] In March 2011, this convergence enabled the Security Council to exercise its institutional powers by authorizing military action "to protect civilians and civilian populated areas under threat of attack in the Libyan Aran Jamahiriya."[154] However, as this author discussed elsewhere,[155] the Council's practice in this realm is too limited and insufficient to transform its institutional competence in a way that carries any legal significance for the protection of human security, even against the most grave forms of violence.

V. Concluding Observations

The protection of national security is prevalent across the field of international law. But this does not mean that each sovereign state has the inherent right to invoke national security as a justification for any violation of international law. Instead, only specific security interests are afforded legal protection under customary international law and in the form of a treaty provision. Whether the protection of national security interests can manifest as an independent, overriding right to the survival of a state under international law remains to be settled. On the other hand, the normative impact of human security has been limited due to its restricted application in practice, as well as the legal and structural obstacles within the existing framework of international law built on the traditional, state-centric paradigm.

151 UNGA Res. 66/290, *supra* note 146, para. 3(d); Follow-up to General Assembly Resolution 64/291 on Human Security, UN Doc. A/66/763 (Apr. 5, 2012) para. 23.

152 See chapter 6 for discussion regarding the distinction between the expansion of institutional powers and institutional competence.

153 UNGA Res. 60/1 "World Summit Outcome" (Sep. 16, 2005) para. 139.

154 UNSC Res. 1973 "The Situation in Libya" (Mar. 17, 2011) para. 4.

155 Hitoshi Nasu, "The UN Security Council's Responsibility and the 'Responsibility to Protect,'" *Max Planck Yearbook of United Nations Law* 15 (2011) 377. The Council's failure to implement this responsibility since then has further supported this finding: see Hitoshi Nasu, "The End of the United Nations? The Demise of Collective Security and Its Implications for International Law," *Max Planck Yearbook of United Nations Law* 24 (2021) 110.

The various formulations adopted in the form of a treaty provision reflect the national security concerns prevailing at the time when the rule was developed. New security threats emerge over time, creating a normative gap between state practice and judicial standard, as has been the case with the right of self-defense against non-state actors. The emergence of a new security concern could be accommodated through an expansive interpretation of the relevant rule. This approach has the benefit of keeping the conduct of states motivated in the interest of national security within existing legal frameworks. However, it also involves the risk of generating divergent and incoherent jurisprudence, as has been shown in the context of freedom from arbitrary detention and the security of person.

The protection of national security under customary international law or in the form of a treaty provision manifests an agreement among states to reserve the exclusive competence to address national security issues as states perceive them within the bounds of international law. It does not necessarily mean that states themselves are vested with the interpretive authority to determine which issues fall within the reserved domain or whether security measures can be adopted at their discretion. As will be explored in the next chapter, there is an inherent tension over the locus of interpretive authority to determine these jurisdictional questions, which plays out at the intersection of the subjective intent of states and the judicial pursuit of objectivity.

3

JUDGING SECURITY

I. Introduction

In search for the realization of the rule of law in international relations, the authority to assess legally valid recourse to the concept of security is an essential condition, but it does not easily find its place in the operation of international law. The idea of extending the rule of law to the sovereign authority exercised in the realm of national security or to the delegated authority of an international organization for the maintenance of international peace and security through the process of international adjudication enjoys little support in practice. Various judicial attempts to regulate the exercise of sovereign powers have produced mixed jurisprudence. It highlights the inherent tension that arises between the political interest among states in leaving discretion to deal with a security threat as they see it and the normative demand for imposing constraints on the exercise of discretion to prevent the abuse of powers.

This chapter considers three different ways in which the concept of security may preclude or restrain international adjudication. First, the concept of security may manifest as a jurisdictional bar to international adjudication. Second, the issue itself may be found non-justiciable—in other words, not objectively reviewable. Third, judicial discretion may be exercised in deference to the political decision that addresses a security threat. The ultimate position reached by adjudicators in each specific case may vary, depending on how security interests are codified in the relevant rule of international law and how it is interpreted and applied in the specific context. Rather, the purpose of this inquiry is to understand the challenges that have confronted various adjudicative bodies (including arbitral tribunals and treaty monitoring bodies) in establishing their jurisdiction, justiciability of the issue, and judicial propriety when security interests are at stake.

II. Security as a Jurisdictional Bar

The exclusion of security issues from international adjudication must be understood in

the historical context of international dispute settlement.[1] At the dawn of the twentieth century, the burgeoning practice of concluding an arbitration agreement as a legal device for the peaceful settlement of international disputes entailed reservations excluding, in various forms, questions affecting the vital interests, independence, or honor of the state.[2] Reserved as the domain of sovereign prerogative, these matters were not considered arbitrable, with the presumption that each state was sole judge in determining whether a particular dispute was excluded from the arbitration agreement.[3]

The Covenant of the League of Nations narrowed the scope of exclusion by introducing a domestic jurisdiction clause as a jurisdictional bar to conciliation by the League Council.[4] Since then, it became a common practice to reserve matters within the domestic jurisdiction of a state from arbitration agreements.[5] This tradition continues to date in the form of a unilateral declaration that the state can make in accepting the compulsory jurisdiction of the International Court of Justice. Sovereign states are not obliged to settle their disputes or to accept the Court's compulsory jurisdiction, but when they do, such reservations can be seen as a procedural expression of the right that every sovereign state enjoys in dealing with its own domestic affairs free from external interference.[6]

Whether and to what extent national security constitutes a procedural bar to international adjudication depends on the scope of the domestic jurisdiction of a state, as

1 See Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933) 147–73.

2 See, for example, Arbitration Convention, Austria-Hungary–Great Britain, art. I, July 16, 1910, 211 CTS 298; Arbitration Convention, Brazil–Great Britain, art. I, June 18, 1909, 209 CTS 178; Arbitration Convention, Paraguay–US, art. I, Mar. 13, 1909, 208 CTS 414; Arbitration Convention, Germany–Great Britain, art. I, July 12, 1904, 196 CTS 98; Agreement between France and Great Britain for the Settlement by Arbitration of Certain Classes of Questions Which May Arise between the Two Governments art. I, Oct. 14, 1903, 194 CTS 194. For the study of various forms of reservation accompanying arbitration agreements, see Robert R. Wilson, "Reservation Clauses in Agreements for Obligatory Arbitration," *American Journal of International Law* 23 (1929) 68, 75–93.

3 Wilson, *supra* note 2, 74; P. J. Baker, "The Obligatory Jurisdiction of the Permanent Court of International Justice," *British Year Book of International Law* 6 (1925) 68, 85. Cf. Lauterpacht, *supra* note 1, 195 (noting some arbitration agreements in which such authority was left for arbitral tribunals).

4 Article 15(8) of the Covenant of the League of Nations provided: "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report and shall make no recommendation as to its settlement": Treaty of Peace pt. I art. 15(8), June 28, 1919 (entered into force Jan. 10, 1920) 225 CTS 188.

5 See, for example, Treaty of Conciliation, Judicial Settlement and Arbitration, Norway–Turkey, art. 21, Jan. 16, 1933 (entered into force Dec. 6, 1934) 161 LNTS 173; General Treaty of Inter-American Arbitration art. 2(a), Jan. 5, 1929 (entered into force Oct. 28, 1929) 130 LNTS 135; Arbitration Treaty, US–Austria, art. II(a), Aug. 16, 1928 (entered into force Feb. 28, 1929) 88 LNTS 95; Conciliation and Arbitration Convention between Esthonia, Finland, Latvia and Poland art. 2, Jan. 17, 1925 (entered into force Sep. 7, 1925) 38 LNTS 357. See also C. H. M. Waldock, "The Plea of Domestic Jurisdiction before International Legal Tribunals," *British Year Book of International Law* 31 (1954) 96, 99–107.

6 See chapter 2.II.

well as the locus of interpretive authority to determine that scope. As shown in chapter 2, national security may fall exclusively within the purview of domestic jurisdiction, even though specific national security issues such as terrorism and insurgency may affect the interests of multiple states. National security is also protected in various international agreements, whereby states have arguably reserved the exclusive competence to determine what amounts to a threat to national security.[7]

However, this reservation does not give states absolute discretion in dealing with national security threats. In *Nationality Decrees*, the Permanent Court of International Justice illuminated this distinction as follows:

> it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15, paragraph 8, then ceases to apply as regards those States which are entitled to invoke such rules, and the dispute as to the question whether a State has or has not the right to take certain measures becomes in these circumstances a dispute of an international character and falls outside the scope of the exception contained in this paragraph.[8]

In the absence of a specific treaty obligation suggesting otherwise, a state may well enjoy the exclusive competence to determine what constitutes a threat to its national security; however, the security measures that the state adopts to address the threat could nonetheless be regulated under international law. For example, a state may have the exclusive competence to designate narcotics trade as a national security issue, but the endorsement of extrajudicial killing as a means of suppressing the issue could be a violation of international law.

The practice of jurisdictional exclusion has continued to be relevant for the judicial settlement of international disputes when such an intention is expressed. Article 36(1) of the Statute of the Permanent Court of International Justice (and now the International Court of Justice as its successor) established the Court's jurisdiction to entertain "all cases which the Parties refer to it and all matters specifically provided for in treaties and conventions in force."[9] The Permanent Court confirmed that this principle could become

7 See chapter 4.II.

8 *Nationality Decrees in Tunis and Morocco*, Advisory Opinion, 1923 PCIJ Rep. Series B No. 4, 24.

9 Statute of the Permanent Court of International Justice art. 36(1), Dec. 16, 1920 (entered into force Aug. 20, 1921) 6 LNTS 380; Statute of the International Court of Justice art. 36(1), June 26, 1945 (entered into force Oct. 24, 1945) 59 Stat. 1055, TS No. 993 [hereinafter ICJ Statute].

inoperative only in exceptional cases where the matter was expressly reserved for the exclusive jurisdiction of other authority.[10]

The apprehension about endangering the vital interests of a sovereign state is no longer considered relevant to the denial of the Court's jurisdiction.[11] It follows that in the absence of express exclusion, no category of disputes may be precluded from the Court's jurisdiction upon acceptance.[12] Jurisdictional exclusion can be expressed in the form of: (i) a reservation to the acceptance of international jurisdiction; and (ii) a jurisdictional clause of the dispute settlement procedures established under an international agreement.

A. Jurisdictional Reservation

States may specifically reserve matters concerning national security in accepting the Court's compulsory jurisdiction under Article 36(2) of the Statute of the International Court of Justice—the optional clause creating the regime of compulsory jurisdiction of the Court. Greece, for example, reserves "any dispute relating to military activities and measures taken by the Hellenic republic for the protection of its sovereignty and territorial integrity, for national defense purposes, as well as for the protection of its national security."[13] Pakistan excludes "all matters related to the national security of the Islamic Republic of Pakistan."[14]

Although later withdrawn, the United Kingdom (UK) previously reserved any dispute "which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom or of any of its dependent territories."[15] Similarly, the French declaration used to exclude "disputes arising out of a crisis affecting the national security or out of any measure or action relating thereto."[16] In the aftermath of *Nicaragua*, Louis B. Sohn proposed that a similar reservation be included

10 *Rights of Minorities in Upper Silesia (Germany v. Poland)*, Judgment, 1928 PCIJ Rep. Series A No. 15, 29. The principle is therefore distinguished from the issue of non-justiciability, which may be implied in Article 36(2) of the PCIJ/ICJ Statute as discussed in section III of the present chapter.

11 *Fisheries Jurisdiction (UK v. Iceland)*, Jurisdiction, 1973 ICJ Rep. 3, 19–20 paras. 38–40.

12 As examined below, the Court may nonetheless find certain matters inadmissible. For the distinction between the jurisdiction of the Court and the admissibility of a claim, see *Oil Platforms (Iran v. US)*, Judgment, 2003 ICJ Rep. 161, 177 para. 29; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, 1986 ICJ Rep. 14, 26–27 paras. 32–34. See also Malcolm N. Shaw, ed., *Rosenne's Law and Practice of the International Court: 1920–2015*, 5th ed. (The Hague: Martinus Nijhoff, 2016) ch. 9.

13 Declaration of Jan. 13, 2015, 1761 UNTS 99.

14 Declaration of Mar. 29, 2017.

15 Declaration of Apr. 18, 1957, 265 UNTS 221, para v.

16 Declaration of July 10, 1959, 337 UNTS 65, para. 3; Declaration of May 16, 1966, 562 UNTS 71, para. 3. This reservation was withdrawn by a notification received on Jan. 10, 1974, 907 UNTS 129.

in a future US declaration,[17] although the US government chose instead to terminate its declaration altogether.[18]

The reservation of matters concerning national security is no longer widely practiced. It nonetheless continues to frustrate the exercise of international jurisdiction by judicial and treaty monitoring bodies due to the protean nature of the concept. Inevitably, cases arise in which the classification of a particular matter as a threat to national security reserved for the exclusive competence of the state is disputed. The question of whether a disputed matter is barred from adjudication hinges upon the judicial authority to determine the scope of the reservation. International courts and tribunals are often expressly,[19] or as an incidental or inherent power,[20] vested with the competence to decide the extent of jurisdiction conferred upon them in accordance with their own rules and procedures (*la compétence de la compétence*).[21] However, a broader construct of security has the potential to impose opaque constraint on the Court's authority to determine the scope of the reservation.

The challenge is similar in nature to the dispute over the competence of an adjudicative body in cases where the state, by employing a discretionary language, reserves the authority to interpret its own reservation to a dispute settlement clause.[22] Often characterized as automatic or self-judging, such reservation is notably found in a unilateral declaration accepting the compulsory jurisdiction of the International Court of Justice under Article

17 Louis B. Sohn, "Suggestions for the Limited Acceptance of Compulsory Jurisdiction of the International Court of Justice by the United States," *Georgia Journal of International and Comparative Law* 18 (1988) 1, 12–14.

18 Notification of Termination received on Oct. 7, 1985, 1408 UNTS 270.

19 See, for example, ICJ Statute, *supra* note 9, art. 36(6); Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 41(1), Mar. 18, 1965 (entered into force Oct. 14, 1966) 575 UNTS 159.

20 See, for example, *Nottebohm Case (Liechtenstein v. Guatemala)*, Preliminary Objections, 1953 ICJ Rep. 111, 119; *Interpretation of the Greco-Turkish Agreement*, Advisory Opinion, 1928 PCIJ Rep. Series B No. 16, 20; *Croatia v. Slovenia*, PCA Case No. 2012-04, Partial Award (June 30, 2016) paras. 148–57 (and earlier arbitration decisions cited therein); *Prosecutor v. Tadić*, Case No. ICTY-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) paras. 18–19 [hereinafter *Tadić* appeal on jurisdiction]; *Lindsay v. Asian Development Bank*, Decision No. 1 of Asian Development Bank Administrative Tribunal (Dec. 18, 1992) para. 11.

21 See generally Shaw, *supra* note 12, ch. 13 §II.215 and literature cited therein.

22 This type of reservation is also known as the Connally Reservation, named after US Senator Tom Connally of Texas who proposed it for inclusion in the US Declaration of Aug. 14, 1946, 1 UNTS 9. For details, see, for example, Hans Goldschmidt, "The Connally Amendment Revisited: Sterile and Effective Measures of Protecting the Reserved Domain," *Virginia Journal of International Law* 6 (1965–66) 65, 71–74; Andre Aversa, "As Determined by the United States of America," *American University Law Review* 10 (1961) 146; Herbert W. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice," *Recueil des Cours* 93 (1958) 223, 328–63; Francis O. Wilcox, "The United States Accepts Compulsory Jurisdiction," *American Journal of International Law* 40 (1946) 699, 710–14; Lawrence Preuss, "The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction," *American Journal of International Law* 40 (1946) 720.

36(2) of its Statute. Typically, the automatic reservation excludes matters which the state considers to be within its own domestic jurisdiction, of which national security forms an essential part. This self-judging nature of the reservation challenges the judicial authority to determine the scope of its own jurisdiction, especially when the reserving state makes an arbitrary determination as a pretext to deny the Court's jurisdiction.

This problem emerged in *Aerial Incident of 1955*, in which the United States filed an application against Bulgaria regarding its responsibility for causing military aircraft to fire upon and destroy a civilian aircraft while overflying Bulgarian territory en route from Vienna to Tel Aviv. By invoking the automatic reservation found in the US declaration on the basis of reciprocity, Bulgaria disputed the court's jurisdiction over the matter arguing that the defense of national territory fell within its domestic jurisdiction.[23] The United States initially responded by arguing that this reservation did not authorize or empower Bulgaria to make an arbitrary determination that a particular matter was essentially within its domestic jurisdiction, but withdrew this argument during the oral proceedings.[24] Ultimately, the United States concluded that the premise of the argument was invalid in light of its own submission to the Court in the *Interhandel Case*, which claimed that its determination under the automatic reservation was not subject to review or approval by any tribunal.[25]

In *Norwegian Loans*, Norway invoked an automatic reservation—albeit as an ancillary ground for its pleadings—on the basis of reciprocity by relying upon the self-judging proviso found in the French declaration of acceptance. The Court adopted this argument as the reason for dismissing the French application, maintaining that neither of the Parties questioned the validity of this reservation.[26] Sir Hersch Lauterpacht notably challenged the Court's decision in his separate opinion, observing that the French declaration was incompatible with the inherent power of a tribunal to determine its jurisdiction as expressed in Article 36(6) of the Court's Statute.[27] He characterized

23 *Aerial Incident of 27 July 1955 (US v. Bulgaria)*, Preliminary Objections, 1959 ICJ Pleadings 265, 271.

24 *US v. Bulgaria*, *supra* note 23, 322–25, 676–77. See also Louis Henkin, "The Connally Reservation Revisited and, Hopefully, Contained," *American Journal of International Law* 65 (1971) 374, 376; Leo Gross, "Bulgaria Invokes the Connally Amendment," *American Journal of International Law* 56 (1962) 357, 367–72.

25 *Interhandel Case (Switzerland v. US)*, Preliminary Objections, 1959 ICJ Pleadings 301, 320.

26 *Certain Norwegian Loans (France v. Norway)*, Judgment, 1957 ICJ Rep. 9, 27. For critical analysis, see H. W. A. Thirlway, "Reciprocity in the Jurisdiction of the International Court," *Netherlands Yearbook of International Law* 15 (1984) 97, 114–17.

27 *France v. Norway*, *supra* note 26, 44–47 (Judge Lauterpacht separate opinion). See also ibid., 68–69 (Judge Guerrero dissenting opinion), 94–95 (Judge Read dissenting opinion). Views were also divided as to the legal consequences of this incompatibility: compare, for example, *Interhandel Case (Switzerland v. US)*, Preliminary Objections, 1959 ICJ Rep. 6, 55–57 (Judge Spender separate opinion), 101 (Judge Lauterpacht dissenting

the automatic reservation as contrary to one of the most fundamental principles of jurisprudence and an essential condition of the compulsory judicial settlement system.

Despite this vigorous defense, the validity and legal effect of self-judging reservations upon the Court's competence to entertain the jurisdictional dispute remains unsettled.[28] The practical significance of this issue has subsided considerably as, currently, only a small number of states still retain a self-judging reservation.[29] Nonetheless, this conundrum of international law applies equally to the use of a protean concept, such as national security, which is likely to operate as a form of self-judging reservation against the exercise of international jurisdiction by the Court.[30] A difference, if anything, is that no matter how vague it is, the reservation of matters concerning national security is presumed to be valid in the absence of an overriding rule that negates its legal effect.[31] The jurisdictional reservation concerning national security does not, ipso jure, deprive the Court of the inherent power to determine its own jurisdiction. Rather, it poses the practical difficulty in ascertaining the legal content of the reservation due to the ambiguity and dynamic nature of security.

Similarly problematic is the legal status of self-judging treaty reservations that are intended to retain an interpretive prerogative. In relation to Article 4(1) of the International Covenant on Civil and Political Rights, for example, France reserves its right to determine what constitutes a public emergency threatening the life of the nation and what action is "strictly required by the exigencies of the situation" in accordance with its own Constitution.[32] No objection to this reservation by other contracting parties has been recorded. Nonetheless, when she was a member of the Human Rights Committee of the Covenant, Dame Rosalyn Higgins expressed the view that it would be "unacceptable for states to seek to avoid this [international supervision] by declaring in advance, upon ratification, that their legislation is to be judged compatible."[33] France also made an

opinion); with ibid., 77–78 (Judge Klaestad dissenting opinion), 93 (Judge Armand-Ugon dissenting opinion).

28 See Gunner Törber, *The Contractual Nature of the Optional Clause* (Portland, OR: Hart Publishing, 2015) 224–26 and literature cited therein; Stanimir A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice* (The Hague: Martinus Nijhoff, 1995) 76–91 and literature cited therein; Shaw, *supra* note 12, ch. 12 §II.202.

29 Liberia (Mar. 20, 1952) 163 UNTS 117; Malawi (Dec. 12, 1966) 581 UNTS 135; Mexico (Oct. 28, 1947) 9 UNTS 97; Philippines (Jan. 18, 1972) 808 UNTS 3; Sudan (Jan. 2, 1958) 284 UNTS 215.

30 See Lauterpacht, *supra* note 1, 196; R. Y. Jennings, "Recent Cases on 'Automatic' Reservations to the Optional Clause," *International & Comparative Law Quarterly* 7 (1958) 349, 362.

31 See James Crawford, "The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court," *British Year Book of International Law* 50 (1979) 63, 83.

32 France, Instrument of Accession to the International Covenant on Civil and Political Rights para. 2, Nov. 4, 1980 (entered into force Feb. 4, 1981) 1202 UNTS 395.

33 Rosalyn Higgins, "Human Rights: Some Questions of Integrity," *Commonwealth Law Bulletin* 15 (1989) 598, 611. See also Dominic McGoldrick, "The Interface between Public Emergency Powers and International Law," *International Journal of Constitutional Law* 2 (2004) 380, 410; Dinah Shelton, "State Practice on

equivalent reservation to Article 15(1) of the European Convention on Human Rights.[34] While it has not been interpreted to preclude international supervision, views are divided as to whether the proclamation of a public emergency by national authorities can be challenged.[35]

The Human Rights Committee expressed particular concerns when the reservation was broadly worded to avoid any change in national law from falling afoul of Covenant obligations.[36] Noting that the absence of protest by other states cannot imply that the reservation is deemed valid, the Committee has asserted its authority to determine whether a specific reservation is compatible with the object and purpose of the Covenant.[37] However, the United States and the UK challenged this position, arguing that the Committee is not granted such authority to make definitive and binding findings.[38]

The locus of authority aside, the use of a protean concept such as national security as a means of modifying the legal effect of a treaty obligation also hinders the Committee's ability to make an objective assessment. The International Law Commission has cautioned that the state should not use its internal law in formulating the reservation "as a cover for not actually accepting any new international obligations."[39] On the other hand, the United States rejects the idea that the use of a discretionary reservation is inconsistent with the object and purpose of the Covenant when "a State party declines for sufficient reason to accept a particular provision of the Covenant in preference for existing domestic law."[40] The divergence of views indicates that the treaty reservation on national security grounds, even though it may not be designed to challenge the competence of a treaty monitoring body directly, could be employed as a form of jurisdictional bar to the exercise of its authority. This is particularly

Reservations to Human Rights Treaties," *Canadian Human Rights Yearbook* (1983) 205, 227.

34 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 (entered into force Sep. 3, 1953) 213 UNTS 221; Instrument of Ratification by France, May 3, 1974, 1496 UNTS 222–33.

35 See, for example, V. Coussirat-Coustère, "*La réserve française à l'article 15 de la Convention européenne des droits de l'homme*," *Journal du droit international* 102 (1975) 269; Alain Pellet, "*La ratification par la France de la Convention européenne des droits de l'homme*," *Revue de droit public et de la science politique en France et à l'étranger* 90 (1974) 1319, 1360–65.

36 HRC, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 2, 1994) para. 12.

37 Ibid., paras. 17–18. For discussion, see especially Catherine J. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No. 24(52)," *International & Comparative Law Quarterly* 46 (1997) 390. For the exercise of such authority by the European Court of Human Rights, see, for example, *Loizidou v. Turkey*, Application No. 15318/89, Preliminary Objections, ECtHR (Grand Chamber) Judgment (Mar. 23, 1995) paras. 90–96; *Belilos v. Switzerland*, Application No. 10328/83, ECtHR (Plenary) Judgment (Apr. 29, 1988) paras. 47, 50.

38 Report of the Human Rights Committee, UN Doc. A/50/40 (1996) 126–34.

39 Guide to Practice on Reservations to Treaties §3.1.5.5 commentary para. 5, *Yearbook of the International Law Commission* II, pt. 3 (2011) 23, 228.

40 Report of the Human Rights Committee, *supra* note 38, 129.

so when the exigencies of national authorities dictate the interpretation of what constitutes a threat to national security.

B. Jurisdictional Clause

The problem of self-judging reservations to international adjudication must be distinguished from the validity and legal effect of what is characterized as a "self-judging clause"—a treaty provision by which states retain their right to unilaterally exempt themselves from international adjudication, based on their own interpretation of the clause. This is because the validity and legal effect of a self-judging clause is, in principle, to be determined through the legal construction of the clause itself in accordance with the rule of treaty interpretation.[41] However, the self-judging clause is often formulated in discretionary language. Tension, here again, arises as to where the locus of authority lies in determining the jurisdictional scope of international adjudication agreed upon under the treaty.

Article XXI(b) of the General Agreement on Trade and Tariff (GATT), for example, expressly reserves for contracting parties the exclusive competence to determine what action "it considers necessary" to protect their essential security interests, indicating a self-judging character of this exemption.[42] Under this provision, trade restrictions are justified to protect the essential security interests of a state. Yet the protection applies only to those relating to fissionable materials, arms and ammunition, and measures taken in time of war and other international emergencies. Alan Sykes thus observes that "narrowly tailored security exceptions, limited on their face to circumstances that are well defined and observable, can function reasonably well, even when made self-judging."[43]

States have nevertheless debated whether trade-restrictive measures on national security grounds are exempted from review under the dispute settlement procedure.[44] In 1949, when

41 For examination of the legal effects of various self-judging clauses, see especially Stephan Schill and Robyn Briese, "'If the State Considers': Self-Judging Clauses in International Dispute Settlement," *Max Planck Year Book of United Nations Law* 13 (2009) 61.

42 Marrakesh Agreement Establishing the World Trade Organization Annex 1A, Apr. 15, 1994 (entered into force Jan. 1, 1995) 1867 UNTS 154, 187. The full text of the provision is cited in chapter 2.III.A. For detailed analysis of its jurisdictional effects, see, for example, Hannes L. Schloemann and Stefan Ohlhoff, "'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence," *American Journal of International Law* 93 (1999) 424, 430–41.

43 Alan O. Sykes, "Economic 'Necessity' in International Law," *American Journal of International Law* 109 (2015) 296, 303.

44 For detailed analysis, see, for example, Sebastián Mantilla Blanco and Alexander Pehl, *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review* (Berlin: Springer, 2020) ch. 2; Roger P. Alford, "The Self-Judging WTO Security Exception," *Utah Law Review* (2011) 697, 706–25; Alan S. Alexandroff and Rajeev Sharma, "The National Security Provision—GATT Article XXI," in *The World Trade Organization: Legal, Economic and Political Analysis*, ed. Patrick F. J. Macrory, Arthur E. Appleton, and Michael G. Plummer (Berlin: Springer, 2005) vol. 1, 1571, 1574–78; Peter Lindsay,

Czechoslovakia complained about US export control on national security grounds, the UK government expressed the view that "every country must have the last resort on questions relating to its own security."[45] In 1982, in the wake of the Falkland/Malvinas Island dispute, the European Communities, Australia, and Canada justified their trade-restrictive measures against Argentina "on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection."[46]

During the GATT Council discussion of these trade restrictions in May 1982, the European Communities argued that the "exercise of these rights constituted a general exception, and required neither notification, justification or approval" and "in effect… every contracting party was—in the last resort—the judge of its exercise of these rights."[47] Canada, on the other hand, observed that "GATT had neither the competence nor the responsibility to deal with the political issue which had been raised."[48] Some states supported the latter argument,[49] while others found the former argument alarming.[50]

When it imposed trade embargoes against Nicaragua, the United States also maintained the position that GATT had no competence to judge national security matters, arguing that Article XXI of GATT "left it to each contracting party to judge what actions it considered necessary for the protection of its essential security interests."[51] Ultimately, the United States acquiesced in the establishment of a Panel with the task to examine the trade effects of the embargoes but without authority to examine or judge the validity or motivation for the application of the security exception. Given this strict condition on its terms of reference, the Panel refrained from considering whether Article XXI would have had the effect of precluding it from reviewing the application of this clause by the United States.[52]

Nevertheless, the Panel expressed its frustration against the way in which this clause

"The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?" *Duke Law Journal* 52 (2003) 1277, 1302–10; Olivia Q. Swaak-Goldman, "Who Defines Members' Security Interest in the WTO?" *Leiden Journal of International Law* 9 (1996) 361, 365–68; Michael J. Hahn, "Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception," *Michigan Journal of International Law* 12 (1991) 558, 569–78.

45 GATT (3rd Session), Summary Record of the Twenty-Second Meeting, GATT Doc. CP.3/SR22 (June 8, 1949) 3.

46 Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, GATT Doc. L/5319/Rev.1 (May 18, 1982) para. 1(b).

47 GATT, Minutes of Meeting Held in the Centre William Rappard on 7 May 1982, GATT Doc. C/M/157 (June 10, 1982) 10.

48 Ibid.

49 Ibid., 8 (US), 9 (New Zealand, Japan), 11 (UK).

50 Ibid., 8 (Hungary), 9 (Poland, Czechoslovakia), 12 (Brazil).

51 *US – Trade Measures Affecting Nicaragua* (Oct. 13, 1986) GATT Doc. L/6053, para. 1.2; *US – Imports of Sugar from Nicaragua* (Mar. 13, 1984) GATT Doc. L/5607 – 13S/67, para. 3.11; GATT, Minutes of Meeting Held in the Centre William Rappard on 29 May 1985, GATT Doc. C/M/188 (June 28, 1985) 4–5.

52 *US – Trade Measures Affecting Nicaragua*, *supra* note 51, para. 5.3.

was invoked, stating: "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?"[53] Such privative reading of the self-judging clause was also implicated in *Nicaragua*, where the International Court of Justice addressed the jurisdictional question that arose, in part, from the exclusion clause under the 1956 Treaty of Friendship, Commerce and Navigation concluded between the two states. This clause provides:

> the present Treaty shall not preclude the application of measures:
>
> …
>
> (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (d) necessary to fulfil the obligation of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.[54]

On this basis, the United States contended that Nicaragua's application should be denied.[55] However, the Court distinguished it from Article XXI of GATT due to the absence of discretionary language. It found that the 1956 Treaty "speaks simply of 'necessary' measures, not of those considered by a party to be such."[56] The reasoning adopted by the Court suggests that this clause is capable of objective reading, whereas Article XXI of GATT is not.

Likewise, in a series of arbitration cases concerning Argentine's regulatory response to the economic crisis that unfolded from the late 1990s to early 2000s, the Arbitral Tribunals rejected the Argentinian government's claim that the self-judging nature of Article XI of the 1991 US–Argentina bilateral investment treaty precluded from their consideration measures necessary for the protection of each Party's own essential

53 Ibid., para. 5.17.

54 Treaty of Friendship, Commerce and Navigation, Nicaragua–US, art. XXI, Jan. 21, 1956 (entered into force May 24, 1958) 367 UNTS 3.

55 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Counter-Memorial of the United States of America, 1984 ICJ Pleadings vol. II, 54 para. 179.

56 *Nicaragua* judgment, *supra* note 12, 116 para. 222. In his dissent, Judge Schwebel was of the view that this clause excluded these matters from the jurisdictional scope of the Treaty: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Jurisdiction and Admissibility, 1984 ICJ Rep. 392, 635–37 para. 128 [hereinafter *Nicaragua* jurisdiction]; *Nicaragua* judgment, *supra* note 12, 310–11 para. 105.

security interests.[57] These Tribunals emphasized the absence of clear textual or contextual indications of a self-judging nature. In *CMS Gas v. Argentine*, for example, the Tribunal observed that "when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly," citing Article XXI of GATT as an example.[58]

However, such reading of a self-judging clause inferred from textual comparison alone is not determinative of its legal effect on the exercise of jurisdiction by a dispute settlement body. Careful studies of Article XXI of GATT in the context of its legal regime, including the dispute settlement mechanism that exists therein, have suggested that this clause does not preclude the World Trade Organization (WTO) dispute settlement bodies from reviewing trade-restrictive measures justified on this ground. Rather, this clause merely grants states broad discretion, leaving room for reviewing whether the clause was invoked in good faith.[59] Indeed, the WTO Dispute Settlement Panel recently adopted the view that Article XXI of GATT is capable of objective determination, observing that interpreting the clause as an outright potestative condition "would be entirely contrary to the security and predictability of the multilateral trading system."[60]

In *Djibouti v. France*, the International Court of Justice did not consider a self-judging clause as a bar to the exercise of its jurisdiction.[61] Article 2(c) of the 1986

57 *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sep. 5, 2008) para. 187; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sep. 28, 2007) paras. 379–80; *Enron Corporation Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007) para. 335; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) paras. 212–13; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005) para. 370.

58 *CMS v. Argentina*, *supra* note 57, para. 370. See also *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Interim Award (Dec. 13, 2017) para. 231.

59 See, for example, Holger P. Hestermeyer, "Article XXI Security Exceptions," in *WTO – Trade in Goods*, ed. Rüdiger Wolfrum, Peter-Tobias Stoll, and Holger P. Hestermeyer (Leiden: Brill, 2010) 569, 580–82; Dapo Akande and Sope Williams, "International Adjudication on National Security Issues: What Role for the WTO?" *Virginia Journal of International Law* 43 (2003) 365, 386–96; Schloemann and Ohlhoff, *supra* note 42, 447–49. Cf. Raj Bhala, "National Security and International Trade Law: What the GATT Says and What the United States Does," *University of Pennsylvania Journal of International Economic Law* 19 (1998) 263, 268–75.

60 *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (Apr. 5, 2019) WT/DS512/R, paras. 7.77–7.79. The Panel also confirms this interpretation by finding that there was no common understanding among contracting parties after having reviewed the negotiating history: ibid., paras. 7.80–7.100.

61 The jurisdiction was established by operation of Article 38(5) of the Rules of the Court, which reads: "When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case." France consented to the Court's jurisdiction only for the purposes of this case "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein": *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 2008 ICJ Rep. 177, 198 para. 39.

Convention Concerning Judicial Assistance in Criminal Matters between France and Djibouti has reserved discretion for the party to which a request for assistance has been made.[62] The Court has nevertheless observed that "this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties."[63] Notably, the Court makes reference to the *Nicaragua* judgment discussed above as authority in affirming the Court's competence to deal with discretionary provisions.[64] The Court did so without discussing the legal significance of discretionary language ("it considers"), contrary to the position implicated in its previous judgment.[65]

Even in the absence of discretionary language, difficulties arise in determining the scope of jurisdictional exclusion. Established under Annex VII of the Law of the Sea Convention in relation to the South China Sea dispute between the Philippines and the People's Republic of China, the Arbitral Tribunal has shown a mixed approach to jurisdictional exclusion. Article 298(1)(b) of the Convention allows contracting states to exclude from compulsory dispute settlement procedures "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service."[66] China abstained from the arbitrary proceedings, having activated this exclusion in its 2006 Declaration.[67] Accordingly, one of the jurisdictional issues that confronted the Arbitral Tribunal was the meaning of "military activities."

The Tribunal addressed this question with respect to two separate aspects of the dispute: (i) China's activities on Mischief Reef and its construction there of installations and artificial islands; (ii) China's actions in and around Second Thomas Shoal preventing the Philippines from conducting rotation and resupply operations for personnel stationed aboard BRP *Sierra Madre*—an aged naval vessel that was deliberately run aground there in 1999.

In relation to China's construction activities on Mischief Reef, the Tribunal declined to find them to be military in nature, relying solely on China's public statements

62 Convention Concerning Judicial Assistance in Criminal Matters art. 2, Sep. 27, 1986 (entered into force Aug. 1, 1992) 1695 UNTS 298. It reads: "*L'entraide judiciaire pourra* être *refusée: … c) Si l'Etat requis estime que l'exécution de la demande est de nature* à *porter atteinte* à *sa souveraineté,* à *sa s*écurité, *à son ordre public ou à d'autres de ses intérêts essentiels*."

63 *Djibouti v. France*, *supra* note 61, 229 para. 145.

64 Ibid. Reference is also made to the *Oil Platforms* judgment, which reaffirms the reasoning adopted in the *Nicaragua* judgment: *Oil Platforms* judgment, *supra* note 10, 183 para. 42.

65 See above note 56 and accompanying text.

66 UN Convention on the Law of the Sea art. 298(1)(b), Dec. 10, 1982 (entered into force Nov. 16, 1994) 1833 UNTS 3.

67 People's Republic of China, Declaration under Article 298, Aug. 25, 2006, 2384 UNTS 327.

indicating its intention to pursue these activities for civilian purposes.[68] Despite the absence of discretionary language in the exclusion clause, China's subjective assessment of the nature of its activities on Mischief Reef met no challenge. The Tribunal's intention could have simply been to show that China was estopped from claiming the military nature of the activities due to the public representation to the contrary. However, this ruling also allows inference that the Tribunal could easily have been swayed in China's favor if China had exhibited its intention to pursue these activities for military purposes.

In contrast, the Tribunal adopted a more objective approach in relation to China's activities in and around Second Thomas Shoal, by stating:

> the essential facts at Second Thomas Shoal concern the deployment of a detachment of the Philippines' armed forces that is engaged in a stand-off with a combination of ships from China's Navy and from China's Coast Guard and other government agencies. In connection with this stand-off, Chinese Government vessels have attempted to prevent the resupply and rotation of the Philippine troops on at least two occasions. Although, as far as the Tribunal is aware, these vessels were not military vessels, China's military vessels have been reported to have been in the vicinity. In the Tribunal's view, this represents a quintessentially military situation, involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another.[69]

This reasoning suggests that there are certain factual circumstances that characterize a situation as a dispute concerning military activities, to which the Arbitral Tribunal's jurisdiction does not extend.

The International Tribunal for the Law of the Sea followed the latter approach by engaging in an objective evaluation of the nature of activities in question when the same jurisdictional issue emerged from Ukraine's request for provisional measures over the detention of Ukrainian navy vessels by the Russian Coast Guard while passing through the Kerch Strait.[70] Unlike the *South China Sea* arbitration, however, the Tribunal finds that the dispute was not military in nature as the circumstances indicated that "at the core of the dispute was the Parties' differing interpretation of the regime of passage through the Kerch Strait."[71] This

68 *South China Sea Arbitration (Philippines v. PRC)*, PCA Case No. 2013-19, Award (July 12, 2016) paras. 1027–28.

69 Ibid., para. 1161. For analysis of the conflicting interpretation and application by the Arbitral Tribunal, see David Letts, Rob McLaughlin, and Hitoshi Nasu, "Maritime Law Enforcement and the Aggravation of the South China Sea Dispute: Implications for Australia," *Australian Year Book of International Law* 34 (2017) 53, 60–61; Keyuan Zou and Qiang Ye, "Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal," *Ocean Development & International Law* 48 (2017) 331, 340.

70 *Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation*), Provisional Measures, Order of May 25, 2019, 2019 ITLOS Rep. No. 26, para. 66.

71 Ibid., para. 72.

position is maintained despite the fact that Ukrainian navy vessels were involved in the passage and the Russian Coast Guard used force in the process of arrest.[72] Pointing to the contradiction in the interpretative approach between the two Tribunals, Judge Gao warns that it may "cast doubt in the minds of these States about the impartiality and effectiveness of the compulsory dispute settlement system."[73]

In both cases, one of the disputing parties (that is, China and Russia respectively) refused to take part in the proceedings and, therefore, failed to challenge the Tribunal's authority to decide the jurisdictional issue. Nonetheless, the Tribunals struggled to characterize certain activities as military in nature because of the need to develop discrete criteria that a dispute concerning military activities ought to satisfy. In the absence of agreed criteria, the interpretive approach adopted by the Tribunals became erratic according to their own preconceived idea of what a dispute concerning military activities would be likely to involve. The problem is that any characterization based on their own preconception can be divisive and variable depending on the circumstances.

Discretionary jurisdictional clauses are imbued with the same problem if there are no general criteria that enable judicial authority to characterize objectively what qualifies as a security interest. Further, any discrete set of criteria bears the risk of encouraging states, particularly those antagonistic toward international adjudication, to securitize—or, in the case of a maritime dispute, militarize—the situation, which could lead to an unnecessary escalation of the conflict. These problems indicate arbitrariness and inconsistency that could undermine the judicial authority to determine its own jurisdiction in an objective manner against the claim of a security exception.

III. Justiciability

Even in the absence of a jurisdictional bar, the question arises as to whether the matter involving security interests is justiciable—in other words, capable of judicial resolution. In domestic legal settings, there are diverse views regarding the extent to which the discretionary judgement made by a political organ should be subject to judicial scrutiny. Drawing on domestic legal doctrines, such as the "political question" doctrine,[74] one may

72 Ibid., paras. 68–75. Judges Gao and Kolodkin considered these aspects of the fact more decisive to the assessment: ibid., paras. 22–39 (Judge Gao separate opinion), paras. 9–22 (Judge Kolodkin dissenting opinion).

73 Ibid., para. 46 (Judge Gao separate opinion).

74 See, for example, *Baker v. Carr*, 369 U.S. 186, 217 (S. Ct. 1962). See generally John Harrison, "The Political Question Doctrines," *American University Law Review* 67 (2018) 457–528; Thomas M. Franck, *Political Questions, Judicial Answers* (Princeton, NJ: Princeton University Press, 1992); Harold H. Koh, *The National*

argue that judicial intervention is precluded when the question belongs to the political sphere or is otherwise considered non-justiciable.[75] Indeed, the former US Secretary of State Frank Kellogg once proclaimed that "no nation can agree to arbitrate purely domestic questions… and, it may be said, all political questions involving the exercise of sovereignty within the nation's territorial limits."[76]

Caution must be exercised, however, in drawing on these domestic law doctrines. This is because the power of judicial review has been variably developed within the constitutional structures of each state.[77] The following analysis therefore focuses on the unique considerations that the concept of security presents to judicial intervention in the context of international dispute settlement or the quasi-judicial monitoring of treaty obligations.

Generally, the assertion that political matters, such as the state's decision to employ armed force, are incapable of judicial determination has received little support in international law. The Nuremberg Tribunal dismissed the contention that Germany alone could decide whether preventive action was necessary, holding that "whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."[78] The International Court of Justice has been consistent in finding that the political character of the question does not preclude it from discharging judicial tasks.[79]

Security Constitution (New Haven, CT: Yale University Press, 1990) 219–20; Maurice Finkelstein, "Judicial Self-Limitation," *Harvard Law Review* 37 (1924) 338. For variation of the doctrine in other jurisdictions, see, for example, Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge: Cambridge University Press, 2016) 489–97; Margit Cohn, "Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems," *American Journal of Comparative Law* 59 (2011) 675; Paul Daly, "Justiciability and the 'Political Question' Doctrine," *Public Law* (2010) 160.

75 For analysis in the context of international law, see, for example, Daniele Amoroso, "Judicial Abdication in Foreign Affairs and the Effectiveness of International Law," *Chinese Journal of International Law* 14 (2015) 99; Ioana Petculescu, "The Review of the United Nations Security Council Decisions by the International Court of Justice," *Netherlands International Law Review* 52 (2005) 167, 174–77; Marcella David, "Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court," *Harvard International Law Journal* 40 (1999) 81, 124–48.

76 Frank B. Kellogg, "The War Prevention Policy of the United States," *American Journal of International Law* 22 (1928) 253, 256.

77 *Nixon v. US*, 506 U.S. 224, 252–53 (S. Ct. 1993) (Souter J concurring); *Baker v. Carr*, *supra* note 74, 210. See also Peter Malanczuk, "Reconsidering the Relationship between the ICJ and the Security Council," in *International Law and The Hague's 750th Anniversary*, ed. W. P. Heere (The Hague: T.M.C. Asser, 1999) 87, 97–98; Jose E. Alvarez, "Judging the Security Council," *American Journal of International Law* 90 (1996) 1, 24–28.

78 Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, Sep. 30–Oct. 1, 1946 (Cmd 6964) 30, reprinted in *American Journal of International Law* 41 (1947) 172, 207.

79 See, for example, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 2010 ICJ Rep. 403, 415 paras. 26–27; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Rep. 136, 155 para. 41; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226, 234 para. 13; *Border and*

In *Nicaragua*, the United States did not contend that the matter was a political question as the ground for claiming that Nicaragua's application to the Court was inadmissible.[80] Judge Schwebel observed that such a contention would have been "unpersuasive."[81]

Nevertheless, some have argued at times that the protection of national security takes precedence over positive law and is, therefore, non-justiciable.[82] Indeed, this claim was rooted in the idea that the use of force in self-defense was not amenable to objective evaluation by law.[83] While acutely aware of states' resistance to submit disputes regarding the use of force to judicial process, Sir Hersch Lauterpacht found such a claim to be self-contradictory "inasmuch as it purports to be based on legal right, and as, at the same time, it dissociates itself from regulation and evaluation by the law."[84] Likewise, Oscar Schachter refutes the self-judging conception of the right of self-defense as incompatible with the national interest of states because it cannot be sustained "without, in effect, licensing the other state to resort to force whenever it chooses to do so."[85] The International Court of Justice has since then established in its jurisprudence that the claim of self-defense is capable of judicial determination.[86]

In his seminal work Sir Hersch Lauterpacht also observed that "it is only the determination of States not to have questions of this nature decided by a foreign tribunal

Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, 1988 ICJ Rep. 69, 91 para. 52; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, 1962 ICJ Rep. 151, 155; *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948 ICJ Rep. 57, 61.

80 *Nicaragua* jurisdiction, *supra* note 56, 436 para. 99.

81 *Nicaragua* judgment, *supra* note 12, 285–86 para. 45.

82 See, for example, "Prepared Statement of Hon. Abraham Sofaer, Legal Adviser, Department of State," in U.S. Decision to Withdraw from the International Court of Justice: Hearing Before the Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs, House of Representatives, 99th Congress, 1st Session (Oct. 30, 1985) 18, 30 (observing that "such matters [involving national security] cannot be left for resolution by judicial means, let alone by a court such as the ICJ"); Dean Acheson, "Remarks on the Cuban Quarantine," *American Society of International Law Proceedings* 57 (1963) 13, 14 (observing that "law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty… The survival of states is not a matter of law").

83 Note of the Government of United States to the Governments of Australia, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, Irish Free State, Italy, Japan, New Zealand, Poland, and South Africa (June 23, 1928), reproduced in David Hunter Miller, *Peace Pact of Paris: A Study of the Briand-Kellogg Treaty* (New York: G.P. Putnam's Sons, 1928) 213–14 ("Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense").

84 Lauterpacht, *supra* note 1, 179–80.

85 Oscar Schachter, "Self-Defense and the Rule of Law," *American Journal of International Law* 83 (1989) 259, 266. See also Oscar Schachter, "International Law in Theory and Practice," *Recueil des Cours* 178 (1982) 9, 39.

86 See, for example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 2005 ICJ Rep. 168, 213–23 paras. 106–47; *Oil Platforms* judgment, *supra* note 12, 186–99 paras. 50–78; *Nicaragua* judgment, *supra* note 12, 119–23 paras. 229–38.

which may make it non-justiciable."[87] A potential finding of non-justiciability might therefore emerge where there is a clear agreement among states that a certain matter is precluded from judicial determination. Judge Oda discussed this potential ground for non-justiciability in his dissent to the *Nicaragua* judgment, detailing the historical development of this notion.[88] According to Judge Oda, the idea of distinguishing justiciable and non-justiciable disputes is inherent in the formulation of Article 36(2) of the Statute of the International Court of Justice—the optional clause for accepting the Court's compulsory jurisdiction in relation to "legal disputes" as enumerated therein.[89] In Judge Oda's view, this clause should not be understood without having regard to the preceding arbitration agreements,[90] which defined legal disputes as differences that were "justiciable by their nature by reason of being susceptible of decision by the application of the principles of law or equity."[91]

In particular, Judge Oda emphasized the voluntary nature of this dispute settlement regime as follows:

> despite the provision of the Statute that *determination* of the Court's jurisdiction should in case of doubt be in the hands of the Court (Art. 36(6)), it is to be assumed that when voluntarily accepting compulsory jurisdiction a State (the United States in this case) will not only have had in mind its own concept of what should constitute a justiciable "legal dispute" under Article 36, paragraph 2, of the Statute but may legitimately entertain expectations that that concept will if necessary be elicited and respected by the Court.[92]

This observation was confined to the justiciability of disputes that were referred to the Court in accordance with Article 36(2) of the Statute.[93] The legal significance of this statement is also qualified as the Court proceeded to examine the merits of Nicaragua's

87 Lauterpacht, *supra* note 1, 180.
88 *Nicaragua* judgment, *supra* note 12, 221–33 paras. 21–38
89 It reads: "The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
   a. the interpretation of a treaty;
   b. any question of international law;
   c. the existence of any fact which, if established, would constitute a breach of an international obligation;
   d. the nature or extent of the reparation to be made for the breach of an international obligation."
90 *Nicaragua* judgment, *supra* note 12, 233–34 paras. 41–42.
91 See, for example, General Arbitration Treaty, US–France, art. 1, Aug. 3, 1911, reprinted in *American Journal of International Law Supplement* 5 (1911) 249; General Arbitration Treaty, Great Britain–US, art. 1, Aug. 3, 1911, reprinted in *American Journal of International Law Supplement* 5 (1911) 253; General Treaty of Inter-American Arbitration art. 1, Jan. 5, 1929 (entered into force Oct. 28, 1929) 130 LNTS 135.
92 *Nicaragua* judgment, *supra* note 12, 234–35 para. 45.
93 Judge Oda expressly denied any suggestion that the subject matter of the dispute belonged to the exclusive domestic jurisdiction of the US: ibid., 238 para. 54.

claims on the basis that the United States failed to contend, during the proceedings on jurisdiction and admissibility, that "international law was not relevant or controlling in a dispute of this kind."[94] Judge Oda's observation is nonetheless significant in that the non-justiciability of certain disputes is not entirely ruled out as a valid objection to judicial intervention when the Court's jurisdiction is established in accordance with Article 36(2) of the Statute.

Non-justiciability may even operate as a general doctrine of judicial restraint, in cases where international law is not relevant or controlling in the dispute. The fact that the Court's compulsory jurisdiction established under Article 36(2) of the Statute is limited to the four categories of legal disputes, all of which involve international law or international obligations, arguably implies that the Court must abstain from entertaining certain matters that are reserved for the exclusive competence of a state. As examined in section II, no category of disputes may be precluded from the Court's jurisdiction in the absence of express exclusion. Nonetheless, the Court may find certain matters non-justiciable and reserved for determination by national authorities under international law.

The Court does not make this finding because certain matters are inherently domestic and are not subject to any international restrictions—the claim that was dismissed in *Oscar Chinn*.[95] Nor is it because these matters lack "a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal"—the claim that was dismissed in *Nicaragua*.[96] The potential for a valid claim of non-justiciability is derived, instead, from the judicial finding that the subject of the dispute is not, in principle, regulated by international law, but falls within the jurisdiction of national authorities.[97] As stated in the *Electricity Company of Sofia*,[98] this question is not of a preliminary character concerning the admissibility of a case, but rather encroaches on the merits because it requires the Court to establish that there

94 Ibid., 27 para. 33.

95 *The Oscar Chinn Case* (*UK v. Belgium*), Judgment, 1934 PCIJ Rep. Series A/B No. 63, 86 (dismissed the Belgian Government's argument that the management of national shipping was not subject to restriction, holding that "[h]owever legitimate and unfettered governmental action in connection with the management and subsidizing of national shipping may be, it is clear that this does not authorize a State to evade on this account its international obligations").

96 *Nicaragua* jurisdiction, *supra* note 56, 436–38 paras. 99–101.

97 *Nationality Decrees* advisory opinion, *supra* note 8, 23–24; *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, Judgment, 1938 PCIJ Rep. Series A/B No. 76, 19 para. 75. See also *Markovic v. Italy*, Application No. 1398/03, ECtHR (Grand Chamber) Judgment (Dec. 14, 2006) paras. 107–8; *Prince Hans-Adam II of Liechtenstein v. Germany*, Application No. 42527/98, ECtHR (Grand Chamber) Judgment (July 12, 2001) paras. 49–50; *Streletz, Kessler and Krenz v. Germany*, Application Nos. 34044/96, 35532/97, 44801/98, ECtHR (Grand Chamber) Judgment (Mar. 22, 2001) para. 49; *Waite and Kennedy v. Germany*, Application No. 26083/99, ECtHR (Grand Chamber) Judgment (Feb. 18, 1999) para. 54.

98 *The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria),* Preliminary Objection, 1939 PCIJ Rep. Series A/B No. 77, 82–83 para. 88.

is no element of international law governing the subject in dispute.

For example, the assessment of national authorities regarding the existence and nature of security threats tends to be precluded from consideration in international adjudication.[99] Indeed, where the state pleaded national security reasons for deportation proceedings, the Human Rights Committee withheld its opinion regarding the validity of such plea, noting that it was "not for the Committee to test a sovereign State's evaluation of an alien's security rating."[100] Likewise, the European Court of Human Rights has abstained from challenging the plea of national security, observing that "it is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field."[101]

The non-justiciability of national security effectively means that the determination regarding the existence or the nature of security threats is entirely left for national authorities. Different wordings used for the protection of security interests—national security, the security of the state, or essential security interests—carry no legal significance. Yet the non-justiciability of this determination does not grant national authorities unlimited discretion in choosing measures as they see fit to address any threat to national security.[102] As will be discussed in the subsequent chapters, the legality of those measures may still be subject to judicial control and treaty monitoring, with varying degrees of judicial deference to the decisions of national authorities.

The finding of non-justiciability may further be made in cases where the self-judging clause is used to protect national security from treaty obligations. For example, the security exception clause in the investment chapter of the Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore,

99 Piet Hein van Kempen, "Four Concepts of Security—A Human Rights Perspective," *Human Rights Law Review* 13 (2013) 1, 13–14; Iain Cameron, *National Security and the European Convention on Human Rights* (The Hague: Kluwer Law International, 2000) 39–58; Anna-Lena Svensson-McCarthy, *The International Human Rights and States of Exception* (The Hague: Martinus Nijhoff, 1998) 147–89; Adda B. Bozeman, "Human Rights and National Security," *Yale Journal of World Public Order* 9 (1982) 40, 53–54.

100 *V. M. R. B. v. Canada*, Communication No. 236/1987, UN Doc. CCPR/C/33/D/236/1987 (July 18, 1988) para. 6.3; *J. R. C. v. Costa Rica*, Communication No. 296/1988, UN Doc. CCPR/C/35/D/296/1988 (Mar. 30, 1989) para. 8.4.

101 *Klass v. Germany*, Application No. 5029/71, ECtHR (Plenary) Judgment (Sep. 6, 1978) para. 49. See also *Rotaru v. Romania*, Application No. 28341/95, ECtHR (Grand Chamber) Judgment (May 4, 2000) para. 53; *Tinnelly & Sons Ltd v. UK*, Application No. 20390/92 ECtHR (Chamber) Judgment (July 10, 1998) para. 76; *Chahal v. UK*, Application No. 22414/93, ECtHR (Grand Chamber) Judgment (Nov. 15, 1996) para. 127; *Leander v. Sweden*, Application No. 9248/81, ECtHR (Chamber) Judgment (Mar. 26, 1987) para. 59.

102 See, for example, *Dağtekin v. Turke*, Application No. 70516/01, ECtHR (Third Section) Judgment (Dec. 13, 2007) para. 34; *Al-Nashif v. Bulgaria*, Application No. 50963/99, ECtHR (Fourth Section) Judgment (June 20, 2002) para. 123; *Tinnelly & Sons Ltd v. UK*, *supra* note 101, para. 77; *Ireland v. UK*, Application No. 5310/71, ECtHR (Plenary) Judgment (Jan. 18, 1978) para. 214; *Klass v. Germany*, *supra* note 101, para. 49.

which is essentially identical in wording to the comparable clause of other trade and investment agreements,[103] contains a proviso that it is to be interpreted "in accordance with the understanding of the Parties on non-justiciability of security exceptions as set out in their exchange of letters."[104] The understanding of non-justiciability between the Parties is expressed in the exchange of letters as "not be[ing] open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal."[105] These provisions reinforce the intention of the contracting parties to remove national security matters from the purview of international law, challenging the ability of a dispute settlement body to review the decisions of national authorities that they consider necessary to protect their security interests.

Even without such a proviso, the International Court of Justice in *Djibouti v. France* indicated non-justiciability of security matters that are protected by a self-judging clause. The dispute arose when French authorities refused to execute the letters rogatory issued by Djiboutian authorities in relation to the judicial investigation into the death of French Judge Bernard Borrel. It was refused on the grounds that the requested files contained defense secrets, which were exempted from the obligations of mutual assistance in criminal matters. This exemption was granted under the bilateral agreement "if the requested State considers that execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests."[106]

Djibouti contended that even in reliance on a self-judging clause, the requested state must act reasonably and in good faith by stating the reasons to justify its decision.[107] However, the Court abstained from disputing the French investigating judge's decision. While observing that "[i]t is not evident… why Judge Clément found that it was not possible to transmit part of the file, even with some documents removed or blackened out," the Court concluded that "those reasons that were given by Judge Clément do fall within the scope of Article 2(c) of the 1986 Convention."[108]

Questioning this reasoning (or the lack thereof) of the majority judgment, Judge

103 See chapter 2.III.
104 Comprehensive Economic Cooperation Agreement, India–Singapore, art. 6.12(4), June 29, 2005 (entered into force Aug. 1, 2005).
105 Ibid., ch. 6 annex 5.
106 Convention Concerning Judicial Assistance in Criminal Matters art. 2(c), Sep. 27, 1986 (entered into force Aug. 1, 1992) 1695 UNTS 298.
107 *Djibouti v. France*, *supra* note 61, 226 para. 135.
108 Ibid., 230 para. 148.

Keith considers whether the French investigating judge's decision complied with the principles of good faith, abuse of rights and *détournement de pouvoir*, which "require the State agency in question to exercise the power for the purposes for which it was conferred and without regard to improper purposes or irrelevant factors."[109] Without challenging the French judge's substantive assessment, Judge Keith identifies a potential abuse of power—an exercise of the power for wrong reasons—in the conflated reasoning provided in the *soit-transmis* and the failure to address alternative methods of affording Djibouti the widest measure of judicial assistance.[110]

Judge Keith's observation raises a fundamental question regarding the legal relationship between the state and the Court or, for that matter, any forum of international adjudication. This is because the notion of "abuse of rights" or *détournement de pouvoir* is premised upon the idea that legal rights are not absolute and that "the law should prohibit the exercise of a right for a purpose which shocks the conscience of mankind in general."[111] As such, it presupposes the possibility that certain exercise of legal rights and sovereign powers may become unacceptable as anti-social, which can only be determined through the activity of courts, not by an abstract rule, drawing the line in each particular case.[112] Any attempt to review an exercise of sovereign powers, with a potential finding of an abuse of rights or *détournement de pouvoir*, necessarily implies that international judicial authorities are vested with overriding powers to assess the bona fides of sovereign decisions.

The doctrines of abuse of rights and *détournement de pouvoir* could arguably be derived from the principle of good faith that imposes a restraint on the freedom of action.[113] Robert Jennings and Arthur Watts observe, rather speculatively, that such a principle is "implied in the frequent judicial affirmation of the obligation of states to act in good faith."[114] While accepting abuse of rights as existing in any system of administration of justice, Sir Hersch Lauterpacht cautioned against the use of this doctrine without

109 Ibid., 279 para. 6 (Judge Keith declaration).
110 Ibid., 280–82 paras. 7–10 (Judge Keith declaration).
111 H. C. Gutteridge, "Abuse of Rights," *Cambridge Law Journal* 5 (1933) 22, 24–25.
112 Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958) 162; Lauterpacht, *supra* note 1, 294–307.
113 See, for example, Charles T. Kotuby Jr. and Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford: Oxford University Press, 2017) 107–13; Michael Byers, "Abuse of Rights: An Old Principle, A New Age," *McGill Law Journal* 47 (2002) 389, 397–404; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Son, 1953) 121–36.
114 Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9th ed. (Oxford: Oxford University Press, 1992) vol. I, 408.

"studied restraint."[115] Indeed, it must carefully be considered whether this principle gives rise to an institutional presumption that international courts and tribunals have overriding powers to conduct judicial review by virtue of their judicial authority or as derived from their constituent instrument.

This institutional presumption is justifiable in the context of democratic constitutions based on the rule of law and the separation of powers. In the domestic context, the judicial function extends to the protection of constitutional order by reviewing acts of the political branches of government for their conformity with constitutional and legislative requirements. In international relations, on the other hand, it remains debatable whether and in what form modern international law has evolved into a global constitutional order,[116] given the corresponding shift in the role of judicial institutions.[117] In the absence of such constitutional underpinning, international courts and treaty monitoring bodies would have no authority to challenge the substantive assessment of national authorities, particularly when it comes to matters concerning national security. As Sir Hersch Lauterpacht observed, it is "doubtful whether any tribunal acting judicially can override the assertion of a State that a dispute affects its security."[118]

The same challenge arises when an international organization is granted discretion in making political decisions. A paradigmatic example is the United Nations (UN) Security Council's determination under Article 39 of the UN Charter regarding the existence of a threat to the peace, a breach of the peace, or an act of aggression.[119] Judge Weeramantry viewed this clause as giving the Security Council "full discretion" in judging the state of affairs which brought Chapter VII into operation.[120] Likewise, the International Criminal Tribunal for Rwanda observed that "[b]y their very nature… such discretionary

115 Lauterpacht, *supra* note 112, 164–65.

116 For relevant contemporary debates, see Anne Peters, "Are We Moving Towards Constitutionalization of the World Community?" in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012) 118; Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009); Jürgen Habermas, "The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society," *Constellations* 15 (2008) 444; Erika de Wet, "The International Constitutional Order," *International & Comparative Law Quarterly* 55 (2006) 51–76.

117 See, for example, Francisco Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society* (Cambridge: Cambridge University Press, 2004) 18–22.

118 Lauterpacht, *supra* note 1, 196.

119 Charter of the United Nations art. 39, June 26, 1945 (entered into force Oct. 24, 1945) 59 Stat. 1031, TS No. 993, 1 UNTS XVI.

120 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. UK)*, Provisional Measures, 1992 ICJ Rep. 3, 66 [hereinafter *Lockerbie* provisional measures]; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. US)*, Provisional Measures, 1992 ICJ Rep. 114, 176 [hereinafter *Lockerbie* provisional measures].

assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber."[121]

It is by no means unreasonable to find that the determination regarding a threat to the peace, a breach of the peace, or an act of aggression is entirely left for the Security Council and is thus non-justiciable.[122] This finding can be derived from the interpretation of Article 39 of the Charter, having due regard to the intention of the drafters.[123] And this does not necessarily preclude, as will be discussed in chapter 6, an exercise of judicial authority to review the legality and validity of enforcement measures adopted as a result of that determination.

However, judicial restraint by recognizing the exercise of discretion granted under Article 39 of the Charter as non-justiciable may run counter to the principle of legality.[124] The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia indeed dismissed the doctrine of political questions and non-justiciability as "remnants of the reservations of 'sovereignty', 'national honour'…."[125] Instead, the Tribunal opined that this determination "has to remain, at the very least, within the limits to the Purposes and Principles of the Charter."[126] This putative restriction rests with the general competence of the Security Council as provided in Article 24(2) of the Charter,[127] upon which the specific powers of determining a threat to the peace, a breach of the peace, or an act of aggression

121 *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Jurisdiction (June 18, 1997) para. 20. See also *Prosecutor v. Ayyash*, Case No. STL-11-01/PT/AC/AR90.1, Decision on the Defence Appeals against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal" (Oct. 24, 2012) para. 51; *Prosecutor v. Tadić*, Case No. ICTY-94-1-T, Decision on the Defence Motion on Jurisdiction (Aug. 10, 1995) paras. 23–24 [hereinafter *Tadić* jurisdiction].

122 See, for example, Michael J. Matheson, "ICJ Review of Security Council Decisions," *George Washington International Law Review* 36 (2004) 615, 621–22; David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (The Hague: Kluwer Law International, 2001) 261–67.

123 The drafters decided "to leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to peace, a breach of the peace, or an act of aggression": Documents of the United Nations Conference on International Organizations (UN Information Organizations, 1945) vol. 11, 17. See also T. 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," *Netherlands Yearbook of International Law* 26 (1995) 33, 39–46.

124 See, for example, Kenneth Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (The Hague: Martinus Nijhoff, 2006) 3–40; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Portland, OR: Hart Publishing, 2004) 134–38. Cf. Gabriël H. Oosthuizen, "Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law," *Leiden Journal of International Law* 12 (1999) 549, 559–61.

125 *Tadić* appeal on jurisdiction, *supra* note 20, para. 24.

126 Ibid., para. 29.

127 It reads: "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."

must be exercised.[128]

Interpreted in this legal context, it is plausible to extend judicial control over the exercise of discretionary powers granted under Article 39 of the Charter, for example, where the powers are exercised for improper purposes or where there is no evidence to support factual determination.[129] Alternatively, as will be examined in the next section, the judiciary can defer to the factual findings and political judgement of the Security Council in the exercise of judicial discretion, rather than leaving the entire matter as non-justiciable.

An exercise of judicial restraint is thus conceivable as a consequence of securitization when discretion is granted under international law. However, the dispute involving security issues will not necessarily be pronounced as *non liquet*. The declaration of *non liquet* means that no solution is available to a dispute due to the absence or insufficiency of an applicable rule.[130] An attempt can be made to avoid it by remedying the gap in the law with liberal interpretation or by deciding the case *ex aequo et bono*.[131]

By contrast, non-justiciability is concerned with the overriding assertation of imperative interests,[132] which in modern international law, takes the form of discretionary powers that are reserved to preclude judicial intervention. Therefore, the issue of non-justiciability does not arise from gaps left in the law, but rather from the reserved space in the law which cannot be remedied through further legal development or equitable settlement.

Notably, the non-justiciability of determinations under Article 39 of the Charter does not necessarily preclude judicial intervention in relation to the way in which the Security

128 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16, 52 para. 110. See also ibid., 293 para. 112 and 294 para. 116 (Judge Fitzmaurice dissenting opinion, suggesting that no threat to peace and security could be artificially created as a pretext for the realization of ulterior purposes), 340 para. 34 (Judge Gros dissenting opinion)

129 See the author's earlier analysis in Hitoshi Nasu, "Chapter VII Powers and the Rule of Law: The Jurisdictional Limits," *Australian Year Book of International Law* 26 (2007) 87, 106–9. See also Benedetto Conforti, "*Le pouvoir discrétionnaire du Conseil de Sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression*," in *The Development of the Role of the Security Council*, ed. René-Jean Dupuy (The Hague: Martinus Nijhoff, 1993) 51, 56–57.

130 For detailed analysis, see Ige F. Dekker and Wouter G. Werner, "The Completeness of International Law and Hamlet's Dilemma: Non Liquet, The Nuclear Weapons Case and Legal Theory," *Nordic Journal of International Law* 68 (2000) 225, 228–30; Mariano J. Anzar-Gómez, "The 1996 Nuclear Weapons Advisory Opinion and Non Liquet in International Law," *International & Comparative Law Quarterly* 48 (1999) 3, 15–17; Daniel Bodansky, "Non-Liquet and the Incompleteness of International Law," in *International Law, the International Court of Justice and Nuclear Weapons*, ed. Laurence Boisson de Chazournes and Philippe Sands (Cambridge: Cambridge University Press, 1999) 153, 154–58.

131 ICJ Statute, *supra* note 9, art. 38(2).

132 Julius Stone, "Non Liquet and the Function of Law in the International Community," *British Year Book of International Law* 35 (1959) 124, 124.

Council exercises its powers founded upon those determinations.[133] Determining the political characterization of a situation and deciding what course of action should be taken to address the situation are two separate matters. Although the political findings themselves may well be deemed non-justiciable, the legal consequences thereof, including the remit of the Security Council's authority in adopting measures affecting the rights and interests of sovereign states, could legitimately be subject to judicial scrutiny.

Judge Fitzmaurice made this point in his dissent to the *Namibia* advisory opinion.[134] Adopting a strict interpretation in the range of the powers accorded to the Security Council, Judge Fitzmaurice emphasized that "[t]hese 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."[135] Although views might be divided with respect to the precise remit of the Council's powers,[136] this does not preclude judicial scrutiny into the legality or validity of the measures that the Council adopts on the basis of the political findings it makes in accordance with the Charter.

IV. Judicial Propriety

In addition to the questions of jurisdiction and justiciability, adjudicators may consider whether they should take a deferential approach to security affairs by virtue of judicial impropriety. Unlike the issue of justiciability, the question of judicial propriety does not concern the nature of the issue to be considered. Rather, this question arises due to putative constraints on the judicial authority by its institutional character.[137] As such, judicial deference for reasons of impropriety should not be confused with the margin of appreciation doctrine. As will be discussed in chapter 5, the margin of appreciation merely acknowledges that there is a scope for legitimate disagreement in balancing competing rights and interests protected in the specific legal context.[138]

133 See chapter 6.

134 *Namibia* advisory opinion, *supra* note 128.

135 Ibid., 294 para. 116.

136 Compare ibid., 52 para. 110 (acknowledging the general powers of the Security Council for the maintenance of international peace and security under Article 24 of the Charter beyond those specifically stipulated); with ibid., 293 para. 112 (Judge Fitzmaurice dissenting opinion interpreting the same clause more narrowly in light of the specific powers laid down in the Charter).

137 See W. Michael Reisman, "International Non-Liquet: Recrudescence and Transformation," *International Lawyer* 3 (1969) 770, 775.

138 See chapter 5.III. Cf. Chiara Ragni, "Standard of Review and the Margin of Appreciation Before the International Court of Justice," in *Deference in International Court and Tribunals: Standard of Review and*

Domestically, the question of judicial propriety in times of public emergency has received mixed response.[139] The idea of judicial deference in matters involving national security is articulated, most notably, in *The Zamora*, in which Lord Parker observed that "[t]hose who are responsible for the national security must be the sole judges of what the national security requires."[140] Such a position would nowadays be considered too absolute and has been qualified in many jurisdictions.[141] However, the view that the judiciary should defer to the political judgement in times of public emergency remains strong.[142]

In the context of international law, where each sovereign state is responsible for its own national security, the question is whether each state remains the sole judge of what its own national security requires. This, in turn, depends on whether international courts and tribunals are inclined to defer to the political judgement of the state in matters involving national security. The International Court of Justice indeed acknowledged "inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore."[143] Thus, the issue of judicial propriety conceivably arises from judicial character itself.

Judicial deference may therefore apply where the Court cannot maintain its judicial integrity or render a judgment capable of execution.[144] There are four potential grounds that emerge from the practice of international adjudication for varying degrees of judicial deference: (i) the imperative interest of security; (ii) institutional division of responsibilities; (iii) lack of expertise; and (iv) lack of evidence due to the protection of

Margin of Appreciation, ed. Lukasz Gruszczynski and Wouter Werner (Oxford: Oxford University Press, 2014) 319.

139 See especially Subrata Roy Chowdhury, *Rule of Law in a State of Emergency* (London: Pinter Publishers, 1989) 58–65; George J. Alexander, "The Illusory Protection of Human Rights by National Courts during Periods of Emergency," *Human Rights Law Journal* 5 (1984) 1.

140 *The Zamora* (1916) 2 AC 77, 107.

141 See, for example, *A v. Hayden* (1984) 156 CLR 532, 548 (Gibbs CJ); *Chandler v. Director of Public Prosecution* [1964] AC 763, 811 (Lord Devlin); *Korematsu v. US*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (observing that the Supreme Court's war-time decision [*Korematsu v. US*, 323 U.S. 214 (S. Ct. 1944)] "stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability").

142 See, for example, Jens Elo Rytter, "Terrorist Threats and Judicial Deference," in *The Long Decade*, ed. David Jenkins, Amanda Jacobsen, and Anders Henriksen (Oxford: Oxford University Press, 2014) 229–47; Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: Oxford University Press, 2007) 17–18, 75–76, 121–23; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) 24–26, 160–64.

143 *Northern Cameroons (Cameroons v. UK)*, Preliminary Objections, 1963 ICJ Rep. 15, 29.

144 Shaw, *supra* note 12, ch. 9 §II.151. Cf. *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt and United Arab Emirates v. Qatar)*, Judgment, 2020 ICJ Rep. 81, 104 para. 60 (finding it difficult to apply the concept of judicial propriety to the ICAO Council due to the absence of judicial character).

official secrets. Whether and to what extent a deferential approach is warranted on any of these grounds requires careful consideration because of the different normative and institutional settings under which judicial and treaty monitoring institutions operate in each case.

A. The Imperative Interest of Security

The first question is whether an imperative interest of security deters adjudicators from rendering a decision when they perceive institutional limitation in the system of international adjudication. In *Nicaragua*, the International Court of Justice addressed this question set out as follows:

> It is suggested that the plea of collective self-defence which has been advanced by the United States as a justification for its actions with regard to Nicaragua requires the Court to determine whether the United States was legally justified in adjudging itself under a necessity, because of its own security was in jeopardy, to use force in response to foreign intervention in El Salvador. Such a determination, it is said, involves a pronouncement on political and military matters, not a question of a kind that a court can usefully attempt to answer.[145]

The Court, in response, had to navigate carefully by strictly formulating the issue as a legal one concerning the purported exercise of the right of collective self-defense. In so doing, the Court dissociated itself from any determination as to whether the victim state "was faced with a necessity of reacting" or any evaluation of military considerations.[146]

On the other hand, a careful handling of difficult legal questions regarding the use or threat of nuclear weapons led the Court to find itself in a legal quandary. In the oft-quoted *dispositif* (2)E of the 1996 advisory opinion, the Court declared that: "In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[147] This highly controversial conclusion, narrowly adopted by the Court president's casting vote, has widely been seen as a declaration of *non liquet* and its adequacy heavily contested.[148]

145 *Nicaragua* judgment, *supra* note 12, 27 para. 34.
146 Ibid., 27–28 para. 35.
147 *Nuclear Weapons* advisory opinion, *supra* note 79, 266 para. 105.
148 Compare ibid., 291–92 (Judge Guillaume separate opinion); with ibid., 389–90 (Judge Shahabuddeen dissenting opinion); ibid., 494–96 (Judge Weeramantry dissenting opinion); and further with ibid., 583–93 (Judge Higgins dissenting opinion).

The issue of *non liquet* is as much about an aspect of the Court's jurisdiction as the theoretical debate about the completeness of international law as a legal order.[149] *Non liquet* is a rare event in international adjudication because, in contentious cases, the will of the states demands a judicial settlement of their disputes.[150] In exercising the advisory jurisdiction, however, the International Court of Justice has judicial discretion to decline an opinion for compelling reasons, with a view to protecting the integrity of the Court as the UN's principal judicial organ.[151] Although it could have therefore chosen to abstain,[152] the Court instead proceeded to the point where it faced the risk of going beyond what was legitimate as a judicial function.[153]

The controversial paragraph of the *dispositif* can be seen as the Court's acknowledgment of judicial impropriety in making a definitive or general statement, rather than as a declaration of *non liquet*.[154] The reference to "an extreme circumstance of self-defence, in which the very survival of a State would be at stake" suggests that it was the imperative interest of security that dissuaded the majority of the Court from drawing a definitive conclusion on the general question.[155]

Judge Higgins hinted in her dissent that this reference could be interpreted as implying the lawfulness of a particular use of nuclear weapons even where it is contrary to international humanitarian law.[156] However, this reading of the opinion does not appear

149 See, for example, Ilmar Tammelo Salzburg, "Logical Aspects of the Non-Liquet Controversy in International Law," *Rechtstheorie* 5 (1974) 1; Stone, *supra* note 132; Hersch Lauterpacht, "Some Observations on the Prohibition of '*Non Liquet*' and the Completeness of the Law," *Symbolae Verzijl* (1958) 196, reprinted in *Sources of International Law*, ed. Martti Koskenniemi (Farnham: Ashgate, 2000) 433.

150 Prosper Weil, "'The Court Cannot Conclude Definitively…': Non Liquet Revisited," *Columbia Journal of Transnational Law* 36 (1998) 109, 115.

151 See, for example, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 ICJ Rep. 95, 113 paras. 63–65; *Kosovo* advisory opinion, *supra* note 79, 415–16 paras. 29–30; *Palestinian Wall* advisory opinion, *supra* note 79, 156–57 paras. 44–45; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, 1989 ICJ Rep. 177, 191 para. 37; *Western Sahara*, Advisory Opinion, 1975 ICJ Rep. 12, 21 para. 23; *Namibia* advisory opinion, *supra* note 128, 27 para. 41; *Certain Expenses* advisory opinion, *supra* note 79, 155; *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization*, Advisory Opinion, 1956 ICJ Rep. 77, 86.

152 See *Nuclear Weapons* advisory opinion, *supra* note 79, 322 (Judge Schwebel dissenting opinion), 372 (Judge Oda dissenting opinion).

153 See Judge Bedjaoui's Declaration as President of the Court in *Nuclear Weapons* advisory opinion, *supra* note 79, 272 para. 18. See also ibid., 280–81 (Judge Vereshchetin declaration).

154 See Dekker and Werner, *supra* note 130, 240–46.

155 See the emphasis on vital security interests in the reasoning: *Nuclear Weapons* advisory opinion, *supra* note 79, 254 para. 66, 263 para. 96. This reference would have been superfluous if the conclusion was merely that there was no general prohibition on the threat or use of nuclear weapons or that the Court was unable to reach a definitive conclusion because of insufficient information: see Dekker and Werner, *supra* note 130, 245–46.

156 *Nuclear Weapons* advisory opinion, *supra* note 79, 590 para. 29 (Judge Higgins dissenting opinion). See also Timothy L. H. McCormack, "A *Non Liquet* on Nuclear Weapons: The ICJ Avoids the Application of General Principles of International Humanitarian Law," *International Review of the Red Cross* 37 (1997) 76, 88–89.

to be compatible with its reasoning. The Court indeed affirmed the applicability of the established principles and rules of international humanitarian law to the use of nuclear weapons.[157] Judge Bedjaoui clarified this point, as president of the Court who exercised a casting vote, by stating that "self-defence—if exercised in extreme circumstances in which the very survival of a State is in question—cannot produce a situation in which a State would exonerate itself from compliance with the 'intransgressible norms' of international humanitarian law."[158] In other words, the advisory opinion merely abstained from making legal assessment, in the abstract, as to how the relevant rules of international law, such as the right of self-defense and the principles of distinction, proportionality, and precautions, might be applied in extreme circumstances where the very survival of a State was threatened.[159]

Conceived as such, adjudicators may consider it inappropriate to address a general question due to the risk of interference in the legitimate exercise of subjective judgement that a political organ must make in the imperative interest of security. Views are divided as to whether the Court has reserved or abrogated its authority to assess the legality of a threat or use of nuclear weapons under specific circumstances where the state pleads its very survival for justification. In the view of Judge Ranjeva, the Court has created "a possible sphere of competence" to impose legal limits on the exercise of self-defense,[160] whereas Judge Koroma observed that the Court's findings effectively accorded each state the exclusive right to decide for itself in assessing the legality of the use of nuclear weapons.[161] However, as will be discussed in chapter 5, judicial deference to the decision of a political organ in recognition of the imperative interest of security does not release it from defending the lawfulness of a particular measure in the implementation of that decision.

B. Institutional Division of Responsibilities

During an early period in the practice of international adjudication, there was a general view that the matters involving the essential interests of a state should be submitted to political processes for resolution.[162] The International Court of Justice also observed that any issues arising from the implementation of the Mandate System established by the

157 *Nuclear Weapons* advisory opinion, *supra* note 79, 259–60 paras. 86–87.
158 Ibid., 273 para. 22.
159 See ibid., 303–4 (Judge Ranjeva separate opinion), 310 (Judge Fleischhauer separate opinion).
160 Ibid., 303–4 (Judge Ranjeva separate opinion).
161 Ibid., 560–61 (Judge Koroma dissenting opinion).
162 See the remarks made by Lord Robert Cecil during the drafting of the Covenant of the League of Nations: David Hunter Miller, *The Drafting of the Covenant* (New York: G.P. Putnam's Sons, 1928) vol. II, 378.

League of Nations were regarded as "matters that had their place in the political field."[163]

Under the UN collective security system, the Security Council is entrusted with the primary responsibility for the maintenance of international peace and security.[164] The prevailing view is that there is no institutional basis for barring the International Court of Justice from exercising its jurisdiction on matters which the Security Council has seized.[165] Nevertheless, there is room for the Court to exercise judicial deference so that it will not place itself in a position of confrontation with the Security Council, where the organ has exercised collective enforcement powers in a legally binding manner.[166]

In *Greece v. Turkey*, the Court refrained from indicating provisional measures with a view to preventing aggravation of the dispute, having regard to the provisional measures issued by the Security Council.[167] Likewise, in the *Lockerbie* cases, the Court considered that the circumstances developed as a result of the adoption of Resolution 748 by the Security Council were not such as to require an exercise of judicial power to indicate provisional measures.[168] As will be discussed in chapter 6, the Court has a limited role to play in assessing the legality or validity of Security Council resolutions. Its deferential approach could have been derived from this institutional arrangement, in which the Court is inclined to avoid fundamentally irreconcilable legal positions between the two organs from emerging. Such a situation could have put the entire international legal system into greater jeopardy than if the question remained unresolved.[169]

There are a few other occasions where adjudicators considered it inappropriate to review the legality of political decisions. The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia found that "[t]he factual and political nature of an

163 *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, 1966 ICJ Rep. 6, 45 para. 84.

164 UN Charter, *supra* note 119, art. 24(1).

165 *Kosovo* advisory opinion, *supra* note 79, 439 para. 85; *Lockerbie* provisional measures, *supra* note 120, paras. 39–41; *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, Judgment, 1980 ICJ Rep. 3, 21–22 para. 40; *Nicaragua* jurisdiction, *supra* note 56, 435 para. 95; *Nicaragua* judgment, *supra* note 12, 287–90 paras. 51–60 (Judge Schwebel dissenting opinion). But see *Anglo-Iranian Oil Co. (UK v. Iran)*, Preliminary Objection, 1952 ICJ Rep. 93, 134 (Judge Alvarez dissenting opinion); *Conditions of Admission* advisory opinion, *supra* note 79, 109 (Judge Krylov dissenting opinion). See also Shaw, *supra* note 12, ch. 3 §§I.26, I.30

166 *Kosovo* advisory opinion, *supra* note 79, 455–56 (Judge Tomka declaration), 483–88 (Judge Keith separate opinion), 502–5 (Judge Bennouna dissenting opinion), 515–19 (Judge Skotnikov dissenting opinion); *Lockerbie* provisional measures, *supra* note 120, 70 and 180 (Judge Weeramantry dissenting opinion).

167 *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Interim Measures of Protection, 1976 ICJ Rep. 3, 13 paras 41–42.

168 *Lockerbie* provisional measures, *supra* note 120, 15 paras. 40, 43 and 126–27 paras. 43, 46.

169 See Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague: Kluwer Law International, 2003) 108–9; Georg Nolte, "The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections," in *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. Michael Byers (Oxford: Oxford University Press, 2000) 315, 318.

Article 39 determination by the Security Council makes it inappropriate for any review by this Trial Chamber."[170] Similarly, Judge Lauterpacht drew attention to the Court's lack of readiness to substitute its discretion for that of the Security Council in making this determination and "the political steps to be taken following such a determination."[171] However, the deferential attitude expressed in these cases is hardly distinguishable from the finding of non-justiciability as discussed in the previous section.[172] The opaque reasoning indicates discrepancy in the judicial approach to the assessment of the Security Council's powers and their limitation.

C. Lack of Expertise

The third ground in support of judicial deference is the lack of expertise in ruling on the assessment of national authorities when the issue involves national security. This is because what is considered harmful or damaging to national security is subjective in nature and has a wide field of repercussions. For these reasons, national courts in many cases consider themselves ill-equipped to evaluate or second-guess the significance and implications of the decision made by political authorities for the protection of national security.[173] As the author discussed elsewhere, the modern growth of the national security state, together with technological advances in intelligence gathering and analysis for national security purposes, has been driving the judiciary further into the realm of judicial deference.[174] This trend has often resulted in the abdication of the judicial role in reviewing the government's security assessment, while making national security claims increasingly speculative.

The European Court of Human Rights has adopted a deferential approach to the decision of national authorities in derogating from their obligations to protect human

170 *Tadić* jurisdiction, *supra* note 121, para. 24.

171 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of Sep. 13, 1993, 1993 ICJ Rep. 325, 439 para. 99. See also *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. UK)*, Preliminary Objections, 1998 ICJ Rep. 9, 110 (Judge Jennings dissenting opinion).

172 See text above accompanying notes 122–23.

173 See, for example, *Center for International Environmental Law v. Office of the US Trade Representative*, 718 F.3d 899 (D.C. Cir. 2013); *Meredith Larson v. Department of State*, 565 F.3d 857, 865 (D.C. Cir. 2009); *Leghaei v. Director General of Security* (2007) 241 ALR 141, 147; *A v. Secretary of State for the Home Department* [2005] 2 AC 68, 128 (Lord Nicholls); *Secretary of State for the Home Department v. Rehman* [2003] 1 AC 153, 194 (Lord Hoffmann); *Choudry v. Attorney-General* [1999] 3 NZLR 399, 407–8; *Attorney-General v. Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 220 (Bingham LJ); *D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171, 233 (Lord Simon).

174 Hitoshi Nasu, "State Secrets Law and National Security," *International & Comparative Law Quarterly* 64 (2015) 365, 400–1.

rights. In *Ireland v. UK*, the Court justified its approach as follows:

> It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.[175]

A wide margin of appreciation thus granted, as Joan Fitzpatrick observes, "expresses a judicial reticence that arises not from fear but from a perceived disparity in institutional competence to make the fact-specific determinations necessary to determine whether a crisis truly threatens the life of the nation and whether particular measures are strictly required by the exigencies of the crisis."[176]

However, the deferential approach adopted in this judgment must be understood in its legal and structural context. This judgment addresses the legal regime of derogation, which is tightly regulated without granting discretion in balancing human rights with public interests.[177] Judicial deference is not an acknowledgment of discretionary powers that render the issue non-justiciable. Rather, it is an expression of structural limitations imposed on the European Court of Human Rights due to its subsidiary role for the protection of human rights.[178] Although the difference between the finding of non-justiciability and the exercise of judicial deference is a subtle one, this judgment should rather be considered as an instance where judicial discretion was exercised by virtue of a margin of appreciation accorded to the decisions of national authorities,[179] not due to the

175 *Ireland v. UK*, *supra* note 101, para. 207. See also Sir Humphrey Waldock's remarks as the President of the European Commission of Human Rights in *Lawless v. Ireland*, Application No. 332/57, ECHR Report (Dec. 19, 1959) 119 para. 106; *A and Others v. UK*, Application No. 3455/05, ECtHR (Grand Chamber) Judgment (Feb. 19, 2009) para. 173; *Aksoy v. Turkey*, Application No. 21987/93, ECtHR (Chamber) Judgment (Dec. 18, 1996) para. 68; *Brannigan and McBride v. UK*, Application No. 14553/89, ECtHR (Plenary) Judgment (May 25, 1993) para. 43.

176 Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights during States of Emergency* (Philadelphia, PA: University of Pennsylvania Press, 1994) 197.

177 See chapter 5.III.

178 See, for example, Brussels Declaration, adopted at the High-Level Conference on the "Implementation of the European Convention on Human Rights, Our Shared Responsibility" para. 7 (Mar. 27, 2015); Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, June 24, 2013, CETS No. 213; Brighton Declaration, adopted at the High-Level Conference on the Future of the European Court of Human Rights para. 11 (Apr. 18–20, 2012); For further analysis, see Marisa Iglesias Vila, "Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights," *International Journal of Constitutional Law* 15 (2017) 393; Alastair Mowbray, "Subsidiarity and the European Convention on Human Rights," *Human Rights Law Review* 15 (2015) 313; Herbert Petzold, "The Convention and the Principle of Subsidiarity," in *The European System for the Protection of Human Rights*, ed. Ronald St. J. MacDonald, Franz Matscher, and Herbert Petzold (Dordrecht: Martinus Nijhoff, 1993) 41.

179 Note that the margin of appreciation as a structural concept here is distinct from the same doctrine as a substantive concept, which will be discussed in chapter 5.III. On this conceptual distinction, see George

non-justiciable nature of the subject matter.

Drawing on this judgment, the Advocate General opined in *Commission v. Greece* that "issues of national security are primarily a matter for the appraisal of the authorities of the State concerned."[180] The Advocate General's opinion also urged the European Court of Justice to exercise caution in reviewing the legality of trade embargoes imposed by Greece against the Former Yugoslav Republic of Macedonia on grounds of "war or serious international tension constituting a threat of war."[181] The Advocate General justified this cautious approach in the following manner:

> What the Court must decide is whether in the light of all the circumstances, including the geopolitical and historical background, Greece could have had some basis for considering, from its own subjective point of view, that the strained relations between itself and FYROM [Former Yugoslav Republic of Macedonia] could degenerate into armed conflict. I stress that the question must be judged from the point of view of the Member State concerned. Because of differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third State. Security is, moreover, a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless.[182]

After the delivery of this opinion, the European Commission decided to withdraw the complaint.[183] Even though the European Court of Justice tends to interpret security exceptions restrictively,[184] this opinion is indicative of the Court's deferential attitude toward the subjective assessment of the member state when it comes to national security issues.

On the other hand, the concept of security as a subjective matter of perception rather than hard fact has been challenged in the proceedings before the International Court of Justice. In the *Palestinian Wall* advisory opinion, the Court observed that "the circumstance that others may evaluate and interpret these facts in a subjective and political manner can be no argument for a court of law to abdicate its judicial task."[185]

Letsas, "Two Concepts of the Margin of Appreciation," *Oxford Journal of Legal Studies* 26 (2006) 705.

180 Case C-120/94, *Commission v. Greece*, 1996 ECR I-1514, Opinion of Advocate General Jacobs, para. 55.

181 Treaty on European Union art. 224, Feb. 7, 1992 (entered into force Nov. 1, 1993) OJ C 224.

182 *Commission v. Greece*, *supra* note 180, para. 54.

183 For details, see Constantin Stefanou and Helen Xanthaki, *A Legal and Political Interpretation of Articles 224 and 225 of the Treaty of Rome: The Former Yugoslav Republic of Macedonia Cases* (Abingdon: Routledge, 1997) 31–70.

184 See chapter 4.III.

185 *Palestinian Wall* advisory opinion, *supra* note 79, 162 para. 58.

However, the significance of this observation is qualified insofar as it was to reinforce the position that sufficient information was available to the Court to arrive at a judicial conclusion. Indeed, it was the Court's response to the concern that the Court would inevitably have to speculate about "the security threat faced by Israel, which would in turn require an assessment of the nature and scale of terrorist attacks, the continuing nature of the threat, and the likely nature and scale of future attacks."[186] Israel's contention was not directed at the Court's ability to make an objective assessment of security threats, but rather at the lack of sufficient information upon which to perform its judicial task.

D. Lack of Evidence

The fourth ground that militates against judicial intervention is the difficulty of securing reliable and adequate sources of evidence for reasons of national security. In the *Interpretation of Peace Treaties*, the International Court of Justice alluded to the possibility that its judicial function was limited in respect of a question of fact which could not be elucidated without hearing relevant parties.[187] In *Nicaragua*, Judge Oda and Judge Schwebel also questioned the propriety of judicial intervention owing to unreliable sources of evidence adduced by Nicaragua without any challenge or cross-examination.[188] Judge Schwebel went even further by suggesting that no imputation need be made of the United States' failure to report its action as self-defense to the UN Security Council due to the secretive nature of the defensive measures.[189] While this reasoning has been dismissed as hardly acceptable or warranted,[190] the legal protection of state official secrets before international tribunals was barely debated at that time.[191]

186 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Written Statement of the Government of Israel on Jurisdiction and Propriety, 2004 ICJ <https://www.icj-cij.org/files/case-related/131/1579.pdf> para. 8.4.

187 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950 ICJ Rep. 65, 72.

188 *Nicaragua* judgment, *supra* note 12, 244–45 paras. 67–69 (Judge Oda dissenting opinion), 293–96 paras. 69–76 (Judge Schwebel dissenting opinion).

189 Ibid., 269 para. 7, 373 para. 222.

190 Rein Mullerson, "Self-Defense in the Contemporary World," in *Law and Force in the New International Order*, ed. Lori Fisler Damrosch and David J. Scheffer (Boulder, CO: Westview Press, 1991) 13, 19; Richard Falk, "The World Court's Achievement," *American Journal of International Law* 81 (1987) 106, 111.

191 See Chittharanjan F. Amerasinghe, "Problems of Evidence before International Administrative Tribunals," in *Fact-Finding Before International Tribunals*, ed. Richard B. Lillich (Ardsley-on-Hudson, NY: Transnational Publishers, 1992) 210, 211; Dunward V. Sandifer, *Evidence Before International Tribunals*, revised ed. (Charlottesville, VA: University Press of Virginia, 1975) 377. Cf. Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Leiden: Martinus Nijhoff, 2005) 137 (acknowledging potential difficulties arising from national security concerns, while noting that "a tribunal would be more cautious in drawing adverse inferences against a State").

In *Prosecutor v. Blaškić*, the International Criminal Tribunal for the Former Yugoslavia considered at length whether state official secrets enjoyed privilege on national security grounds.[192] While its Statute is silent on this matter, the protection of national security interests is envisaged in sub-rule 66(C) of the Rules of the Tribunal regarding the *in camera* proceedings, in cases where the information in the possession of the Prosecutor may affect the security interests of a state.[193] As the Trial Chamber noted, this clause constitutes an exception to the general obligation of disclosure under Article 29 of the Statute,[194] due to considerations of national security.[195] While acknowledging that a national security privilege was generally accepted as a legitimate limitation on disclosure of information in state practice, the Trial Chamber rejected the idea that states enjoyed a unilateral right to withhold information on that basis as contrary to the spirit and language of the Statute, as well as the nature and purpose of the Tribunal.[196]

The Appeals Chamber upheld the Trial Chamber's judgment, with a more pragmatic approach by relying squarely on Article 29 of the Statute. This trial was essentially an implementation of enforcement measures under Chapter VII of the UN Charter,[197] which obliged states to comply with the Tribunal's requests and orders without any exception.[198] However, the Appeals Chamber's reasoning also suggests that a state's entitlement to refuse requests for evidence on account of national security is contingent upon the power of the tribunal and governed by its specific rules and procedures.

Indeed, the International Court of Justice lacks comparable powers due to non-mandatory language employed in Article 49 of its Statute and Article 62 of the Rules of Court.[199] In the *Corfu Channel Case*, the Court therefore confined itself to taking note

192 *Prosecutor v. Blaškić*, Case No. ICTY-95-14-PT, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum* (July 18, 1997) paras. 107–48 [hereinafter *Blaškić I*]; *Prosecutor v. Blaškić*, Case No. ICTY-95-14-AR108*bis*, Judgment on the Request for the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997) paras. 61–66 [hereinafter *Blaškić II*]. For detailed analysis, see, for example, Ruth Wedgwood, "The International Criminal Tribunal and Subpoenas for State Documents," *International Law Studies* 71 (2000) 483; Jacob Katz Cogan, "The Problem of Obtaining Evidence of International Criminal Courts," *Human Rights Quarterly* 22 (2000) 404; Roland Bank, "Cooperation with the International Criminal Tribunal for the Former Yugoslavia in the Production of Evidence," *Max Planck Yearbook of United Nations Law* 4 (2000) 233, 247–51.

193 *Blaškić I*, *supra* note 192, paras. 113, 147–48. A similar concession was made in *Godínez-Crux v. Honduras*, Merits (Jan. 20, 1989) IACtHR Series C No. 5, paras. 33–35.

194 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (May 3, 1993) art. 29(2)(c).

195 *Blaškić I*, *supra* note 192, para. 113.

196 Ibid., paras. 124–33, 147–49.

197 UNSC Res. 827 "International Criminal Tribunal for the former Yugoslavia" (May 25, 1993) Annex, art. 29.

198 *Blaškić II*, *supra* note 192, paras. 62–65. The ruling has subsequently been incorporated into ICTY Rules: Rules of Procedure and Evidence, UN Doc. IT/32/Rev.17 (Dec. 7, 1999) r. 54*bis*.

199 Article 49 of the Statute reads: "The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal." Article 54 of

of the British refusal to disclose information requested by the Court on account of naval secrecy.[200] Under the Rome Statute, in which the national security privilege is expressly granted,[201] the International Criminal Court can only refer the matter to the Assembly of States Parties if the Court is not satisfied with the reasons for refusal.[202]

However, the issue of judicial deference is not subject to, and therefore must be distinguished from, the national security privilege on disclosure of information. Here, the question is whether the judiciary should abstain from rendering a judgment due to the lack of sufficient evidence, irrespective of the state's entitlement to withhold information for reasons of national security. In this respect, what is decisive for the Court is whether it has "sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character."[203]

During the *Palestinian Wall* proceedings, Israel submitted that it would be inappropriate to make an assessment without extensive documentary, witness and expert evidence from all parties involved.[204] While acknowledging that the lack of sufficient information and evidence might cause it to decline its opinion for reasons of judicial impropriety,[205] the Court ultimately proceeded to exercise its advisory jurisdiction on the basis that it had sufficient information before it.[206] However, a few judges sounded a note of caution regarding the partiality of factual evaluation, as a result of Israel's non-participation.[207] Judge Buergenthal distinguished Israel's non-participation in advisory proceedings, in which Israel had no obligation to present its case or adduce evidence in support, from the failure to participate in contentious proceedings where each party has

the Rules of Court provides, in relevant part: "The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue…": Rules of Court, Apr. 14, 1978 (entered into force July 1, 1978), reprinted in 17 ILM 1286. For detailed analysis, see Christian J. Tams and James G. Devaney, "Article 49," in *The Statute of the International Court of Justice: A Commentary*, ed. Andreas Zimmermann and Christian J. Tams, 3rd ed. (Oxford: Oxford University Press, 2019) 1415; James Gerard Devaney, *Fact-Finding before the International Court of Justice* (Cambridge: Cambridge University Press, 2016) 19–20, 180–83.

200 *Corfu Channel Case (UK v. Albania)*, Merits, 1949 ICJ Rep. 4, 32.

201 Rome Statute of the International Criminal Court arts. 72, 93(4), July 17, 1998 (entered into force July 1, 2002) 2187 UNTS 3.

202 Ibid., art. 87(7). See also Ruth Wedgwood, "National Courts and the Prosecution of War Crimes," in *Substantive and Procedural Aspects of International Criminal Law*, ed. Gabrielle Kirk McDonald and Olivia Swaak-Goldman (The Hague: Kluwer Law International, 2000) vol. 1, 389, 408; Cogan, *supra* note 192, 423–26.

203 *Western Sahara* advisory opinion, *supra* note 151, 28–29 para. 46. See also *Status of Eastern Carelia*, Advisory Opinion, 1923 PCIJ Rep. Series B No. 5, 28.

204 Written Statement of the Government of Israel on Jurisdiction and Propriety, *supra* note 186, para. 8.5.

205 *Palestinian Wall* advisory opinion, *supra* note 79, 161 para. 56.

206 Ibid., 161–62 paras. 57–58.

207 Ibid., 217 (Judge Higgins separate opinion), 240–41 (Judge Buergenthal declaration), 264–71 (Judge Owada separate opinion).

the burden of proving its claims.[208] As Judge Owada observed, the underlying concern was the maintenance of fairness in the administration of justice.[209]

The proper administration of justice was also a key consideration in the view of Judge Cançado Trindade in his separate opinion to the provisional measures indicated in *Timor-Lester v. Australia* concerning the seizure and detention of certain documents and data.[210] While citing the *Blaškić* judgment with approval, Judge Cançado Trindade considers that the refusal to produce evidence by reasons of national security undermines the due process of law and the proper administration of justice.[211] Here again, however, the issue of judicial propriety should not be confused with the national security privilege on disclosure of information. The consideration of judicial propriety concerns the Court's ability to maintain the proper administration of justice when the state, rightly or wrongly, refuses to disclose information on account of national security. Judge Greenwood, Judge Donoghue, and Judge Callinan are all mindful of the inherent difficulty that arises from the lack of information in the adjudication of issues involving national security.[212]

In its counter-memorial, Australia submitted that "the Court should take a very cautious approach in recognising any new limitations on forum State's right to exercise territorial sovereignty, particularly with respect to the protection of its national security interests."[213] As the case was ultimately discontinued upon return of the documents in question,[214] it remains to be seen whether and under what circumstances the Court may decline adjudication due to insufficient evidence to evaluate claims involving national security. Nevertheless, the non-disclosure of information as prejudicial to the national security of a state could be found to be an insurmountable obstacle to the proper administration of justice when the information constitutes the very subject matter of the dispute.

208 Ibid., 245. See also *Nicaragua* judgment, *supra* note 12, 25 para. 30.
209 *Palestinian Wall* advisory opinion, *supra* note 79, 266–67.
210 *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, 2014 ICJ Rep. 147.
211 Ibid., 182–83 paras. 39–41.
212 Ibid., 198 (Judge Greenwood dissenting opinion), 212 (Judge Donoghue separate opinion), 223 (Judge Callinan dissenting opinion).
213 *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Counter-Memorial of Australia, 2014 ICJ <https://www.icj-cij.org/files/case-related/156/18702.pdf> vol. 1, para. 2.31.
214 *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order of June 11, 2015, 2015 ICJ Rep. 572.

V. Concluding Observations

As the perception of security threats evolves and security conditions change, the concept of security is likely to test the readiness of adjudicators in examining the jurisdictional exclusion of security matters or their justiciability under international law. There are also various grounds upon which the adjudicators might be inclined to exercise judicial discretion in deference to the decision of a political organ without challenging its factual assessment or political judgement. However, the judicial approach lacks consistency and uniformity in the practice of international adjudication.

The mixed jurisprudence that has been examined in this chapter highlights the inherent tension between the imperative interest of security that demands discretion reserved for the protection of security interests, and the public interest of accountability that demands legal control and constraints on the exercise of that discretion. Balancing these competing interests in the practice of international adjudication often leads to a legal quandary. This chapter has identified three flashpoints over which the debate remains unresolved.

The first contentious issue is the locus of interpretive authority when the security clause is open to subjective assessment. The jurisdictional exclusion of national security does not, *ipso jure*, deprive the Court of the inherent power to determine its own jurisdiction. However, the jurisdictional exclusion does pose practical difficulties in resolving the scope of exclusion due to the subjective perception of security and conceptual ambiguity associated with it. The issue may depend on whether discretionary language is used in the jurisdictional reservation or clause. However, the privative reading of a self-judging clause implicated in *Nicaragua*, inferred from textual comparison alone, is not determinative of its legal effect on the exercise of jurisdiction by an adjudicative body, as illustrated in *Djibouti v. France* and the WTO ruling in *Russia – Measures Concerning Traffic in Transit*.

An express agreement to remove security matters from the purview of international law also challenges the ability of adjudicators to review the legality of security measures. A potential finding of non-justiciability requires adjudicators to establish that there is no element of international law governing the subject in dispute. As such, the locus of authority necessarily resides with adjudicators in finding whether the subject matter indeed precludes judicial intervention. In practice, however, the express protection of security matters from judicial control or treaty monitoring has effectively meant that

the determination regarding the presence of security threats is entirely left for political authorities.

The second and under-developed area of contention is the ability of adjudicators to assess bona fides in the exercise of discretion. Although the idea has only been advanced in limited contexts, there is a potential for wider applications, especially in determining whether a self-judging reservation or clause is invoked in good faith. However, the ability of international courts and tribunals to conduct a bona fides review is premised upon the paradigmatic shift in the constitutional relationship between sovereign states and international judicial institutions. The power of judicial review, comparable to those of national courts, is not inherent in the judicial function but must rather be derived from the constitutional structure of international law.

The third challenge concerns the exercise of judicial discretion in a consistent manner. Unlike jurisdictional questions, the issue of judicial propriety rests squarely within the realm of judicial authority. It is thus conceivable that an adjudicative body may adopt a deferential approach to avoid drawing a definitive conclusion on general questions involving the imperative interest of security or so as not to cause fundamentally irreconcilable legal situations. Judicial deference may also be considered appropriate when there are constraints perceived on the expertise or material information available to adjudicators. However, as Shabtai Rosenne cautioned, judicial discretion must be carefully circumscribed lest it expose the judiciary to criticism of arbitrariness.[215]

This is not to say that adjudicators should abstain from seizing an opportunity as it presents itself to provide clarification on contentious matters.[216] Rather, the issue at stake here is the uniformity in the application of judicial restraint so that states can maintain confidence in the certainty and stability of the legal system within which they operate to combat uncertainty and volatility of security threats. The project of extending the rule of law to the sovereign authority exercised in the realm of national security, or to collective enforcement powers authorized for the maintenance of international peace and security, would suffer a setback should it be found that judicial discretion is arbitrarily applied. The mixed approach in jurisprudence and the opaque reasoning of a judgment does not help assure the international community that the legitimate interest of security will adequately be protected through international adjudication.

215 Shaw, *supra* note 12, ch. 9 §II.151.

216 See Peter Kooijmans, "The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy," *International & Comparative Law Quarterly* 56 (2007) 741, 750–53.

4

INTERPRETING SECURITY

I. Introduction

The expression of security interests in the legal text is subject to interpretation for the clarification of its meaning. Even though the term "security" or any expression associated with it cannot be defined clearly or exhaustively, it is amenable to legal construction. However, the text of the rule is open to different interpretations when the interest protected therein is indeterminate and open-ended,[1] as is often the case with the concept of security. Although the indeterminacy of rules is susceptible to exploitation, it increases room for judicial maneuver when the interpretative question arises in international adjudication.[2] In charting a course through legal indeterminacy, adjudicators must make a choice between competing, and at times, conflicting legal considerations.

This chapter examines how the legal text associated with the concept of security has been interpreted in the practice of international adjudication. The focus of this chapter is the extent to which the conceptual evolution of security, as discussed in chapter 1, can be accommodated in the legal construction of security. This consideration also involves whether and under what circumstances the concept of security is subject to restrictive interpretation or evolutive interpretation as the usage of the term evolves from the meaning originally attached to it.

This chapter seeks a general approach to the legal construction of security in international adjudication, recognizing that a particular legal text associated with the concept of security is variably construed in each specific context. As such, no guidance will be offered on how a particular legal text is to be interpreted. Rather, the central purpose of inquiry is to identify an objective and consistent approach to interpretation in international adjudication when the subjective perception of security changes due to the emergence of new threats.

1 See chapter 1.V.
2 Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933) 394–400.

II. The Legal Construction of Security

It is axiomatic in modern international law that the expression of security interests in the text of a treaty instrument is subject to legal construction in accordance with the general rule of treaty interpretation, which is set forth in the Vienna Convention on the Law of Treaties.[3] This rule of interpretation leaves room for flexibility in the legal construction of security, allowing for adjustment to the meaning of the term as circumstances change over time in light of subsequent agreement and subsequent practices, or through systemic integration with other relevant rules of international law.[4] This flexibility in the general approach to the legal construction of security must be distinguished from an evolutive interpretation of the concept embedded in the text of a treaty itself. As will be discussed in section IV of this chapter, the latter has more limited potential for extending meanings.

The Vienna Convention rule of interpretation does not apply to other international instruments or unilateral acts of states, although it may provide guidance. The International Court of Justice has indeed observed in the *Fisheries Jurisdiction Case* that the interpretive regime relating to unilateral declarations made under Article 36 of its Statute is not identical with the Vienna Convention rule.[5] Instead, the Court will "interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court."[6] On the other hand, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea considered the Vienna Convention rule, by analogy, to have provided guidance in the interpretation of regulations adopted by the International Seabed Authority.[7] In this specific case, however, the close connection between these regulations and the Law of the Sea Convention was identified as a unique factor in justifying the analogous application of the Vienna Convention rule.

Likewise, in its advisory opinion on the *Unilateral Declaration of Independence in*

3 Vienna Convention on the Law of Treaties arts. 31, 32, May 23, 1969 (entered into force Jan. 27, 1980) 115 UNTS 331 [hereinafter VCLT]. Its status under customary international law has been affirmed: *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 1994 ICJ Rep. 6, 21–22 para. 41.

4 VCLT, *supra* note 3, arts. 31(3)(a), 31(3)(b), 31(3)(c) respectively. See also Jean-Marc Sorel and Velérie Boré Eveno, "1969 Vienna Convention: Article 31 General Rule of Interpretation," in *The Vienna Conventions on the Law of Treaties: A Commentary*, ed. Olivier Corten and Pierre Klein (Oxford: Oxford University Press, 2011) 804, 825–29.

5 *Fisheries Jurisdiction Case (Spain v. Canada)*, Jurisdiction, 1998 ICJ Rep. 453 para. 46.

6 Ibid., 454 para. 49.

7 *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 2011 ITLOS Rep. 10, 29 para. 60.

respect of Kosovo, the International Court of Justice abstained from applying the Vienna Convention rule to the interpretation of UN Security Council resolutions. Council resolutions differ from treaties in terms of the collective nature and process of decision-making, as well as their potentially binding effect on all member states, including those that take no part in drafting.[8] Instead, the Court found it necessary to "analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions."[9] Likewise, the International Criminal Tribunal for the Former Yugoslavia adopted a "logical and systematic interpretation" of its Statute annexed to Security Council Resolution 827,[10] having regard to the Security Council's statements leading up to its establishment, the UN Secretary-General's reports, and the statements made by representatives of Council members.[11] All these elements are considered as the means to ascertain the collective intention of the Council,[12] which is a central consideration when interpretating Council resolutions.

A. Definitional Problems

Various scholars have attempted to define the concept of security in the context of a specific treaty. According to the Siracusa Principles, for example, national security can be invoked to justify restrictions on human rights under the International Covenant on Civil and Political Rights only when such measures are designed "to protect the existence of the nation or its territorial integrity or political independence against force or threat of force."[13] Likewise, national security is described in the Johannesburg Principles as the

8 *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 2010 ICJ Rep. 403, 442 para. 94.

9 Ibid. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 4, 53 para. 114.

10 UNSC Res. 827 "International Criminal Tribunal for the former Yugoslavia" (May 25, 1993) Annex.

11 *Prosecutor v. Tadić*, Case No. ICTY-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) paras. 72–78.

12 See, for example, Efthymois Papastavridis, "Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis," *International & Comparative Law Quarterly* 56 (2007) 83, 105–7; Michael C. Wood, "The Interpretation of Security Council Resolutions," *Max Planck Yearbook of United Nations Law* 2 (1998) 73, 82–84. Cf. Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008) 490.

13 The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1984/4 (Sep. 28, 1984) Annex, para. 29, reprinted in *Human Rights Quarterly* 7 (1985) 3–14. See also HRC, General Comment No. 37: Article 21 (Right of Peaceful Assembly), UN Doc. CCPR/C/GC/37 (Sep. 17, 2020) para. 42.

protection of "a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force."[14] In these definitions, the concept of security is narrowly confined to a limited range of military threats.

In practice, however, it is generally accepted that the notion of national security is not amenable to a clear and exhaustive definition. In *Prosecutor v. Delalić*, the term "security" as the ground for internment and assigned residence under Geneva Convention IV,[15] was not deemed "susceptible to more concrete definition."[16] The Supreme Court of Israel accepted this broad construction of security in the same legal context, distinguishing it from "military reasons" that are used elsewhere in the Convention.[17] In *Al-Nashif v. Bulgaria*, the European Court of Human Rights observed that "[b]y the very nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance."[18]

The meaning of national security may indeed evolve over time. For example, when the 1951 Refugee Convention was drafted, predominant concerns of national security were espionage, sabotage, and subversion, which prompted the insertion of a national security exception to the prohibition of expulsion or refoulement of refugees.[19] The limited records of drafting history indicate that the notion of national security was considered a distinct concept, separate from public order and envisaging those who engaged in subversive activities on behalf of a foreign power.[20] Accordingly, Atle Grahl-Madsen observed that "[a] person may be said to offend against 'national security' if he engages in activities directed at the

14 ARTICLE 19 Global Campaign for Free Expression, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (London: ARTICLE 19, 1995) principle 2(a). In contrast, the Tshwane Principles abstained from defining national security: Open Society Justice Initiative, *The Global Principles on National Security and the Right to Information* (New York: Open Society Foundations, 2013) 12.

15 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 27(4), 42, 78, Aug. 12, 1949 (entered into force Oct. 21, 1950) 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

16 *Prosecutor v. Delalić*, Case No. ICTY-96-21-T, Judgment (Nov. 16, 1998) para. 574. See also Jean Pictet, ed., *Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) 257.

17 *Ajuri v. IDF Commander* [2002] HCJ 7015/02, 7019/02, para. 28.

18 *Al-Nashif v. Bulgaria*, Application No. 50963/99, ECtHR (Fourth Section) Judgment (June 20, 2002) para. 121. See also *Zakharov v. Russia*, Application No. 47143/06, ECtHR (Grand Chamber) Judgment (Dec. 4, 2015) para. 247; *Kennedy v. UK*, Application No. 26839/05, ECtHR (Fourth Section) Judgment (May 18, 2010) para. 159; *Esbester v. UK*, Application No. 18601/91, ECHR Report (Apr. 2, 1993) 18 EHRR CD 72 (stating that "the term 'national security' is not amenable to exhaustive definition").

19 Convention Relating to the Status of Refugees arts. 32(1), 33(2), July 28, 1951 (entered into force Apr. 22, 1954) 189 UNTS 137.

20 See Ulrike Davy, "Article 32," in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, ed. Andreas Zimmermann (Oxford: Oxford University Press, 2011) 1277, 1308–10; Paul Weis, *The Refugee Convention, 1951: The Travaux Preparatoires Analysed, with a Commentary by the Late Dr Paul Weis* (Cambridge: Cambridge University Press, 1995) 328, 342.

overthrow by external or internal force or other illegal means of the government of the country concerned, or in activities which are directed against a foreign government, which as a result threatens the former government with intervention of a serious nature."[21]

In *Rehman*, while quoting this statement with approval, Lord Slynn rejected the idea that only these kinds of action could justify the deportation of a person in the interests of national security.[22] Lord Slynn reasoned that in contemporary world conditions, individuals have the ability to threaten national security, directly or indirectly, due to the sophistication of offensive means, the mobility of persons and goods, and the speed of modern communication, among other factors.[23] Likewise, the Supreme Court of Canada recognized the interdependent nature of security in the age of global terrorism, holding that a threat to national security "may be grounded in distant events that indirectly have a real possibility of harming Canadian security."[24] While remanding the case to the Minister of Immigration for reconsideration, the Court did not challenge the broad and flexible interpretation of national security. Instead, Canada's highest court demanded evidence upon which an objectively reasonable suspicion must be grounded to prove a potentially serious threat to the country.[25]

As contemporary security concerns increasingly diversify, any attempt to attach a fixed, strict meaning to the concept of security risks falling into anachronism. For example, the notion of security in New Zealand's statute book has evolved considerably from protection against espionage, sabotage, and subversion to combating terrorism and other adverse impact on the "international well-being or economic well-being" of the country.[26] In the People's Republic of China, national security encompasses "the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the state."[27] For Vietnam, national security encompasses "the stability and sustainable development of the socialist regime."[28] The

21 Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951* (Geneva: UNHCR, 1997) 119, 236. See also Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007) 235–36.

22 *Secretary of State for the Home Department v. Rehman* [2003] 1 AC 153, 182 (UK House of Lords).

23 Ibid.

24 *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 50–51 para. 88.

25 Ibid., 49 para. 85, 51 paras. 89–90. For critical evaluation of the Court's formalistic image of security, see Obiora Chinedu Okafor and Pius Lekwuwa Okoronkwo, "Re-configuring *Non-Refoulement*? The *Suresh* Decision, 'Security Relativism', and the International Human Rights Imperative," *International Journal of Refugee Law* 15 (2003) 30, 37–43.

26 New Zealand Security Intelligence Service Act 1969 (NZ) s. 2 (definition of security); *Choudry v. Attorney-General* [1999] 2 NZLR 582, 595 (Court of Appeal Wellington).

27 National Security Law 2015 (PRC) art. 2.

28 Law on National Security 2004 (Vietnam) Law No. 32/2004/QH11, art. 3(1).

United States has also articulated national security broadly, including "actual, potential or threatened interference with, attacks on, compromise of, or incapacitation of critical infrastructure or protected systems by either physical or computer-based attack or other similar conduct."[29]

These are small samples of contemporary state practice illustrative of the diverse and evolving ideas of security across national jurisdictions. The practice is consistent with the broadening concept of security through the political process of securitization as a greater range of disruptive and destructive events emerge. The deontological pursuit of a universal definition of security inevitably risks subjective bias and failure to accommodate non-traditional perspectives. It is even plausible to find that the ordinary meaning of security evolves in such a way that it influences the legal construction of security, as will be discussed in section IV of this chapter.

Further, there are inevitable difficulties with all-encompassing definitions. The subjective perception of security is necessarily influenced and shaped by various extraneous factors, such as cultural values, shared experiences, internal narratives, and psychological archetypes.[30] Thus, for example, different countries have different reasons to perceive the territorial and maritime disputes in the South China Sea as a security issue. For China, the area is a natural shield and a strategic hinterland for its security in the south,[31] whereas the United States views assertive Chinese activities in the area as challenges to the existing maritime order.[32] Other states and people might see the tension as a danger of conflict escalation between a rising power and the established hegemon—a situation that bears comparison with Thucydides's ancient narrative of the decline and fall of the Athenian empire during the Peloponnesian War (431–404 B.C.).[33] Although a fixed definition of security may well contribute to judicial efforts to address the issue of indeterminacy, this idea is fraught with conceptual problems.

29 Critical Infrastructure Information Act 2002 (US) PL 107–296, 116 Stat. 2135 s. 212(3)(A). This description of national security is also adopted in *Boniface Okezie v. Attorney-General*, Suit No. FHC/L/CS/514/2012, Judgment of Federal High Court of Nigeria (Feb. 22, 2013).

30 See, for example, Karin M. Fierke, *Critical Approaches to International Security*, 2nd ed. (Cambridge: Polity Press, 2015) 302–20; Lucia Zedner, *Security* (Abingdon: Routledge, 2009) 16–17.

31 See R. D. Kaplan, *Asia's Cauldron: The South China Sea and the End of a Stable Pacific* (New York: Random House, 2014) 41.

32 See James Kraska and Raul Pedrozo, *The Free Sea: The American Fight for Freedom of Navigation* (Annapolis, MD: Naval Institute Press, 2018) ch. 11.

33 See Mark J. Valencia, "The South China Sea and the 'Thucydides Trap'," in *The South China Sea: A Crucible of Regional Cooperation or Conflict-making Sovereignty Claims?* ed. C. J. Jenner and Tran Truong Thuy (Cambridge: Cambridge University Press, 2016) 59.

B. Constructional Problems

The fact that the concept of security remains undefined in international law is not a barrier to the legal construction of security when it forms part of a legal text. In principle, the concept of security must be construed in the specific legal context of the rule in which the relevant term appears. As such, the same term may well be interpreted differently in each legal context. For example, in the context of refoulement on national security grounds under the Refugee Convention, mentioned above, security may well be construed in opposition to a very serious danger, rather than dangers of a lesser order, because of the fundamental character of protection that the legal regime establishes for individuals against the risk of persecution.[34] In comparison, national security as a permissive ground for restricting human rights may be construed more widely so that national authorities can balance their interest in the protection of national security against the degree of interference with individual freedoms.[35]

In *C. G. v. Bulgaria*, the European Court of Human Rights rejected the claim that drug trafficking was a matter of national security since such an interpretation would go "beyond its natural meaning" and "any reasonable definition of the term."[36] By adopting the same textual approach, the Arbitral Tribunal in *Deutsche Telekom v. India* and *Devas v. India* dismissed societal needs such as train tracking, disaster management, tele-education, tele-health and rural communication as distorting the natural meaning of "essential security interests."[37] In both cases, however, the Tribunal found no issue accepting that the strategic needs of defense and other security agencies would qualify for the protection of essential security interests, despite the fact that the Indian government had mixed motives to annul a satellite communication contract.[38] As discussed previously in relation to the interpretation of jurisdictional clauses,[39] there is a risk of arbitrarily characterizing and soliciting the militarization of otherwise political or economic issues

34 See Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion," in *Refugee Protection in International Law*, ed. Erika Feller, Volker Türk, and Frances Nicholson (Cambridge: Cambridge University Press, 2009) 87, 136; Andrea Zimmermann and Philipp Wennholz, "Article 33, para. 2," in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, ed. Andreas Zimmermann (Oxford: Oxford University Press, 2011) 1396, 1417. Cf. *Suresh v. Canada*, *supra* note 24, 51 para. 89.

35 See Iain Cameron, *National Security and the European Convention on Human Rights* (The Hague: Kluwer Law International, 2000) 49–50.

36 *C. G. v. Bulgaria*, Application No. 1365/07, ECtHR (Fifth Section) Judgment (July 24, 2008) para. 43.

37 *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Interim Award (Dec. 13, 2017) paras. 236, 281; *CC/Devas (Mauritius) Ltd and Others v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits (July 25, 2016) para. 354.

38 *Devas v. India*, *supra* note 37, David R. Haigh dissenting opinion paras. 96–100.

39 See chapter 3.II.B.

when the interpretation of security is based on the preconceived idea of what essential security interests would be likely to involve.

Caution must therefore be exercised not to read too much into textual constraint as the basis for the legal construction of security. For example, the term "national" may operate to limit the ground for the expulsion and refoulement of refugees, as Lauterpacht and Bethlehem posit, by excluding "danger to the security of other countries or to the international community more generally."[40] However, such a construction is too narrow to contemplate the cross-border dimension of national security that was not envisaged by the drafters of the text.[41] It is nowadays plausible to acknowledge a material link between a threat to national security and a danger to the security of other countries or to the international community as a whole.[42] Indeed, the European Court of Human Rights adopted this position in *Nada v. Switzerland* by recognizing Security Council resolutions for combating international terrorism as capable of contributing to the national security and public safety of Switzerland.[43]

Another example is the term "public emergency threatening the life of the nation" and its variants in different legal regimes of human rights derogation.[44] In *Lawless v. Ireland*, the European Court of Human Rights interpreted this term, according to its natural and ordinary meaning, as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."[45] Subsequently, in the *Greek Case*, the same Court further

40 Lauterpacht and Bethlehem, *supra* note 34, 135.

41 Cf. Zimmermann and Wennholz, *supra* note 34, 1416; James C. Hathaway and Colin J. Harvey, "Framing Refugee Protection in the New World Disorder," *Cornell International Law Journal* 34 (2001) 257, 291.

42 See James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) 266. Note the associated problem with the interpretation of "nation" as discussed in chapter 1.II.A.

43 *Nada v. Switzerland*, Application No. 10593/08, ECtHR (Grand Chamber) Judgment (Sep. 12, 2012) para. 174.

44 International Covenant on Civil and Political Rights art. 4. Dec. 16, 1966 (entered into force Mar. 23, 1976) 999 UNTS 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950 (entered into force Sep. 3, 1953) 213 UNTS 221 [hereinafter European Convention on Human Rights]; American Convention on Human Rights art. 27, Nov. 22, 1969 (entered into force July 18, 1978) 1144 UNTS 123; Arab Charter on Human Rights art. 4, May 23, 2004 (entered into force Mar. 15, 2008), reprinted in *International Human Rights Reports* 12 (2005) 893. The drafters of the African Charter of Human and People's Rights and ASEAN Human Rights Declaration elected not to adopt a derogation clause in favor of a general limitation clause: African Charter of Human and People's Rights art. 27(2), June 27, 1981 (entered into force Oct. 21, 1986) 1520 UNTS 217; ASEAN Human Rights Declaration para. 8 (Nov. 18, 2012).

45 *Lawless v. Ireland (No. 3)*, Application No. 332/57, ECtHR (Chamber) Judgment (July 1, 1961) para. 28. The Court follows the natural and ordinary meaning of the term as articulated by the majority of the European Commission in the same case: *Lawless v Ireland*, Application No. 332/57, ECHR Report (Dec. 19, 1959) 84 ("a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question"). The word "imminent" is absent in the English version of the judgment but appears in the French text ("*une situation de crise ou de danger exceptionnel et imminent qui affecte l'ensemble de la population et*

developed this interpretation by characterizing public emergency as follows:

1. It must be actual or imminent.
2. Its effects must involve the whole nation.
3. The continuance of the organized life of the community must be threatened.
4. 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.[46]

These definitions of public emergency as the basis for derogation have become a reference point in the subsequent debates regarding the scope of derogation.[47] For example, the Paris Minimum Standards of Human Rights Norms in a State of Emergency, adopted at the 61st Conference of the International Law Association held in 1984, defined public emergency as "an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed."[48]

The Siracusa Principles, mentioned above, defined the term even more restrictively by interpreting a threat to the life of the nation as one that:

a. affects the whole of the population and either the whole or part of the territory of the State; and
b. threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.[49]

Paragraph 40 of the Siracusa Principles also declares that internal conflict and unrest do not constitute a grave and imminent threat to the life of the nation and therefore

constitute une menace pour la vie organisée de la communauté composant l'Etat").

46 *Denmark, Norway, Sweden, and the Netherlands v. Greece*, Application Nos. 3321/67, 3322/67, 3323/67, 3344/67, ECHR Report (May 31, 1968) para. 153, reprinted in *Yearbook of the European Convention on Human Rights 1969: The Greek Case* (The Hague: Martinus Nijhoff, 1972).

47 See, for example, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, UN Doc. E/CN.4/Sub.2/1982/15 (July 27, 1982) 8 para. 23 [Questiaux Report].

48 The entire text is reproduced in *American Journal of International Law* 79 (1985) 1072–81. For a commentary, see Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (London: Pinter Publishers, 1989).

49 Siracusa Principles, *supra* note 13, para. 39. The reference to "the political independence or the territorial integrity of the State" follows the definition of national security mentioned above drawing on the language of Article 2(4) of the UN Charter. Compare Daniel O'Donnell, "Commentary by the Rapporteur on Derogation," *Human Rights Quarterly* 7 (1985) 23, 23–24; with Bert B. Lockwood Jr., Janet Finn, and Grace Jubinsky, "Working Paper for the Committee of Experts on Limitation Provisions," *Human Rights Quarterly* 7 (1985) 35, 71.

cannot justify derogation.[50] Following these restrictive interpretations, Lord Hoffmann dismissed terrorism as a ground for derogation, observing that "[t]errorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community."[51]

However, such restrictive interpretations find little support in state practice and the subsequent development of jurisprudence. For example, derogation has been invoked under Article 4 of the International Covenant on Civil and Political Rights in a wide range of emergency situations involving foreign intervention,[52] internal disturbances,[53] natural disasters,[54] mass violence,[55] acts or threats of terrorism,[56] food shortage,[57] the rapid spread of infectious disease,[58] and economic crises.[59] The Human Rights Committee has declined to fix the definition of national security so as not to impede a legitimate future application of permissive restrictions.[60]

The different wordings associated with the notion of "public emergency" in the legal regimes of derogation (such as "which threatens the life of the nation") are designed to qualify its meaning. The drafting records of the Covenant indicate that the qualification reflects the concerns about the risk of abuse.[61] Although various qualifying phrases were

50 Cf. Joan F. Hartman, "Working Paper for the Committee of Experts on the Article 4 Derogation Provision," *Human Rights Quarterly* 7 (1985) 89, 93.

51 *A v. Secretary of State for the Home Department* [2005] 2 AC 68, 132 para. 96.

52 See, for example, Ukraine: Eighth Periodic Report, UN Doc. CCPR/C/UKR/8 (Jan. 30, 2019) paras. 52–61; Azerbaijan: Initial Report, UN Doc. CCPR/C/81/Add.2 (Mar. 8, 1994) paras. 22–23.

53 See, for example, Ecuador: Fifth Periodic Report, UN Doc. CCPR/C/ECU/5 (May 26, 2008) para. 106; Colombia: Fourth Periodic Report, UN Doc. CCPR/C/103/Add.3 (Oct. 8, 1996) para. 77.

54 See, for example, Chile: Sixth Periodic Report, UN Doc. CCPR/C/CHR/6 (Sep. 12, 2012) para. 29 (earthquake and tsunami); Report of the Human Rights Committee, UN Doc. A/46/40 (1991) 14 para. 59 (forest fires).

55 See, for example, Armenia: Second and Third Periodic Reports, UN Doc. CCPR/C/ARM/2-3 (Nov. 22, 2010) paras. 160–61; Report of the Human Rights Committee, UN Doc. A/42/40 (1987) 28–29 paras. 114–15 (Tunisia).

56 See, for example, Sri Lanka: Fifth Periodic Report, UN Doc. CCPR/C/LKA/5 (Jan. 31, 2013) para. 67; Report of the Human Rights Committee, UN Doc. A/46/40 (1991) 116 para. 461, 123 para. 490 (Sri Lanka); Report of the Human Rights Committee, UN Doc. A/38/40 (1983) 60 para. 259 (Peru); UK: Sixth Periodic Report, UN Doc. CCPR/C/GBR/6 (May 18, 2007) 33–41.

57 See, for example, Report of the Human Rights Committee, UN Doc. A/46/40 (1991) 132 para. 538 (Madagascar).

58 See, for example, Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, UN Doc. CCPR/C/128/2 (Apr. 30, 2020) para. 1; Georgia's Third Periodic Report under Article 40 of the Covenant, UN Doc. CCPR/C/GEO/3 (Nov. 7, 2006) paras. 56–60 (to prevent further spread of the H5N1 virus).

59 HRC, General Comment No. 29: Article 4 (States of Emergency), UN Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) para. 5; Report of the Human Rights Committee, UN Doc. A/47/40 (1992) 52–53 para. 2300 (Ecuador); Report of the Human Rights Committee, UN Doc. A/46/40 (1991) 29 para. 114 (Finland).

60 Michael O'Flaherty, "Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34," *Human Rights Law Review* 12 (2012) 627, 652.

61 See, for example, UNCHR (2nd Session), Summary Record: 42nd Meeting, UN Doc. E/CN.4/SR.42 (Dec. 16, 1947) 5 (Belgium); UNCHR (5th Session), Summary Record: 127th Meeting, UN Doc. E/CN.4/SR.127 (June 17, 1949) 6 and 8 (Lebanon); UNCHR (6th Session), Summary Record: 195th Meeting, UN Doc. E/CN.4/SR.195 (May 29, 1950) 11 para. 54 (Uruguay), 13 para. 64 (Chile). See also Dominic McGoldrick, "The Interface between Public Emergency Powers and International Law," *International Journal of Constitutional Law* 2 (2004) 380, 393.

suggested and adopted in different treaties, they were all designed to emphasize the element of gravity required for the classification of a situation as a public emergency.[62] As such, these phrases are not intended to restrict the range of security threats that can qualify as a public emergency. Rather, restrictive language is employed to ensure bona fide assessment according to the gravity of each situation, leaving a degree of flexibility in conceptualizing public emergency as the ground for derogation.

Beyond this gravity-based restriction, the precise range of situations that may qualify as a public emergency is left open to interpretation.[63] As Joan Hartman observes, whether the restrictive language of the derogation clause is meaningful "depends largely on who strikes the balance between individual rights and community needs in a particular crisis."[64] The notion of derogation has not been fixed with a clear remit, partly due to inadequate reporting by states. The lack of clarity has caused treaty monitoring bodies to struggle with independent fact-finding, especially in the early days of their work.[65] As a result, the UN Human Rights Committee goes no further than noting that derogation "must be of an exceptional and temporary nature" and that "[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation."[66]

European jurisprudence has also acknowledged a degree of flexibility by granting national authorities a margin of appreciation in determining the existence of a public emergency threatening the life of the nation.[67] In *Lawless v. Ireland*, the European

62 The wording of the derogation clause in the ICCPR closely follows Article 15 of the European Convention due to the simultaneous drafting during the overlapping period. The American Convention, on the other hand, adopts a differently worded clause ("in time of war, public danger, or other emergency that threatens the independence or security of a State Party"), but the drafting records and associated documents suggest that it does not differ substantially from the derogation clause of the other treaties. For details, see Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (The Hague: Martinus Nijhoff, 1998) 203–11, 246, 249–50; Jaime Oraá, *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press, 1992) 13–16.

63 See Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2009) 5–6.

64 Joan F. Hartman, "Derogation from Human Rights Treaties in Public Emergencies – A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations," *Harvard International Law Journal* 22 (1981) 1, 23.

65 HRC, General Comment No. 5: Article 4 (Derogations), UN Doc. A/36/40 (1981) 110 para. 2. For detailed analysis, see especially Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (Philadelphia, PA: University of Pennsylvania Press, 1994) 82–105; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991) 301–27; P. R. Ghandhi, "The Human Rights Committee and Derogation in Public Emergencies," *German Yearbook of International Law* 32 (1990) 321, 332–34.

66 HRC, General Comment No. 29, *supra* note 59, paras. 2–3.

67 See generally Christoph Schreuer, "Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights," *Yale Journal of World Public Order* 9 (1982) 113, 122–25; Francis G. Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1975) 204–9.

Commission of Human Rights observed that "a certain discretion must be left to the Government in determining whether there exists a public emergency which threatens the life of the nation."[68] The European Court of Human Rights, on the other hand, found that the identification of a public emergency threatening the life of the nation "was reasonably deduced by the Irish Government from a combination of several factors," such as the trans-border activities of a secret army and an alarming increase in terrorist threats.[69] The absence of any in-depth analysis as to how these facts were deemed to satisfy the interpretive criteria leaves an impression that the Court deferred to national authorities by following the general statement and factual analysis adopted by the majority of the European Commission of Human Rights when it previously examined the case.[70]

Since that ruling, the European Court of Human Rights has maintained a deferential approach to the decisions of national authorities under Article 15(1) of the European Convention on Human Rights, relying on the doctrine of the margin of appreciation.[71] In *Belmarsh Prison*, the Court expressly set aside restrictive interpretations adopted in the *Greek Case*,[72] dismissing the requirement of imminence pronounced by the European Commission of Human Rights.[73] The Court also refused to equate the life of the nation strictly with government institutions and the existence of a civil community, contrary to what Lord Hoffmann had envisaged.[74] As discussed in chapter 3, this deferential position can be seen as an exercise of judicial discretion due to the lack of necessary expertise, associated with the structural limitations imposed on the institutional competence of the Court as a subsidiary organ for the protection of human rights.

Despite the gravity-based restriction envisaged by the drafters of the human rights instruments, the margin of appreciation doctrine as an interpretive tool has not proven to be meaningful in restricting the declaration of a public emergency threatening the life of the nation.[75] Concerns have been raised about granting national authorities too much

68 *Lawless v. Ireland*, *supra* note 45, para. 90.
69 *Lawless v. Ireland (No. 3)*, *supra* note 45, para. 28.
70 For critical analysis, see Svensson-McCarthy, *supra* note 62, 293–300; P. O'Higgins, "The Lawless Case," *Cambridge Law Journal* 20 (1962) 234, 249–50.
71 See *A and Others v. UK*, Application No. 3455/05, ECtHR (Grand Chamber) Judgment (Feb. 19, 2009) para. 173; *Aksoy v. Turkey*, Application No. 21987/93, ECtHR (Chamber) Judgment (Dec. 18, 1996) para. 68; *Brannigan and McBride v. UK*, Application No. 14553/89, ECtHR (Plenary) Judgment (May 25, 1993) para. 43; *Ireland v. UK*, Application No. 5310/71, ECtHR (Plenary) Judgment (Jan. 18, 1978) para. 207.
72 See *supra* note 46 and accompanying text.
73 *A and Others v UK*, *supra* note 71, paras. 175–81.
74 See *supra* note 51 and accompanying text.
75 See Oren Gross and Fionnuala Ni Aoláin, "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights," *Human Rights Quarterly* 23 (2001) 625, 627–29, 638–41.

discretion in interpreting security clauses due to the risk of abuse for improper purposes. Indeed, various studies show that public emergencies have been declared to legitimize and perpetuate an authoritarian regime, particularly by those responsible for internal disturbances resulting from coups d'etat, under the pretext of national defense against military, ideological, cultural, or other manifestations of threats.[76]

The right to adopt derogatory measures is equally available to democratically elected governments and to the revolutionary regimes that remove them forcibly from power.[77] There is no credible way to distinguish the legitimate recourse to derogation from an illegitimate state of emergency, based on the democratic legitimacy of national authorities or the purpose and motivation behind the declaration of a public emergency.[78] Any interpretative restriction upon the scope of national security and public emergency that uses an elusive definition of the term can hardly avoid criticisms for subjectivity and arbitrariness in the demarcation of legally valid claims.

There is, therefore, no sound reason to identify a fixed meaning of security for the legal construction of the term in the context of a specific treaty. Nor is it desirable to adopt and apply a uniform definition of security without regard for the legal context in which it is invoked or its diverse and evolving nature as reflected in state practice. Although the legal text associated with the concept of security must be objectively construed, the preceding analysis demonstrates divergence in interpretive approach.

Originalists tend to focus on textual constraint, whereas others allow for a more flexible interpretation to accommodate the subjective perception of security as it evolves over time in state practice or by adopting a margin of appreciation as an interpretive tool. This discrepancy in interpretative approach is not conducive to the judicial pursuit of objectivity in the legal construction of security. It obscures the extent to which, and the way in which, the dynamic changes in the subjective perception of security are legitimately accommodated in international adjudication.

III. Restrictive Interpretation

As discussed in chapter 2, the protection of national security in the text of a treaty tends to be formulated as an exception to the rule. The question arises as to whether its

76 See, for example, International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (Geneva: International Commission of Jurists, 1983) 416–17; Questiaux Report, *supra* note 47, 35 para. 161.

77 *Greek Case*, *supra* note 46, 32 para. 60.

78 See Gross and Ní Aoláin, *supra* note 63, 264 (questioning the assumptions about the quality of democratic legitimacy).

formulation as an exception in itself demands a stricter interpretation of the clause.[79] As a general observation, there is no reason to assume that the scope of protection on national security grounds should be narrowly construed merely because it is formulated as an exception.[80] Rather, the extent to which national security is protected from interference of international law depends on how it is interpreted within its context and in light of the object and purpose of the treaty.

Restrictive interpretation may be justified because of the manner in which the exception is formulated. For example, the "essential security interest" that contracting parties are entitled to protect under the trade law regime is expressly limited to concerns relating to fissionable materials, arms and ammunition, and measures taken in time of war or other emergencies in international relations.[81] Despite using discretionary language ("it considers"),[82] this clause is restrictively formulated to exclude security interests that are entirely economic in nature.[83] Likewise, the regime of innocent passage under the law of the sea protects the "peace, good order or security" of the coastal state by restrictively prescribing a list of activities that will be viewed as prejudicial to its security interest.[84] This restrictive prescription eliminates some of the subjectivity allowed to coastal states when characterizing the passage of a ship.[85]

In the European Union (EU), derogation for reasons of national security is expressly justified under exceptional and clearly defined conditions only, which must be subject

79 *European Economic Community – Restrictions on Imports of Apples: Report of the Panel* (June 22, 1989) GATT Doc. L/6513, para. 5.13 (recalling "the legal principle that exceptions were to be interpreted narrowly").

80 *EC – Measures Concerning Meat and Meat Products (Hormones): Report of the Appellate Body* (Feb. 13, 1998) WT/DS26/AB/R, WT/DS48/AB/R, para. 104 (the Appellate Body, however, challenged the Panel's characterization of Article 3.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures as an exception).

81 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 (entered into force Jan. 1, 1995) 1867 UNTS 154; Annex 1A art. XXI, 1867 UNTS 187; Annex 1B art. XIV, 1869 UNTS 183; Annex 1C art. 73, 1869 UNTS 299.

82 See chapter 3.II.B. There is also a potential for an expansive interpretation as demonstrated, for example, in: *Sweden – Import Restrictions on Certain Footwear* (Nov. 17, 1975) GATT Doc. L/4250, para. 4 (Sweden claiming that the continued decrease in domestic production of footwear became a critical threat); GATT, Summary Record of the Twelfth Session, GATT Doc. SR 19/12 (Dec. 21, 1961) 196 (Ghana arguing that the policy pursued by the Government of Portugal in Angola posed a constant threat to the peace of the African continent and created an emergency in international relations between Portugal and African countries). See also George-Dian Balan, "The Latest United States Sanctions Against Iran: What Role to the WTO Security Exceptions?" *Journal of Conflict and Security Law* 18 (2013) 365, 383–89.

83 *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (Apr. 5, 2019) WT/DS512/R, paras. 7.83–7.125. See also Dapo Akande and Sope Williams, "International Adjudication on National Security Issues: What Role for the WTO?" *Virginia Journal of International Law* 43 (2003) 365, 396–402 and literature cited therein.

84 UN Convention on the Law of the Sea art. 19, Dec. 10, 1982 (entered into force Nov. 16, 1994) 1833 UNTS 3.

85 See especially Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011) 30–32, 36.

to uniform application.[86] EU courts have upheld this restrictive interpretation on the basis that the scope of derogation from the fundamental principles of the Union "cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community."[87] In *Commission v. Spain*, for example, the EU Court of Justice strictly construed the notion of public security as a justification for refusing freedom of movement across national borders, requiring "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."[88] However, this strict interpretation must be understood against the backdrop of a unique legal structure that the EU has established, where the EU law takes primacy in areas where the Union assumes competence.[89] Indeed, EU courts have adopted a broader interpretation of national security in relation to the admission of third-country nationals, where national authorities enjoy a wide discretion.[90]

By contrast, nowhere is the notion of national security restrictively prescribed under the International Covenant on Civil and Political Rights or any other human rights treaties. The fact that this notion is deliberately left undefined and unqualified militates against any arbitrary restriction that draws on analogous reasoning developed in other legal contexts. Although the conditions for invoking national security as a ground for restricting human rights have been clarified through the development of jurisprudence,[91] it does not necessarily mean that the scope of national security has been narrowly

86 See, for example, Case C-38/06, *Commission v. Portugal*, 2010 ECR I-1569, para. 62; Case C-409/05, *Commission v. Greece*, 2009 ECR I-11859, para. 50; Case C-490/04, *Commission v. Germany*, 2007 ECR I-6095, para. 86; Case C-186/01, *Dory*, 2003 ECR I-2479, para. 31; Case C-273/97, *Sirdar*, 1999 ECR I-7403, para. 16; Case 222/84, *Johnston*, 1986 ECR 1651, para. 26.

87 Case 41/74, *Van Duyn*, 1974 ECR 1337, para. 18; Case 36/75, *Rutili*, 1975 ECR 1219, para. 27. See also Cases C-331/16 and C-366/16, *K* and *HF*, ECLI:EU:C:2018:296, para. 40; Case C-554/13, *Zh and O*, ECLI:EU:C:2015:377, para. 48; Case C-430/10, *Gaydarov*, 2011 ECR I-11637, para. 32; Case C-33/07, *Jipa*, 2008 ECR I-5157, para. 23; Case C-36/02, *Omega*, 2004 ECR I-9609, para. 30; Case C-54/99, *Église de scientologie*, 2000 ECR I-1335, para. 17.

88 Case C-503/03, *Commission v. Spain*, 2006 ECR I-1097, para. 52. See also Directive 2004/38/EC 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 amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360EEC, 72/194/EEC, 73/148EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 OJ L 158/77, art. 27(2); Case 30/77, *Bouchereau*, 1977 ECR 1999, para. 35; *Rutili*, *supra* note 87, para. 28.

89 See, for example, Pär Hallström, "Margin of Appreciation and National Security," in *International Law and Changing Perceptions of Security: Liber Amicorum Said Mahmoudi*, ed. Jonas Ebbesson et al. (Leiden: Brill, 2014) 116, 122–30.

90 See, for example, Cases C-715/17, C-718/17, and C-719/17, *Commission v. Poland, Hungary, and Czech Republic*, ECLI:EU:C:2020:257, para. 157; Case C-544/15, *Fahimian*, ECLI:EU:C:2017:255, para. 40.

91 See, for example, HRC, General Comment No. 34: Article 19 (Freedoms of Opinion and Expression), UN Doc. CCPR/C/GC/34 (Sep. 12, 2011) paras. 21–27, 30, 33–35; Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. A/HRC/14/23 (Apr. 20, 2010) para. 79; HRC, General Comment No. 27: Article 12 (Freedom of Movement), UN Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999) paras. 11–16.

construed. For example, when the Republic of Korea sought to justify restrictions on freedom of expression relating to the distribution of leaflets in support of a national strike, the Human Rights Committee did not dispute whether the matter warranted a national security concern. Instead, the Committee merely opined that "the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed."[92]

In *Stoll v. Switzerland*, the European Court of Human Rights observed that the notion of national security "need[ed] to be applied with restraint and to be interpreted restrictively."[93] However, a careful reading of the judgment reveals that the focus of the restrictive approach is the measure to address threats to national security (the non-disclosure of information in this case), rather than the scope of national security itself.[94] Indeed, the judgment refers to the observations of the Human Rights Committee in support, which in relevant part reads, "The State Party should ensure that its powers to protect information genuinely related to matters of national security are narrowly utilised, and limited to instances where it has been shown to be necessary to suppress release of the information."[95] As will be discussed in chapter 5, this statement addresses the requirement of necessity to justify the choice of means, rather than a restrictive interpretation of the security clause.

Similarly, in *Klass v. Germany*, the European Court contended that the national security exception must be narrowly interpreted in that "[p]owers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions."[96] Again, this interpretation does not suggest that the scope of national security must itself be narrowly construed. On the contrary, the European Court adopted a more expansive view of national security by recognizing the evolving nature of threats. The Court observed:

> Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under

92 *Jong-Kyu Sohn v. Republic of Korea*, Communication No. 518/1992, UN Doc. CCPR/C/50/D/518/1992 (July 19, 1995) para. 10.4.
93 *Stoll v. Switzerland*, Application No. 69698/01, ECtHR (Grand Chamber) Judgment (Dec. 10, 2007) para. 54.
94 Ibid. See also Case C-274/99, *Connolly v. Commission*, 2001 ECR I-1638, para. 41.
95 HRC, Concluding Observations: United Kingdom, UN Doc. CCPR/CO/73/UK (Dec. 6, 2001) para. 21.
96 *Klass and Others v. Germany*, Application No. 5029/71, ECtHR (Plenary) Judgment (Sep. 6, 1978) para. 42.

> exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime.[97]

The European Convention organs have indeed accepted a variety of national security claims, ranging from terrorism and espionage to the maintenance of discipline in the armed forces and the police, the system of loyalty tests for civil services, and the protection of "national cultural and historical symbols."[98] No reasonable basis can thus be found to support the proposition that "the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation."[99]

A restrictive interpretation has also been denied in state-investor arbitration cases, where at issue was the protection of essential security interests under Article XI of the US-Argentine bilateral investment treaty. In *CMS v. Argentine*, the Arbitral Tribunal ruled:

> If the concept of essential security interests were to be limited to immediate political and national security concerns, particularly of an international character, and were to exclude other interests, for example, major economic emergencies, it could well result in an unbalanced understanding of Article XI. Such an approach would not be entirely consistent with the rules governing the interpretation of treaties.[100]

The broad understanding of security was also reaffirmed in *Continental v. Argentine*. In this case, the Tribunal examined the historical context in which the relevant terms had been employed and found that the preceding treaty texts did not support a restrictive interpretation.[101] The Tribunal also prefaced its analysis by recalling that "international law is not blind to the requirement that States should be able to exercise their sovereignty in the interest of their population free from internal as well as external threats to their security and the maintenance of a peaceful domestic order."[102]

97 Ibid., para. 48.
98 Iain Cameron, *National Security and the European Convention on Human Rights* (The Hague: Kluwer Law International, 2000) 55–56.
99 Report of the Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. E/CN.4/1995/32 (Dec. 14, 1994) para. 48.
100 *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005) para. 360. See also *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sep. 28, 2007) para. 374; *Enron Corporation Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007) para. 332; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) para. 238.
101 *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sep. 5, 2008) paras. 176–78.
102 Ibid., para. 175.

It thus follows that the scope of national security as an exception to treaty obligations is not prone to a restrictive interpretation unless there are textual and contextual indications that suggest otherwise. In the absence of such an intention, as reflected in the text of the treaty, the restrictive construction of security runs counter to the fundamental premise of international law; limitations on sovereignty are not to be presumed.[103] The sovereign right of states to decide what constitutes a threat to their security in interpreting the extent of their obligations may not be restricted arbitrarily. As will be discussed in the next chapter, an exercise of sovereign authority in the form of derogatory measures is nonetheless subject to judicial control.

IV. Evolutive Interpretation

As a protean concept, what security refers to may evolve as social conditions and practices change. Because of this mutability, the treaty text associated with the concept of security could be read differently from the way in which it was originally understood. Yet such conceptual variation—which results from the political process of securitization, as discussed in chapter 1—may not necessarily translate into the legal construction of security. It is therefore necessary to examine whether and to what extent the legal construction of security can accommodate the conceptual evolution of the term as part of a treaty text.

A. Conditions

The text of a treaty provision may be open for adaptive interpretation for various reasons—for example, due to the inherently evolving nature of the legal regime it has established or as a result of legal developments in other areas of international law.[104] Indeed, the general rule of treaty interpretation contains various methods of adaptation, such as subsequent agreement and subsequent practice, to make allowance for later developments in international law.[105] However, the focus of inquiry here is not how these interpretive methods apply to accommodate dynamic changes of circumstances in judicial practice. Rather, this inquiry is a more specific one that assesses the evolutive potential of the term associated with the concept of security when its usage has changed

103 *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 2009 ICJ Rep. 213, 237 para. 48; *S.S. Lotus (France v. Turkey)*, Judgment, 1927 PCIJ Rep. Series A No. 10, 18.

104 Richard Gardiner, *Treaty Interpretation*, 2nd ed. (Oxford: Oxford University Press, 2015) 468.

105 See generally Christian Djieffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge: Cambridge University Press, 2016).

over time.[106] In other words, it is the ordinary meaning of the term in which an evolutive element is to be found, which could influence the legal construction of security in the interpretation of a treaty text.

The fundamental premise of textual interpretation is that the terms used in a treaty must be interpreted in light of what is determined to have been the common intention of contracting parties at the time when the treaty was concluded.[107] It follows that the ordinary meaning of a term may evolve as the textual basis for interpretation in cases where the parties had the intent, upon conclusion of the treaty, to give it a meaning or content capable of evolving, rather than fixing it once and for all. The common intention of the parties at the time when the treaty was concluded provides a basis for adapting the meaning of the term according to its new usage, which has developed by the time the treaty is interpreted for application.

This common intention of contracting parties is an objective construct derived from the application of relevant methods of interpretation, rather than the subjective intentions of each party, in light of the specific circumstances in which the treaty was adopted.[108] According to the International Court of Justice, such common intention may be presumed when the text of a treaty employs generic terms, such as national security. In the *Aegean Sea Continental Shelf Case*, where the Court's jurisdiction pursuant to Article 17 of the 1928 General Act for the Pacific Settlement of International Disputes was disputed,[109] the Court had to consider whether the Greek reservation to the General Act regarding territorial status could be interpreted to include continental shelves—the legal regime that was not envisaged at the time of Greek accession.[110] In this context, the Court developed the following position:

106 On this distinction, see Gardiner, *supra* note 104, 274–75; Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford: Oxford University Press, 2014) 76–77.

107 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, Judgment, 2002 ICJ Rep. 303, 346 para. 59; *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, 1999 ICJ Rep. 1045, 1062 para. 25; *Rights of Nationals of the United States of America in Morocco (France v. US)*, Judgment, 1952 ICJ Rep. 176, 189.

108 For detailed analysis, see Bjorge, *supra* note 106, ch. 3; Paolo Palchetti, "Interpreting 'Generic Terms': Between Respect for the Parties' Original Intention and the Identification of the Ordinary Meaning," in *International Courts and the Development of International Law*, ed. Nerina Boschiero (The Hague: TMC Asser, 2013) 91, 97–99.

109 General Act for the Pacific Settlement of International Disputes, Sep. 26, 1928 (entered into force Aug. 16, 1929) 93 LNTS 343.

110 In its instrument of accession of Sep. 14, 1931, Greece excluded "disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication": *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Judgment, 1978 ICJ Rep. 3, 20–21 paras. 48–49.

> Once it is established that the expression "the territorial status of Greece" was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like "domestic jurisdiction" and "territorial status" were intended to have a fixed content regardless of the subsequent evolution of international law.[111]

This position was further elaborated with approval by the majority judgment in *Costa Rica v. Nicaragua*, in which the interpretation of the term "commerce" was disputed over the freedom of navigation guaranteed to Costa Rica under Article IV of the 1858 Treaty of Limits.[112] Considering the above reasoning fully transposable, the Court observed that "[i]t is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."[113]

The World Trade Organization (WTO) Appellate Body has also adopted the same position by recognizing the evolutive potential of generic terms, such as "natural resources," "sound recording," and "distribution."[114] In *China – Audiovidual Entertainment Products*, the Appellate Body observed that if the terms of commitment were to be interpreted differently according to the ordinary meaning attributed to them at the date of adoption or accession, the same commitment could be given different meanings, content, and coverage.[115] According

111 Ibid., 32 para. 77. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16, 31 para. 53 (holding that the contracting parties to the Covenant of the League of Nations must be deemed to have accepted the meaning of the terms such as "the strenuous conditions of the modern world," "the well-being and development," and "sacred trust" as evolving over time).

112 Treaty of Limits, Costa Rica–Nicaragua, Apr. 15, 1858, 118 CTS 439. It was held to be validly in force by the Arbitral Award of Mar. 22, 1888, XXVIII RIAA 189.

113 *Costa Rica v. Nicaragua*, *supra* note 103, 243 para. 66. For critical analysis, see Martin Dawidowicz, "The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on *Costa Rica v Nicaragua*," *Leiden Journal of International Law* 24 (2011) 201.

114 *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovidual Entertainment Products: Report of the Appellate Body* (Dec. 21, 2009) WT/DS363/AB/R, para. 396; *US – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body* (Oct. 12, 1998) WT/DS58/AB/R, para. 130.

115 *China – Audiovidual Entertainment Products*, *supra* note 114, para. 397.

to this ruling, such an interpretation would undermine the predictability, security, and clarity of specific commitments to trade law, which were undertaken through successive rounds of negotiations. The Arbitral Tribunal went even further in *Iron Rhine Railway*, holding that even in cases where a generic term is not in issue, an evolutive interpretation would be warranted to accommodate new technical developments for ensuring an effective application of the treaty in light of its object and purpose.[116] These cases indicate that the common intention of the parties may be derived from various interpretive considerations, including the generic nature of the term itself.

B. Constraints

The preceding analysis shows that a term associated with the concept of security is presumed to have an evolving meaning, provided that: (i) it denotes any matters comprised within the concept of security under general international law; and (ii) it forms part of a treaty of continuing duration. These conditions are likely to be met in many treaty provisions designed to protect security interests. However, the presumption of such common intention does not necessarily result in an evolutive interpretation of the term associated with the concept of security as it expands through the political process of securitization. There are three reasons why the potential impact of evolutive interpretation may be constrained in the legal construction of security.

First, even if the ordinary meaning of the term is open to evolutive interpretation, its evolved meaning cannot be easily fixed. Here, we must distinguish the semantic meaning of the term from its referent in the process of application (in other words, its usage). Consider the semantic meaning of security, which is the state of being free from danger or threat. This semantic meaning has not changed since Thucydides used the Greek term *asphaleia*, denoting security, which Hobbes later adopted and developed into the English terminology.[117] The usage of the term, on the other hand, has evolved considerably as it has been employed in reference to a wider variety of objects, issues, and means of response, as discussed in chapter 1.

Unlike semantic meaning, the usage of the term does not necessarily follow conventional practice shared among interpretive actors. In *C. G. v. Bulgaria*, for example, the European Court of Human Rights did not share the Bulgarian authorities'

116 *The Iron Rhine Railway (Belgium v. Netherlands)*, Award (May 24, 2005) XXVII RIAA 35, 73 para. 80.

117 See J. Frederik M. Arends, "From Homer to Hobbes and Beyond – Aspects of 'Security' in the European Tradition," in *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century*, ed. Hans Günter Brauch et al. (Berlin: Springer, 2008) 263, 264–66.

view that the unlawful trafficking of narcotic drugs posed a threat to national security, finding that such an interpretation stretched the term beyond its natural meaning.[118] As previously discussed, such a natural meaning of security is dubious but this judgment nonetheless suggests that the judicial recognition of the ordinary meaning of security does not necessarily correspond to a contemporary usage of the term developed through the political process of securitization.

Second, the International Court of Justice is prepared to accept evolutive interpretation when the meaning of the term is "intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time."[119] This means that evolutive interpretation does not encompass all changes in the usage of the term; rather, it only embraces those changes that have been generally accepted in the development of international law and practice.[120] Terrorism illustrates a conceptual expansion of security that has been generally accepted in international law and practice through the adoption of treaties,[121] Security Council resolutions,[122] and international jurisprudence.[123] Climate change, by contrast, is not generally accepted as a security issue, as illustrated by the division of views in the Security Council.[124] In *Russia – Measures Concerning Traffic in Transit*, the WTO Dispute Settlement Panel has maintained that the further the issue is removed from the traditional understanding of security, the less obvious are the defense or military interests, and hence, a state would need to articulate its essential security interests with greater specificity.[125]

Third, even if the ordinary meaning of the term is open to adaptation according to its contemporary usage, its potential for evolutive interpretation is constrained due to the simultaneous and holistic application of other methods of treaty interpretation.[126] Such

118 *C. G. v. Bulgaria*, *supra* note 36, para. 43. See also *M v. Bulgaria*, Application No. 41416/08, ECtHR (Fourth Section) Judgment (July 26, 2011) para. 101.

119 *Aegean Sea Continental Shelf Case*, *supra* note 110, 32 para. 77. See also *Costa Rica v. Nicaragua*, *supra* note 103, 242 para. 64 ("so as to make allowance for, among other things, developments in international law").

120 Cf. *Fisheries Jurisdiction Case (Spain v. Canada)*, Jurisdiction, 1998 ICJ Rep. 432, 461–62 paras. 69–71 (examining the meaning attached to the expression "conservation and management measures" in light of international law).

121 See, for example, International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997 (entered into force May 23, 2001) 2149 UNTS 256; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999 (entered into force Apr. 10, 2002) 2178 UNTS 197.

122 See, for example, UNSC Res. 1624 "Threats to International Peace and Security" (Sep. 14, 2005); UNSC Res. 1373 "Threats to International Peace and Security Caused by Terrorist Acts" (Sep. 28, 2001).

123 See, for example, *Ireland v. UK*, *supra* note 71, para. 220.

124 See, for example, Chair's Summary of the Debate of the Security Council held on 11 July 2018 on the subject "Understanding and Addressing Climate-related Security Risks," UN Doc. S/2018/749/Annex (July 31, 2018) 4.

125 *Russia – Measures Concerning Traffic in Transit*, *supra* note 83, para. 7.135.

126 See, for example, *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala*, Preliminary Objections (Jan. 25, 1996) IACtHR Series C No. 23, para. 40; *Golder v. UK*, Application No. 4451/70, ECtHR (Plenary)

constraint figured prominently in the *Legality of the Use of Force*, in which Serbia and Montenegro's right of access to the International Court of Justice in accordance with the "special provisions contained in treaties in force" under Article 35(2) of the Court's Statute was challenged.[127] The Court accepted that the ordinary meaning of "treaties in force" was open to any treaties that came into force by the time when the proceedings had commenced. Nevertheless, the Court found that such an interpretation would be "inconsistent with the main thrust of the text" in light of its drafting records.[128] As stated in *Atasoy and Sarkut v. Turkey*, evolutive interpretation "cannot go beyond the letter and spirit of the treaty or what the States parties initially and explicitly so intended."[129]

Due to these constraints, the conceptual expansion of security through the political process of securitization does not necessarily have a corresponding effect on the legal construction of security. Rather, its potential impact on the interpretive outcome in a specific context is limited as a result of the simultaneous and holistic application of various methods of treaty interpretation. The evolutive interpretation in the ordinary meaning of the term can thus be seen as a judicial technique to accommodate the changing perception of security, as reflected in the contemporary usage of the term in international law and practice, to the extent that it is plausible as a result of the simultaneous and holistic application of all relevant interpretive methods.

C. Foreseeability and the Principle of Legality

The restrained use of evolutive interpretation also addresses the issue of foreseeability as an element of the principle of legality when treaty obligations are implemented domestically. The principle of legality is a procedural requirement that any restriction upon freedom must be provided by law.[130] Applied in the context of international human rights law, it has

Judgment (Feb. 21, 1975) para. 30; Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission* II (1966) 187, 219 para. 8.

127 This provision regulates access to the Court by states non-parties to the Statute, providing: "The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

128 *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, 2004 ICJ Rep. 279, 318–24 paras. 101–14.

129 *Atasoy and Sarkut v. Turkey*, Communication Nos. 1853/2008, 1854/2008, UN Doc. CCPR/C/104/D/1853-1854/2008 (Mar. 29, 2012) para. 7.13.

130 See, for example, *Medvedyev v. France*, Application No. 3394/03, ECtHR (Grand Chamber) Judgment (Mar. 29, 2010) para. 80; *Claude-Reyes v. Chile*, Judgment (Sep. 19, 2006) IACtHR Series C No. 151, para. 94; *Leander v. Sweden*, Application No. 9248/81, ECtHR (Chamber) Judgment (Mar. 26, 1987) para. 50. Cf. *Rekvényi v. Hungary*, Application No. 25390/94, ECtHR (Grand Chamber) Judgment (May 20, 1999) para. 59 (including an absence of arbitrariness).

meant that such a rule must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly and those charged with its implementation to act in accordance with the law.[131] However, this requirement does not appear to be compatible with the degree of flexibility necessary to address evolving security threats, which may not be foreseeable at the time when the law is enacted.

Indeed, the problem of foreseeability was the primary motive behind the British appeal for a derogation clause, even though human rights restrictions on national security grounds had already been agreed upon with respect to specific provisions. During the fifth session of the Commission on Human Rights, the British delegation explained that "it felt that it was necessary to envisage possible conditions of emergency in which States would be compelled to impose limitations upon certain human rights."[132] Australia also expressed its doubt that "the words 'national security' appearing in a number of articles…were sufficient to meet all the contingencies arising out of a war or a serious emergency."[133]

These concerns were driven, in part, by interpretive constraints that were perceived to render the notion of national security insufficient to justify derogatory measures necessary to meet all the contingencies that were not envisaged at the time of drafting. The legal regime of derogation was thus devised to address uncertainty regarding the ability to respond flexibly to unforeseen events within the framework of international human rights law. This uncertainty could have been somewhat reduced if the evolutive potential of the term was recognized as the interpretive means to accommodate new national security concerns.

Indeed, the European Court of Human Rights has acknowledged inherent difficulties in defining threats to national security in advance, holding that the requirement of foreseeability cannot be held to the same standard when the measure of interference concerns national security. "Whilst certainty is desirable," as the Court observed in *The Sunday Times v. UK*, "it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances."[134] In *C. G. v. Bulgaria*, the Court affirms that

131 See HRC, General Comment No. 34, *supra* note 91, paras. 24–25.

132 UNCHR (5th Session), Summary Record: 126th Meeting, UN Doc. E/CN.4/SR.126 (June 17, 1949) 4.

133 UNCHR (5th Session), Summary Record: 127th Meeting, UN Doc. E/CN.4/SR.127 (June 17, 1949) 4. See also the remarks made by Egypt at the same meeting: ibid., 6.

134 *The Sunday Times v. UK*, Application No. 6538/74, ECtHR (Plenary) Judgment (Apr. 26, 1979) para. 49. See also *Lindon, Otchakovsky-Laurens and July v. France*, Application No. 21279/02, ECtHR (Grand Chamber) Judgment (Oct. 22, 2007) para. 41; *VgT Verein Gegen Tierfabriken v. Switzerland*, Application No. 24699/94, ECtHR (Second Section) Judgment (June 28, 2001) para. 55; *Hertel v. Switzerland*, Application No. 25181/94, ECtHR (Chamber) Judgment (Aug. 25, 1998) para. 35.

this requirement does not go so far as to compel states to enact legal provisions that detail all conduct subject to regulation, acknowledging that "threats to national security may vary and may be unanticipated or difficult to define in advance."[135] Instead, the degree of precision required to satisfy foreseeability "depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed."[136]

Accordingly, in its jurisprudence, the legislative provisions for the protection of state secrets on national security grounds have rarely been challenged for lack of foreseeability.[137] On the other hand, the European Court has required sufficient clarity when national authorities authorize secret measures of surveillance, such as the interception of communications, with "an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures."[138] The latter position appears to derive from the rule of law, as one of the basic principles of a democratic society enshrined in the European Convention on Human Rights. According to this principle, national authorities are required to indicate the scope of any discretion conferred upon them and the manner in which it is to be exercised with sufficient clarity.[139] The rule of law, if established at the international level, would add such constraint on the exercise of sovereign authority even when derogatory action is based on an evolutive interpretation of the treaty text associated with the concept of security, as will be examined in the next chapter.

V. Concluding Observations

Despite the lack of a fixed and exhaustive definition, the concept of security and associated terms in the text of a treaty are subject to legal construction in accordance with the general

135 *C. G. v Bulgaria*, *supra* note 36, para. 40. See also *Kennedy v. UK*, Application No. 26839/05, ECtHR (Fourth Section) Judgment (May 18, 2010) para. 159; *Al-Nashif*, *supra* note 18, para. 121.

136 *Lindon, Otchakovsky-Laurens and July v. France*, *supra* note 134, para. 41; *Chauvy v. France*, Application No. 64915/01, ECtHR (Second Section) Judgment (June 29, 2004) para. 44; *Cantoni v. France*, Application No. 17862/91, ECtHR (Grand Chamber) Judgment (Nov. 15, 1996) para. 35; *Groppera Radio AG v. Switzerland*, Application No. 10890/84, ECtHR (Plenary) Judgment (Mar. 28, 1990) para. 68.

137 See, for example, *Gîrleanu v. Romania*, Application No. 50376/09, ECtHR (Fourth Section) Judgment (June 26, 2018) para. 77; *Guja v. Moldova*, Application No. 14277/04, ECtHR (Grand Chamber) Judgment (Feb. 12, 2008) para. 58; *Stoll v. Switzerland*, *supra* note 93, para. 50. Cf. *Bucur and Toma v. Romania*, Application No. 40238/02, ECtHR (Third Section) Judgment (Jan. 8, 2013) para. 82.

138 *Zakharov v. Russia*, Application No. 47143/06, ECtHR (Grand Chamber) Judgment (Dec. 4, 2015) para. 229 and references cited therein.

139 Ibid., paras. 230, 247; *Al-Nashif*, *supra* note 18, para. 119; *Malone v. UK*, Application No. 8691/79, ECtHR (Plenary) Judgment (Aug. 2, 1984) para. 67. Cf. *S. and Marper v. UK*, Application Nos. 30562/04, 30566/04, ECtHR (Grand Chamber) Judgment (Dec. 4, 2008) para. 99 (considering this question closer to the broader issue of necessity, which is discussed in chapter 5).

rule of treaty interpretation as set forth in the Vienna Convention on the Law of Treaties. Even though the protection of security interests may well be formulated as an exception to treaty obligations, it is not necessarily susceptible to a restrictive interpretation for that reason alone. Rather, the security clause must be construed in the specific legal context of each rule to determine whether a restrictive interpretation is warranted.

The same approach applies to evolutive interpretation in the ordinary meaning of the term associated with the concept of security. For evolutive interpretation, the common intention of contracting parties at the time when the treaty was concluded plays a decisive role. Generic terms such as national security are presumed to have an evolving meaning when they form part of a treaty of continuing duration. Yet the actual impact of conceptual evolution on the interpretive outcome differs in each case. As a judicial technique to accommodate the changing perception of security, evolutive interpretation is limited to the textual basis for interpretation. It is further constrained because the contemporary usage of the term must be generally accepted in the development of international law and practice.

The protean concept of security, or the open-ended nature of its terms, is not in itself inimical to the rule of law as the normative basis for constraining the exercise of sovereign authority. However, the resulting flexibility and uncertainty in the legal construction of security creates problems with foreseeability when treaty obligations are implemented domestically. There are inevitable difficulties in allowing for flexible response to evolving security threats, while at the same time prescribing the circumstances in which the security clause may be invoked with sufficient clarity in a manner compatible with the principle of legality.

Nevertheless, this flexibility does not necessarily lead to unlimited discretion that national authorities enjoy in exercising sovereign powers against other states or individuals. No matter how the concept of security is construed in the context of a legal text, the interpretive outcome alone does not control the legality of security measures that are justified on that basis. Rather, as will be explored in chapters 5 and 6, the risk of abuse depends on the availability of legal and political safeguards that regulate the means to address security threats. The excessive measures of derogation raise concerns about abusing the concept of security, particularly when these measures infringe upon the competing rights and interests of other states or individuals.

5

DEFENDING SECURITY

I. Introduction

As discussed in the previous chapters, national authorities may enjoy exclusive competence or discretion in determining what constitutes a threat to their national security, precluding or restraining judicial intervention and treaty monitoring. However, national authorities do not have unlimited discretion in choosing the means to address the national security threat. Even if the security issue itself is deemed non-justiciable, or judicial discretion is exercised to defer to national authorities, this does not necessarily preclude judicial authority from examining the legality of political decisions associated with it. Specific measures resulting from political decisions are subject to legal constraint to the extent that the rights and interests of other states or individuals are affected.

As discussed in chapter 1, a variety of measures are available to address security issues, ranging from peaceful dispute settlement to the conclusion of a new agreement, a mutual assurance and verification mechanism, a collective security arrangement, and derogatory measures such as deprivation of liberty and the use of violence to eliminate threats. However, states must defend the choice of measures when the assertion of a security interest competes with the rights of other states or other interests protected under international law, such as the individual's freedom from arbitrary killing or detention, freedom of expression, and privacy. At this juncture, the normative role of international law as the basis for realizing the rule of law in international relations is tested against the justificatory value of security, which forms the focus of this chapter.

The central question explored in this chapter is how judicial control is exercised against the concept of security when invoked as a means of justifying derogatory measures that would otherwise be deemed unlawful under international law. In various areas of law, the concept of security is often employed as a justification for challenging and deviating from existing norms.[1] However, as has been established in the previous

1 I. Vladeck, "Is 'National Security Law' Inherently Paradoxical?" *National Security Law Brief* 1 (2011) 11, 13–14.

chapters, the concept of security forms an integral part of existing norms in international relations as inextricably woven into the fabric of international law.

The justificatory value of security is expressed and invoked differently in the context of international law. This chapter examines the extent to which, and the way in which, the choice of security measures based on the subjective perception of a threat can be objectively balanced against other rights and interests protected under international law. It does so with the focus on the burden of proof, necessity, and proportionality, which are internally embedded in various rules of international law as balancing principles, while identifying their limit in reconciling competing security interests.

II. The Burden of Proof

It is naturally deduced from the justificatory value of security that the adoption of derogatory measures in response to a security threat must be justified with an explanation, evidence, and relevant information. In the context of a treaty, states must interpret and implement their obligations in good faith,[2] which involves the duty to provide sufficient information and reasons for adopting derogatory measures.[3] This is because the valid exercise of their authority to invoke a security clause is subject to explicit and implicit conditions, such as necessity and proportionality. Security measures cannot be deemed to meet those conditions without any pertinent explanation,[4] even in cases where discretionary language is used to protect security interests.[5] As such, any information and reasons that the state provides as justification must be sufficiently clear and detailed to enable a third party to make an objective assessment regarding whether the requisite conditions are satisfied for the valid application of the security clause.

The legal regimes of derogation under international human rights law are squarely grounded in the justificatory concept of security. Under those regimes, states must

2 Vienna Convention on the Law of Treaties arts. 26, 31(1), May 23, 1969 (entered into force Jan. 27, 1980) 115 UNTS 331 [hereinafter VCLT]. See also Piet Hein van Kempen, "Four Concepts of Security—A Human Rights Perspective," *Human Rights Law Review* 13 (2013) 1, 15–16.

3 See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 2008 ICJ Rep. 177, 229 para. 145; GATT, Decision Concerning Article XXI of the General Agreement, GATT Doc. L/5426 (Dec. 2, 1982) cl. 1 (in which the Contracting Parties decided that "[s]ubject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI"). Cf. Jarrod Hepburn, "The Duty to Give Reasons for Administrative Decisions in International Law," *International & Comparative Law Quarterly* 61 (2012) 641.

4 See, for example, *Taktakunov. v. Kyrgyzstan*, Communication No. 1470/2006, UN Doc. CCPR/C/101/D/1470/2006 (Mar. 28, 2011) para. 7.7; *Shin v. Republic of Korea*, Communication No. 926/2000, UN Doc. CCPR/C/80/D/926/2000 (Mar. 16, 2004) para. 7.3; Case C-474/12, *Schiebel Aircraft GmbH*, ECLI:EU:C:2014:2139, para. 35; Case C-414/97, *Commission v. Spain*, 1999 ECR I-5585, para. 22.

5 Case C-284/05, *Commission v. Finland*, 2009 ECR I-11705, para. 47.

substantiate their claim that a public emergency exists within the meaning of the relevant derogation clause and justify the nature and scope of derogatory measures necessary to avert it. This burden of proof is integral to the requirement of notification upon the official proclamation of a public emergency.[6] As the Human Rights Committee has clarified it, the notification must include "full information about the measures taken and a clear explanation of the reasons for them."[7] When invoking derogation powers, states are "duty bound to give a sufficiently detailed account of the relevant facts" to show that a public emergency of the kind described in the clause exists in the country concerned.[8] This means that a declaration of public emergency in general terms is not sufficient to justify suspension or restriction of individual rights and freedoms.

As Dominic McGoldrick observes, the Committee has clearly placed the burden of proof on contracting states to provide full and comprehensive information, without which their derogations will not be accepted as legitimate under the terms of the Covenant.[9] While acknowledging that a declaration of emergency is primarily political in nature, United Nations (UN) Special Rapporteur on the Prevention of Discrimination and Protection of Minorities calls on national authorities to explain "what are the actual circumstances which strictly require the taking of such measures."[10] Under the European Convention on Human Rights, each contracting party is required to "keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor."[11] The Inter-American Court of Human Rights has similarly required states "to determine the reasons and motives that lead the domestic authorities

6 See International Covenant on Civil and Political Rights art. 4(1), Dec. 16, 1966 (entered into force Mar. 23, 1976) 999 UNTS 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(1), Nov. 4, 1950 (entered into force Sep. 3, 1953) 213 UNTS 221 [hereinafter European Convention on Human Rights]; American Convention on Human Rights art. 27(1), Nov. 22, 1969 (entered into force July 18, 1978) 1144 UNTS 123; Arab Charter on Human Rights art. 4(b), May 23, 2004 (entered into force Mar. 15, 2008), reprinted in *International Human Rights Reports* 12 (2005) 893.

7 HRC, General Comment No. 29: Article 4 (States of Emergency), UN Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2011) para. 17.

8 *Silva v. Uruguay*, Communication No. 34/1978, UN Doc. CCPR/C/OP/1 (Apr. 8, 1981) 65 para. 8.3; *Salgar de Montejo v. Colombia*, Communication No. 64/1979, UN Doc. CCPR/C/OP/1 (Mar. 24, 1982) 127 para. 10.3. See also P. R. Ghandhi, "The Human Rights Committee and Derogation in Public Emergencies," *German Yearbook of International Law* 32 (1990) 321, 334–36, 339–45.

9 Dominic McGoldrick, "The Interface between Public Emergency Powers and International Law," *International Journal of Constitutional Law* 2 (2004) 380, 399; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991) 311–13.

10 The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, prepared by Erica-Irene A. Daes, UN Doc. E/CN.4/Sub.2/432/Rev.2 (1983) 196.

11 European Convention on Human Rights, *supra* note 6, art. 15(3).

to declare a state of emergency."[12]

The burden of proof is central to all systems of adjudication, with variable standards of proof according to the level and method of enforcement available in different legal contexts.[13] Within the framework of international law, where the level of enforcement remains low and its method considerably limited, the burden of proof placed on the state for the adoption of security measures must take account of its normative and practical implications. Enforcement is of little significance in the absence of judicial intervention or treaty monitoring, where the information or explanation furnished as the reasons and motives for adopting security measures is subject to objective scrutiny.

The International Court of Justice has established that the burden of proof in showing the event of an armed attack rests on the defending state purporting to exercise the right of self-defense.[14] With this approach, the Court dismissed the claim advanced by the United States against Iran for the latter's involvement in armed attacks and, likewise, Uganda's contention of armed attacks launched from or on behalf of the Democratic Republic of the Congo, due to insufficient evidence.[15] Although the Court appears to have sought clear and convincing evidence, it failed to articulate this standard and apply it consistently in these decisions.[16] A clear standard of evidence required to establish the factual basis of self-defense helps ensure objectivity in the judicial assessment of justification.

The objective assessment of justification was pursued when the European Commission of Human Rights considered the *Greek Case*.[17] The proceedings were brought by Norway, Sweden, Denmark, and the Netherlands against repressive measures adopted by the Greek military regime after its successful coup d'etat on April 21, 1967.[18] While acknowledging that national authorities must be granted a margin of appreciation, the Commission undertook a detailed examination of evidence to evaluate whether the alleged security threats amounted to a public emergency threatening the life of the Greek

12 *Zambrano Vélez v. Ecuador*, Judgment (July 4, 2007) IACtHR Series C No. 166, para. 47.

13 See generally Louis Kaplow, "Burden of Proof," *Yale Law Journal* 121 (2012) 738.

14 *Oil Platforms (Iran v. US)*, Judgment, 2003 ICJ Rep. 161, 189 para. 57; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Jurisdiction, 1984 ICJ Rep. 392, 437 para. 101.

15 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 2005 ICJ Rep. 168, 222–23 paras. 143–47; *Oil Platforms* judgment, *supra* note 14, 187–90 paras. 52–61, 195–96 paras. 71–72.

16 For details, see James A. Green, "Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice," *International & Comparative Law Quarterly* 58 (2009) 163.

17 *Denmark, Norway, Sweden, and Netherlands v. Greece*, Application Nos. 3321/67, 3322/67, 3323/67, 3344/67, ECHR Report (May 31, 1968), reprinted in *Yearbook of the European Convention on Human Rights 1969: The Greek Case* (The Hague: Martinus Nijhoff, 1972).

18 For background of the case, see James Becket, "The Greek Case Before the European Human Rights Commission," *Human Rights* (American Bar Association) 1 (1970) 91.

nation.[19] The Commission's approach amounted to reviewing the Greek government's decision *de novo* by scrutinizing the factual basis for claiming a public emergency according to its own criteria.[20] In so doing, the Commission reduced the margin of appreciation into a mere rhetoric in its application.[21]

This "objective test" approach, however, did not receive unanimous support. The dissenting opinions criticized it for relying on partial, incomplete information provided by witnesses without actual knowledge of the material and psychological facts.[22] A correct approach for the Commission, according to Süsterhenn, would have been "to examine whether the responsible Government in exercising its discretion has not manifestly behaved in an unreasonable or even arbitrary manner."[23] This approach had previously formed the majority view in *Lawless v. Ireland*, in which the Commission held that the Irish government did not exceed the proper limits of appreciation, while recognizing disagreement as to whether the mere existence of an illegal organization represented a sufficient threat to the life of the nation.[24] The contrasting approach of the majority in the *Greek Case* stands at odds. Commentators attributed this disparity to the Commission's distrust toward the Greek military regime and revulsion against its anti-democratic character.[25]

In subsequent cases, the European Court of Human Rights has maintained an ambivalent position by asserting its authority to exercise judicial control while granting national authorities a wide margin of appreciation.[26] However, the Court has generally been deferential to the decisions of national authorities regarding the declaration of a

19 *Greek Case*, *supra* note 17, 72–76 paras. 154–65, 100 paras. 206–7.

20 See chapter 4.II for the restrictive interpretation of the concept of public emergency to which the Commission subscribed.

21 For further analysis, see Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2009) 274; Jaime Oraá, *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press, 1992) 19; Joan F. Hartman, "Derogation from Human Rights Treaties in Public Emergencies – A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations," *Harvard International Law Journal* 22 (1981) 1, 27–29.

22 *Greek Case*, *supra* note 17, 76–80 paras. 166–78 (Delahaye), 88–92 paras. 188–89 (Süsterhenn).

23 Ibid., 87 para. 187.

24 *Lawless v. Ireland*, Application No. 332/57, ECHR Report (Dec. 19, 1959) 90. See also Brian Doolan, *Lawless v. Ireland (1957–1961): The First Case Before the European Court of Human Rights: An International Miscarriage of Justice?* (Aldershot: Ashgate, 2001) ch. 7.

25 Hartman, *supra* note 21, 29; Becket, *supra* note 18, 113.

26 See *A and Others v. UK*, Application No. 3455/05, ECtHR (Grand Chamber) Judgment (Feb. 19, 2009) para. 173; *Aksoy v. Turkey*, Application No. 21987/93, ECtHR (Chamber) Judgment (Dec. 18, 1996) para. 68; *Brannigan and McBride v. UK*, Application No. 14553/89, ECtHR (Plenary) Judgment (May 25, 1993) para. 43; *Ireland v. UK*, Application No. 5310/71, ECtHR (Plenary) Judgment (Jan. 18, 1978) para. 207.

public emergency,[27] acknowledging a wide margin of appreciation in this respect.[28] In *Brannigan and McBride v. UK*, the Court saw "no indication that the derogation was other than a genuine response,"[29] while in *Aksoy v. Turkey*, the Court said nothing to dispute the presence of a public emergency.[30] In *Belmarsh Prison*, while recognizing differences in national responses to terrorist threats from al-Qaeda, the Court did not challenge the British government over its declaration of a public emergency because the British government was "better placed to assess the evidence relating to the existence of an emergency."[31] However, as will be discussed below in section III, the Court tends to be less deferential when it comes to whether emergency measures are strictly required.

Judicial deference has also been exercised against the claim of national security as a ground for restrictions on human rights. In *Hadjianastassiou v. Greece*, for example, the Court was prepared to accept the view that the disclosure of the state's interest in a particular weapon and the corresponding technical knowledge was capable of causing considerable damage to national security, despite its tenuous link.[32] In *Zana v. Turkey*, the Court was speculative in accepting the potential impact that the political statement made in support of terrorist activities could have had to justify a restrictive measure designed to maintain national security.[33] In *Pasko v. Russia*, the Court expressed no hesitation in stating that the disclosure of information concerning military exercises was, even in the absence of any evidence that it was transferred to a foreign national, "capable of causing considerable damage to national security."[34]

The Human Rights Committee has similarly taken a deferential approach in assessing the compatibility of human rights restrictions on national security grounds with the Covenant, as long as relevant materials are presented to it.[35] When, on the other hand, there is no pertinent explanation, the Committee finds a violation for failing to demonstrate the reasons why restrictions on human rights are necessary for the protection of national security. In *Symonik v. Belarus*, for example, the Committee noted the state party's failure to demonstrate the reasons for restricting freedom of expression

27 See chapter 3.IV.C and chapter 4.II.B.
28 For detailed analysis, see Gross and Aoláin, *supra* note 21, 275–89.
29 *Brannigan and McBride v. UK*, *supra* note 26, para. 51.
30 *Aksoy v. Turkey*, *supra* note 26, para. 70.
31 *A and Others v. UK*, *supra* note 26, para. 180.
32 *Hadjianastassiou v. Greece*, Application No. 12945/87, ECtHR (Chamber) Judgment (Dec. 16, 1992) paras. 44–47.
33 *Zana v. Turkey*, Application No. 18954/91, ECtHR (Grand Chamber) Judgment (Nov. 25, 1997) para. 50.
34 *Pasko v. Russia*, Application No. 69519/01, ECtHR (First Section) Judgment (Oct. 22, 2009) para. 86.
35 See, for example, *A. K. and A. R. v. Uzbekistan*, Communication No. 1233/2003, UN Doc. CCPR/C/95/D/1233/2003 (Mar. 31, 2009) para. 7.2; *Karker v. France*, Communication No. 833/1998, UN Doc. CCPR/C/70/D/833/1998 (Oct. 26, 2000) para. 9.2.

by preventing the complainant from distributing leaflets critical of the government.[36] Moreover, the absence of evidence or clear explanation for adverse national security assessment of individuals has been a common ground for the findings of arbitrariness in the deprivation of liberty and interference with privacy.[37]

Under the European Convention on Human Rights, contracting parties are required to furnish all necessary facilities, including any information in their hands, to enable a proper and effective examination of individual petitions.[38] For an effective operation of the supervisory system, the European Court of Human Rights has asserted its authority to "decide, on the basis of the relevant data available to it, whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient."[39] Similarly, the European Union (EU) Court of Justice opined that a statement of reasons must be provided to enable courts to review the lawfulness and merits of rights-restrictive measures.[40]

The test of relevant and sufficient reasons operates as a judicial standard in assessing whether national authorities are justified in their belief that they have a legitimate claim for restricting human rights to protect national security.[41] For example, when advanced as a reason for restricting human rights within the armed forces, an adverse impact on operational effectiveness must be "substantiated by specific examples."[42] Where political parties are

36 *Symonik v. Belarus*, Communication No. 1952/2010, UN Doc. CCPR/C/112/D/1952/2010 (Oct. 24, 2014) para. 7.5. See also *Androsenko v. Belarus*, Communication No. 2092/2011, UN Doc. CCPR/C/116/D/2092/2011 (Mar. 30, 2016) para. 7.6; *Giry v. Dominican Republic*, Communication No. 193/1985, UN Doc. CCPR/C/39/D/193/1985 (July 20, 1990) para. 5.5.

37 See, for example, *Leghaei v. Australia*, Communication No. 1937/2010, UN Doc. CCPR/C/113/D/1937/2010 (Mar. 26, 2015) paras. 10.4–10.5; *Ilyasov. v. Kazakhstan*, Communication No. 2009/2010, UN Doc CCPR/C/111/D/2009/2010 (July 23, 2014) paras. 7.4–7.7; *Al-Gertani v. Bosnia and Herzegovina*, Communication No. 1955/2010, UN Doc. CCPR/C/109/D/1995/2010 (Nov. 1, 2013) paras. 10.4, 10.9. See also Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge: Cambridge University Press, 2020) 470–71.

38 European Convention on Human Rights, *supra* note 6, arts. 34, 38. See also *Acar v. Turkey*, Application No. 26307/95, ECtHR (Grand Chamber) Judgment (Apr. 8, 2004) paras. 253–54; *Tanrikulu v. Turkey*, Application No. 23763/94, ECtHR (Grand Chamber) Judgment (July 8, 1999) para. 70.

39 *Handyside v. UK*, Application No. 5493/72, ECtHR (Plenary) Judgment (Dec. 7, 1976) para. 50. See also *Zana v. Turkey*, *supra* note 33, para. 51; *Lingens v. Austria*, Application No. 9815/82, ECtHR (Plenary) Judgment (July 8, 1986) para. 40; *The Sunday Times v. UK*, Application No. 6538/74, ECtHR (Plenary) Judgment (Apr. 26, 1979) para. 62.

40 Case T-284/08, *People's Mojahedin Organization of Iran v. Council*, 2008 ECR II-3487, para. 75.

41 *Zana v. Turkey*, *supra* note 33, paras. 55, 61. See also Janneke Gerards, *The General Principles of the European Convention on Human Rights* (Cambridge: Cambridge University Press, 2019) 241–42; Ronald St. J. Macdonald, "The Margin of Appreciation," in *The European System for the Protection of Human Rights*, ed. Ronald St. J. MacDonald, Franz Matscher, and Herbert Petzold (Dordrecht: Martinus Nijhoff, 1993) 83, 87.

42 *Markin v. Russia*, Application No. 30078/06, ECtHR (Grand Chamber) Judgment (Mar. 22, 2012) para. 137; *Smith and Grady v. UK*, Application Nos. 33985/96, 33986/96, ECtHR (Third Section) Judgment (Sep. 27, 1999) para. 89; *Lustig-Prean and Beckett v. UK*, Application Nos. 31417/96, 32377/96, ECtHR (Third Section) Judgment (Sep. 27, 1999) para. 82; *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, Application No. 15153/89, ECtHR (Chamber) Judgment (Dec. 19, 1994) para. 38.

concerned, "convincing and compelling reasons" are required to justify restrictions on freedom of association.[43] In justifying a measure of secret surveillance, national authorities must be able to present relevant facts as the basis for their assessment that the particular individual poses a threat to national security.[44]

The provision of supporting information and evidence has also been recognized as an important procedural safeguard against arbitrary interference with the rights protected under the European Convention on Human Rights.[45] The Court has asserted its authority to assess whether national authorities "relied on an acceptable assessment of the relevant facts."[46] The decision of a domestic court that blindly accepts the claim of national security without any reasoning cannot be regarded as evidence necessary to establish relevant and sufficient reasons to justify interference with individual rights and freedoms.[47] In cases where a contracting state fails to produce the material requested due to security considerations, the Court must be satisfied that there are reasonable and solid grounds for treating it as confidential.[48] On the other hand, the lack of evidence to support justification for human rights restrictions has served as a reason for dismissing the claim.[49]

For the deprivation of liberty during international armed conflict,[50] the International Criminal Tribunal for the Former Yugoslavia has sought individualized justification, emphasizing the exceptional nature of internment that can be imposed as a security measure.[51] In *Prosecutor v. Delalić*, while recognizing the discretion left largely to the detaining power,[52] the Trial Chamber observed that:

43 *Socialist Party v. Turkey*, Application No. 21237/93, ECtHR (Grand Chamber) Judgment (May 25, 1998) para. 50; *United Communist Party of Turkey v. Turkey*, Application No. 19392/92, ECtHR (Grand Chamber) Judgment (Jan. 30, 1998) para. 46.

44 *C. G. v. Bulgaria*, Application No. 1365/07, ECtHR (Fifth Section) Judgment (Apr. 24, 2008) paras. 45–49.

45 Similarly, in the IACtHR context, see *Vélez v. Ecuador*, *supra* note 12, para. 70 (characterizing the duty to inform as a procedural safeguard to prevent the abuse of the exceptional powers).

46 *Zana v. Turkey*, *supra* note 33, para. 51; *Jersild v. Denmark*, Application No. 15890/89, ECtHR (Grand Chamber) Judgment (Sep. 23, 1994) paras. 30–31.

47 *Terentyev. v. Russia*, Application No. 10692/09, ECtHR (Third Section) Judgment (Aug. 28, 2018) para. 82; *Vafki v. Turkey*, Application No. 28255/07, ECtHR (Second Section) Judgment (Oct. 8, 2013) paras. 67–69.

48 See, for example, *Janowiec v. Russia*, Application Nos. 55508/07, 29520/09, ECtHR (Grand Chamber) Judgment (Oct. 21, 2013) para. 205. Note also that the failure to justify confidentiality of information withheld from judicial proceedings could amount to a denial of the right to fair trial: *Bucur and Toma v. Romania,* Application No. 40238/02, ECtHR (Third Section) Judgment (Jan. 8, 2013) paras. 131–32.

49 See, for example, *A and Others v. UK*, *supra* note 26, paras. 187–190. Cf. *Gîrleanu v. Romania*, Application No. 50376/09, ECtHR (Fourth Section) Judgment (June 26, 2018) para. 89; *Observer and Guardian v. UK*, Application No. 13585/88, ECtHR (Plenary) Judgment (Nov. 26, 1991) paras. 69–70.

50 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 27(4), 42, 78, Aug. 12, 1949 (entered into force Oct. 21, 1950) 6 UST 3516, TIAS No. 3365, 75 UNTS 287 [hereinafter Geneva Convention IV].

51 *Prosecutor v. Delalić*, Case No. ICTY-96-21-T, Judgment (Nov. 16, 1998) para. 577 [hereinafter *Delalić I*]. See also Jean Pictet, ed., *Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) 258.

52 *Delalić I*, *supra* note 51, para. 574.

> Subversive activity carried on inside the territory of a party to the conflict, or actions which are of direct assistance to an opposing party, may threaten the security of the former, which may, therefore, intern people or place them in assigned residence if it has *serious and legitimate reasons* to think that they may seriously prejudice its security by means such as sabotage or espionage.[53]

The Trial Chamber concluded that the internment of civilians in the Čelebići prison camp was unjustifiable by any means because several of the civilians, such as a mother of two children without any affiliation with an armed group, "cannot reasonably have been considered to pose any sufficiently serious danger to the detaining forces as to warrant their detention."[54] The internment of civilians was thus found unlawful due to the absence of any serious and legitimate reason to conclude that they seriously prejudiced the security of the detaining power.[55] The Appeals Chamber supported this position by maintaining that the detention of civilians without reasonable grounds for believing that the security of the detaining power made it absolutely necessary was contrary to Article 42 of Geneva Convention IV.[56]

These diverse approaches to the standard of evidence in establishing the factual basis for justifying security measures have the risk of impairing the burden of proof and the normative foundation for it as an integral element of justification. The objective assessment of justification, pursued by the International Court of Justice and the European Commission of Human Rights in the *Greek Case*, is fraught with difficulties in the absence of complete and sufficient information. On the other hand, a deferential approach may diminish the ability of adjudicators to play a meaningful role in reviewing the factual basis for justifying security measures, save extreme cases where no evidence or clear explanation has been provided. These differences indicate a lack of coherent judicial standard according to which the burden of proof is discharged in the system of international adjudication.

As discussed in chapter 3, section IV, there are circumstances in which judicial discretion may be exercised to defer to national authorities on their evaluation of the factual basis for security measures. However, care must be taken so as not to impair an

53 Ibid., para. 576 (emphasis original).
54 Ibid., para. 1132.
55 Ibid., para. 1135. See also *Ajuri v. IDF Commander* [2002] HCJ 7015/02, 7019/02, para. 25 (requiring evidence that "shows clearly and convincingly… there is a reasonable possibility that he will present a real danger of harm to the security of the territory"); Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012) 303 (preventive detention without evidence in the context of non-international armed conflict).
56 *Prosecutor v. Delalić*, Case No. ICTY-96-21-A, Judgment (Feb. 20, 2001) para. 322 [hereinafter *Delalić II*].

effective operation of international adjudication by exercising such discretion too readily. From this point of view, the European Court of Human Rights appears to have taken a balanced approach by requiring relevant and sufficient reasons for enabling the Court to impose procedural safeguards against an arbitrary exercise of powers. Likewise, the International Criminal Tribunal for the Former Yugoslavia sought to identify "serious and legitimate reasons" for security internment. Such an approach recognizes the practical constraint of judicial oversight in making a factual assessment and instead, shifts the focus to relevant explanation and supporting evidence as the basis for determining whether security measures comply with the applicable rule of international law.

III. Necessity

Restrictions on the recourse to the concept of security as a means of justification are variably formulated in different rules of international law. Common to all is the requirement of necessity, which is found in various treaty provisions designed to protect national security interests. It is also identified under customary international law as a condition precedent to the exercise of the right of self-defense,[57] countermeasures,[58] or distress,[59] and inherent in the plea of necessity.[60] These are all derived from the general doctrine of self-preservation as the remnants of its application during the colonial period.[61] As the US Secretary of State Daniel Webster articulated in his letter to the British government in relation to the destruction of the steamer *Caroline*, "the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[62]

States must demonstrate that a specific measure adopted for reasons of national security is necessary to achieve the legitimate objective. In other words, the justificatory value of security is generally constrained insofar as the choice of means is limited to what is necessary to realize that value. There are two different aspects to this constraint: one concerning the material link between the need to address a specific

57 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226, 245 para. 41; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, 1986 ICJ Rep. 14, 94 para. 176.

58 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission* II, pt. 2 (2001) 26, 128–29 para. 4, 135 para. 7.

59 Ibid., 80 para. 8

60 Ibid., 83 para. 15; *Libyan Arab Foreign Investment Company v. Republic of Burundi*, Award (Mar. 4, 1991) 96 ILR 279, 319 (whether it is "the only means of safeguarding an essential interest of Burundi against a grave and imminent peril").

61 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953) 31, 69–97.

62 R. Y. Jennings, "The Caroline and McLeod Cases," *American Journal of International Law* 32 (1938) 82, 89.

threat to security and the means to address it; and the other concerning the degree of interference with other protected rights and interests. The latter will be addressed separately in the next section as the requirement of proportionality.

The requirement of necessity is enigmatic because it can refer to various degrees of necessity. In *Nicaragua*, the International Court of Justice distinguished necessity from "merely useful."[63] Similarly, the World Trade Organization (WTO) Appellate Body envisages necessity as being closer to "indispensable" or "inevitable" than simply "making a contribution."[64] In *Deutsche Telekom v. India*, the Arbitral Tribunal rejected such a strict standard of necessity, instead requiring that a prohibition or restriction be "principally targeted" to the protection of essential security interests.[65] The European Court of Human Rights also rejected the idea that the adjective "necessary" is synonymous with "indispensable," holding that "it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context."[66]

Due to this ambiguity, the requirement of necessity has been applied in various ways as a legal standard to regulate security justification for interference with other rights and interests protected under international law. In *Nicaragua* and *Oil Platforms*, the question of necessity has arisen both as a requisite element of self-defense and under the terms of the bilateral treaty to which the United States was a party.[67] In these cases, the International Court of Justice adopted the position that the requirement of necessity was "strict and objective," leaving no room for any measure of discretion or subjective judgement by the parties themselves.[68] On that basis, the Court denied the necessity of

63 *Nicaragua* judgment, *supra* note 57, 117 para. 224.

64 *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef: Report of the Appellate Body* (Dec. 11, 2000) WT/DS161/AB/R, WT/DS169/AB/R, para. 161. For critical analysis, see Gisele Kapterian, "A Critique of the WTO Jurisprudence on 'Necessity'," *International & Comparative Law Quarterly* 59 (2010) 89.

65 *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Interim Award (Dec. 13, 2017) paras. 237–38.

66 *Handyside v. UK*, *supra* note 39, para. 48. See also *The Sunday Times v. UK*, *supra* note 39, para. 59; *Silver v. UK* Application Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, ECtHR (Chamber) Judgment (Mar. 25, 1983) para. 97.

67 Treaty of Friendship, Commerce and Navigation, Nicaragua–US, art. XXI(1), Jan. 21, 1956 (entered into force May 24, 1958) 9 UST 449, 367 UNTS 3 ("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"); Treaty of Amity, Economic Relations, and Consular Rights, Iran–US, art. XX(1), Aug. 15, 1955 (entered into force June 16, 1957) 8 UST 899, TIAS No. 3853, 284 UNTS 93 ("The present Treaty shall not preclude the application of measures:… (d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests").

68 *Oil Platforms* judgment, *supra* note 14, 196 para. 73; *Nicaragua* judgment, *supra* note 57, 141 para. 282. Note that in *Nicaragua* its reasoning relies on the lack of subjective language ("considers necessary"); however, as discussed in chapter 3.II.B, this textual difference alone is not determinative of the legal effect of the clause on

forcible measures that the United States adopted against Nicaragua, such as the mining of Nicaraguan ports and the trade embargo,[69] as well as the US military action against Iranian oil installations.[70]

The Court's reasoning for these findings is unclear, but the decisive factor appears to have been the availability and adequacy of alternative, non-forcible means of redress.[71] In *Nicaragua*, the Court observed that "it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on [such] activities."[72] In *Oil Platforms*, the Court noted that the United States did not complain to Iran of the military activities carried out from those platforms.[73] Although it is debatable whether the test of necessity is as strict as being indispensable or limited to last resort,[74] the Court appears to have dismissed the standard of reasonableness.[75] This is despite the fact that the latter standard is more aligned with the traditional principle formulated by Daniel Webster in the *Caroline* incident.[76]

In both cases, the requirement of necessity as the condition precedent to the exercise of the right of self-defense was also applied to the interpretation of measures "necessary to protect its essential security interests" reserved under the bilateral treaty that the United States concluded with the respective parties.[77] Recognizing that the notion of "essential security interests" extends beyond the concept of an armed attack,

the exercise of the Court's jurisdiction.

69 *Nicaragua* judgment, *supra* note 57, 122 para. 237, 141 para. 282.

70 *Oil Platforms* judgment, *supra* note 14, 198–99 paras. 76–78.

71 Michael N. Schmitt, ed., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge: Cambridge University Press, 2017) r. 72 para. 2; Addendum to the Eighth Report on State Responsibility, prepared by Mr. Roberto Ago, *Yearbook of the International Law Commission* II, pt. 1 (1980) 13–86, 69 para. 120.

72 *Nicaragua* judgment, *supra* note 57, 122 para. 237.

73 *Oil Platforms* judgment, *supra* note 14, 198 para. 76.

74 Compare, for example, Tom Ruys, *Armed Attack and Article 51 of the UN Charter* (Cambridge: Cambridge University Press, 2010) 95–98; with Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Portland, OR: Hart Publishing, 2010) 479–85 (arguing that military action need not be strictly "indispensable" to repel the armed attack, but must be "genuinely defensive"). See also James A. Green, *The International Court of Justice and Self-Defence in International Law* (Portland, OR: Hart Publishing, 2009) 76–86.

75 Cf. *Nicaragua* judgment, *supra* note 57, 364 para. 203 (Judge Schwebel dissenting opinion, observing that the US decision to apply armed pressures upon Nicaragua as necessary "was not unreasonable").

76 Jennings, *supra* note 62, 89 (US Secretary of State Daniel Webster called upon the British government to show that the local authorities of Canada "did nothing unreasonable or excessive"). See also *Tallinn Manual 2.0, supra* note 71, r. 72 para. 4 ("when measures falling short of a use of force cannot alone reasonably be expected to defeat an armed attack").

77 *Nicaragua* judgment, *supra* note 57, 117 para. 224; *Oil Platforms* judgment, *supra* note 14, 181–83 paras. 40–43. Note, however, the division of views in the latter case was due to the Court's jurisdiction founded on the bilateral treaty alone: see *Oil Platforms* judgment, *supra* note 14, 236–40 paras. 41–53 (Judge Higgins separate opinion), 251–54 paras. 17–26 (Judge Kooijmans separate opinion), 288–89 paras. 45–46 (Judge Buergenthal separate opinion), 315–19 paras. 31–40 (Judge Owada separate opinion), 378–80 paras. 18–19 (Judge Rigaux separate opinion).

the Court observes that it has to assess "whether the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary'."[78] In other words, the Court distinguished two aspects of the inquiry by adopting the test of reasonableness against the claim of essential security interests, while rejecting it as the standard for assessing whether the measures were necessary to protect those interests.

Judge Kooijmans explains this difference in the Court's approach as follows:

> The evaluation of what essential security interests are and whether they are in jeopardy is first and foremost a political question and can hardly be replaced by a judicial assessment. Only when the political evaluation is patently unreasonable (which might bring us close to an "abuse of authority") is a judicial ban appropriate. And although the choice of means to be taken in order to protect those interests will also be politically motivated, that choice lends itself much more to judicial review and thus to a stricter test, since the means chosen directly affect the interests and rights of others.[79]

According to this reasoning, a stricter standard is justified because the necessity of a particular measure to protect the essential security interests of a state must be balanced against the rights and interests of others that are interfered with. Judge Simma, on the other hand, justifies the strict standard of necessity by virtue of the peremptory status of the prohibition of the threat or use of force and the objective of the bilateral treaty between Iran and the United States.[80]

Under the International Covenant on Civil and Political Rights, the requirement of necessity has also been held to a strict standard. According to the Human Rights Committee, the contracting parties are required to demonstrate: (i) the precise nature of the threat to the legitimate interest in specific and individualized fashion;[81] (ii) the material link between the restriction and the specific need for protection on which it is predicated;[82] and (iii) the restriction being the least intrusive instrument among those which might achieve the protective function.[83] In General Comment No. 34 on

78 *Nicaragua* judgment, *supra* note 57, 117 para. 224.
79 *Oil Platforms* judgment, *supra* note 14, 260 para. 44 (Judge Kooijmans separate opinion).
80 Ibid., 329–31 paras. 9–11 (Judge Simma separate opinion).
81 HRC, General Comment No. 34: Article 19 (Freedoms of Opinion and Expression), UN Doc. CCPR/C/GC/34 (Sep. 12, 2011) para. 35; *Lee v. Republic of Korea*, Communication No. 1119/2002, UN Doc. CCPR/C/84/D/1119/2002 (July 20, 2005) para. 7.3; *Shin v. Republic of Korea*, Communication No. 926/2000, UN Doc. CCPR/C/80/D/926/2000 (Mar. 16, 2004) para. 7.3; *Sohn v. Republic of Korea*, Communication No. 518/1992, UN Doc. CCPR/C/54/D/518/1992 (Aug. 3, 1995) para. 10.4.
82 HRC, General Comment No. 34, *supra* note 81, para. 22.
83 HRC, General Comment No. 27: Article 12 (Freedom of Movement), UN Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999) para. 14; Report of the Special Rapporteur on the Promotion and Protection of the Right to

freedoms of opinion and expression, the Committee expressly asserts its authority to assess "whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression necessary."[84] The Committee's approach does not allow room for a margin of appreciation reserved to national authorities.[85]

A brief reasoning, typical of the Committee's reports, provides little insight as to how the strict standard of necessity is applied in individual cases. In *Kim v. Republic of Korea*, the Committee was not satisfied that it was necessary to interfere with freedom of expression on national security grounds by prosecuting the complainant for disseminating printed materials which reflected the views of the Democratic People's Republic of Korea (DPRK).[86] That was because, in the Committee's view, "it is not clear how the (undefined) 'benefit' that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk."[87] The test of necessity was not met despite the fact that in domestic courts, the legislative basis for prosecution, under Article 7 of the National Security Act,[88] was found to be compatible with freedom of expression as long as it was restrictively construed so as not to infringe upon the intrinsic content of freedom.[89] On these domestic judicial decisions, the Committee found "no indication that the courts, at any level…considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being *necessary*."[90]

Freedom of Opinion and Expression, UN Doc. A/HRC/14/23 (Apr. 20, 2010) para. 79(g).

84 HRC, General Comment No. 34, *supra* note 81, para. 36.

85 Cf. *Hertzberg v. Finland*, Communication No. 61/1979, UN Doc. CCPR/C/OP/1 (Apr. 2, 1982) 124 para. 10.3. See also Dominic McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee," *International & Comparative Law Quarterly* 65 (2016) 21; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed. (Oxford: Oxford University Press, 2013) 625 (noting *Hertzberg* is the only case in which a "margin of discretion" is recognized and observing that "it is unwise to apply such a doctrine under the ICCPR").

86 *Kim v. Republic of Korea*, Communication No. 574/1994, UN Doc. CCPR/C/64/D/574/1994 (Jan. 4, 1999) para. 12.4.

87 Ibid.

88 National Security Act 1948 (Republic of Korea) Act No. 10/1948 as amended by Act No. 13722/2016, art. 7(1) ("Any person who supports, incites or propagates the activities of an antigovernment organization, a member thereof or of the person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for not more than seven years").

89 See Whiejin Lee, "The Enforcement of Human Rights Treaties in Korean Courts," *Asian Yearbook of International Law* 23 (2017) 95, 100–3.

90 *Kim v. Republic of Korea*, *supra* note 86, para. 12.4 (emphasis original).

In *Park v. Republic of Korea*, having carefully studied the domestic court decisions whereby the author of the complaint had been convicted, the Committee found that "neither those decisions nor the submissions by the State party show that the author's conviction was necessary for the protection of one of the legitimate purposes set forth by article 19 (3)."[91] In *A. K. and A. R. v. Uzbekistan*, by contrast, the careful study of judicial decisions led the Committee to conclude that the domestic courts, "while not explicitly addressing article 19 of the Covenant, were concerned with a perceived threat to national security (violent overthrow of the constitutional order)."[92] It thus appears that the Committee was satisfied with the need to prosecute someone for disseminating the ideology of a religious group with little evidence of posing an imminent threat of violence,[93] but not for disseminating views in support of a foreign regime that was well known to be in hostile relationship. The brevity of the reasoning fails to disclose any critical difference between the two cases regarding the way in which the precise nature of the threat, or its material link to criminal prosecution, was considered.[94]

Due to limited reasoning, the Committee's strict standard of necessity must be evaluated with great care. In particular, the justification of a specific need for protection with a material link to the particular measure of interference must be distinguished from demonstrating the precise nature of a threat by establishing "a direct and immediate connection between the expression and the threat."[95] The latter requirement was added at a later stage in the drafting of General Comment No. 34 on freedoms of opinion and expression, setting a higher bar for restrictions.[96] However, such a strict requirement to demonstrate that a single individual poses a specific threat to national security is too restrictive an approach and fails to take into account the cumulative effect of individual threats.[97] The test of necessity concerns the choice of means with a particular focus on the material link between the need to address a specific threat to security and the means

91 *Park v. Republic of Korea*, Communication No. 628/1995, UN Doc CCPR/C/64/D/628/1995 (Nov. 3, 1998) para. 10.3.

92 *A. K. and A. R. v. Uzbekistan*, Communication No. 1233/2003, UN Doc CCPR/C/95/D/1233/2003 (Mar. 31, 2009) para. 7.2.

93 For critical analysis, see Helen Keller and Maya Sigron, "State Security v. Freedom of Expression: Legitimate Fight against Terrorism or Suppression of Political Opposition?" *Human Rights Law Review* 10 (2010) 151, 158–62.

94 In *A. K. and A. R. v. Uzbekistan*, the Committee also noted the careful steps taken during the judicial process (at para. 7.2), whereas such consideration cannot be found in *Kim*, *Lee*, or *Park*.

95 HRC, General Comment No. 34, *supra* note 81, para. 35.

96 Michael O'Flaherty, "Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No. 34," *Human Rights Law Review* 12 (2012) 627, 649.

97 For a similar view in a different context, see McGoldrick, *supra* note 85, 51–52. Cf. *Peltonen v. Finland*, Communication No. 492/1992, UN Doc. CCPR/C/51/D/492/1992 (July 21, 1994) para. 8.4 (observing that "restrictions of the freedom of movement of individuals who have not yet performed their military service are in principle to be considered necessary for the protection of national security and public order").

to address it. An extension of the test by linking the conduct of an individual with the identification of a threat would amount to reviewing the decision of national authorities de novo, with the risk of making arbitrary findings based on their own preconceived ideas of security as discussed in chapter 4, section II.

On the other hand, the European Court of Human Rights has interpreted the adjective "necessary" as implying the existence of a pressing social need,[98] while recognizing a margin of appreciation available to national authorities.[99] This approach, in the view of Sir James Fawcett, comes close to interpreting the adjective "necessary" as what the citizens in a democratic society would consider or accept as being necessary within the limits of reasonableness and good faith.[100] Therefore, the doctrine of a margin of appreciation operates in tandem with the supervisory jurisdiction of the European Court of Human Rights, which places itself in the position of citizens in a democratic society, rather than taking the place of national authorities. As such, this doctrine is "a tool to define relations between the domestic authorities and the Court,"[101] acknowledging a scope for legitimate disagreement.

Accordingly, under Articles 8–11 of the European Convention on Human Rights, national authorities are granted a margin of appreciation in determining the substantive scope of individual rights when necessary to restrict them on national security grounds.[102] In the European Court of Human Rights' jurisprudence, this margin has been variably applied so that the need to pursue the legitimate interest of national security is balanced against the degree of interference with privacy,[103] freedom of expression,[104] freedom

98 For variation of its application, see Gerards, *supra* note 41, 230–39.

99 See generally Gerards, *supra* note 41, 160–97; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Cambridge: Intersentia, 2001); Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dordrecht: Martinus Nijhoff, 1996).

100 J. E. S. Fawcett, *The Application of the European Convention on Human Rights*, 2nd ed. (Oxford: Clarendon Press, 1987) 310–11.

101 *A and Others v. UK*, *supra* note 26, para. 184.

102 The doctrine has also been applied to non-derogable rights such as the right to life, but it should rather be understood as an exercise of judicial deference as discussed in chapter 3.IV.C. For criticisms, see, for example, Sarabeth M. Zielonka, "The Universality of the Right to Life: Article 2 and the Margin of Appreciation in the Jurisprudence of the European Court of Human Rights," *New York University Journal of International Law and Politics* 47 (2014) 245; Stephen Skinner, "Deference, Proportionality and the Margin of Appreciation in Lethal Force Case Law under Article 2 ECHR," *European Human Rights Law Review* 1 (2014) 32.

103 *Big Brother Watch v. UK*, Application Nos. 58170/13, 62322/14, 24960/15, ECtHR (Grand Chamber) Judgment (May 25, 2021) para. 338; *Zakharov. v. Russia*, Application No. 47143/06, ECtHR (Grand Chamber) Judgment (Dec. 4, 2015) para. 232; *Leander v. Sweden*, Application No. 9248/81, ECtHR (Chamber) Judgment (Mar. 26, 1987) para. 59; *Klass v. Germany*, Application No. 5029/71, ECtHR (Plenary) Judgment (Sep. 6, 1978) para. 49.

104 *Ceylan v. Turkey*, Application No. 23556/94, ECtHR (Grand Chamber) Judgment (July 8, 1999) para. 34; *Zana v. Turkey*, *supra* note 33, para. 51; *Observer and Guardian v. UK*, *supra* note 49, para. 59.

of information,[105] and freedom of association.[106] As a doctrine of judicial restraint, the margin of appreciation has provided the Court with a pragmatic and flexible tool to avoid damaging confrontation with member states.[107] The margin of appreciation can be especially wide where national standards and constitutional values are diverse.[108] It may be narrowed in an incremental fashion as European consensus emerges to apply a uniform standard of protection.[109]

Considerations of national security generally weigh in favor of a wider margin of appreciation.[110] This is because the doctrine was originally designed to respond to government concerns that regional human rights policies could jeopardize their national security.[111] However, the European Court of Human Rights does not translate the doctrine into a clear standard of review in a consistent manner.[112] For example, while acknowledging the maintenance of discipline in the armed forces as a legitimate aim of protecting national security,[113] the Court found no "imperative necessities" in refusing the distribution of a particular military magazine within the army.[114] Likewise, the Court demanded "particularly convincing and weighty reasons" to justify the policy against

105 *Gîrleanu v. Romania*, *supra* note 49, para. 96; *Pasko v. Russia*, *supra* note 34, para. 87; *Stoll v. Switzerland*, Application No. 69698/01, ECtHR (Grand Chamber) Judgment (Dec. 10, 2007) para. 107; *Hadjianastassiou v. Greece*, *supra* note 32, para. 47.

106 *Socialist Party v. Turkey*, *supra* note 43, para. 50; *United Communist Party of Turkey v. Turkey*, *supra* note 43, para. 46 ("only a limited margin of appreciation").

107 Aileen McHarg, "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights," *Modern Law Review* 62 (1999) 671, 683 (observing that "courts have to choose between giving strong protection to rights, but with a relatively narrow jurisdiction to hear disputes, or alternatively, a more extensive jurisdiction, but one where rights have to give way in persistent conflicts with public interest goals").

108 See, for example, *Animal Defenders International v. UK*, Application No. 48876/08, ECtHR (Grand Chamber) Judgment (Apr. 22, 2013) para. 123; *TV Vest AS and Rogaland Pensjonistparti v. Norway*, Application No. 21132/05, ECtHR (First Section) Judgment (Dec. 11, 2008) para. 67; *Wingrove v. UK*, Application No. 17419/90, ECtHR (Chamber) Judgment (Nov. 25, 1996) para. 58; *Handyside v. UK*, *supra* note 39, para. 57.

109 See Janneke Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights," *Human Rights Law Review* 18 (2018) 495; Kanstantsin Dzehtsiarou, *European Consensus as the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015) 132–37; Legg, *supra* note 99, 103–29; Yourow, *supra* note 99, 194–96.

110 Arai-Takahashi, *supra* note 99, 104–7; Iain Cameron, *National Security and the European Convention on Human Rights* (The Hague: Kluwer Law International, 2000) 27–31, 444–47.

111 Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards," *New York University Journal of International Law and Politics* 31 (1999) 843, 845.

112 See, for example, Gerards, *supra* note 109, 505; Jan Kratochvíl, "The Inflation of the Margin of Appreciation by the European Court of Human Rights," *Netherlands Quarterly of Human Rights* 29 (2011) 324.

113 See, for example, *Markin v. Russia*, *supra* note 42, para. 128; *Smith and Grady v. UK*, *supra* note 42, para. 89; *Lustig-Prean and Beckett v. UK*, *supra* note 42, para. 82; *Grigoriades v. Greece*, Application No. 24348/94, ECtHR (Grand Chamber) Judgment (Nov. 25, 1997) para. 41; *Engel v. Netherlands*, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, ECtHR (Plenary) Judgment (June 8, 1976) para. 100. Cf. *Rekvényi v. Hungary*, Application No. 25390/94, ECtHR (Grand Chamber) Judgment (May 20, 1999) para. 41 (in relation to police force during transition to democracy).

114 *VDSÖ and Gubi v. Austria*, *supra* note 42, para. 37.

homosexuals within the armed forces,[115] while requiring the exclusion of servicemen from the entitlement to parental leave to be "objectively and reasonably justified."[116] In some cases, these considerations are turned into the test of proportionality,[117] whereas in other cases the latter is assessed separately.[118]

It has been observed that the degree of judicial scrutiny by the European Court of Human Rights is increasingly dependent upon whether Convention principles are adequately embedded in the domestic legal order.[119] In operationalizing the principle of subsidiarity, the Court has shifted the focus of necessity analysis under the limitation clauses to legislative processes, independent oversight mechanisms, and judicial reasoning. For example, a system of secret surveillance for national security purposes has been evaluated with reference to various procedural safeguards for providing adequate and effective guarantees against abuse, in view of its risk of undermining or even destroying democracy under the cloak of defending it.[120] This process-based approach has enabled the Court to consider domestic compliance mechanisms as the basis for determining whether an interference with Convention rights was properly considered and weighed within reasonable parameters in accordance with the principles set out in the Court's case law. Such process-based review facilitates the Court's engagement with reason-based, justificatory arguments as the basis for assessing Convention compliance.

The process-based review has also been the primary focus of treaty monitoring during public emergencies, due to concerns about the risk of abuse as discussed in chapter 4, section II.[121] Even in cases where national authorities are granted a margin

115 *Smith and Grady v. UK*, *supra* note 42, paras. 94, 105, 110; *Lustig-Pream and Beckett v. UK*, *supra* note 42, paras. 87, 98, 103.

116 *Markin v. Russia*, *supra* note 42, paras. 133, 151.

117 See, for example, *VDSÖ and Gubi v. Austria*, *supra* note 42, para. 40. Cf. Partly Concurring, Partly Dissenting Opinion of Judge Loucaides in *Smith and Grady v. UK*, *supra* note 42 and *Lustig-Pream and Beckett v. UK*, *supra* note 42 (stating that "the Court should not interfere simply because there is a disagreement with the necessity of the measures taken by a State. Otherwise the concept of the margin of appreciation would be meaningless. The Court may substitute its own view for that of the national authorities only when the measure is patently disproportionate to the aim pursued").

118 See, for example, *Pasko v. Russia*, *supra* note 34, para. 87; *Ceylan v. Turkey*, *supra* note 104, paras. 36–38; *Hadjianastassiou v. Greece*, *supra* note 32, para. 47; *Observer and Guardian v. UK*, *supra* note 49, paras. 63–64.

119 For detailed analysis, see, for example, Thomas Kleinlein, "The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution," *International & Comparative Law Quarterly* 68 (2019) 91 and literature cited at fn. 1; Robert Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law," *Human Rights Law Review* 18 (2018) 473.

120 See, for example, *Big Brother Watch v. UK*, *supra* note 103, paras. 338–39; *Roman Zakharov. v. Russia*, *supra* note 103, para. 238; *Leander v. Sweden*, *supra* note 103, paras. 60–67; *Klass v. Germany*, *supra* note 103, paras. 50–60.

121 See, for example, Scott P. Sheeran, "Reconceptualizing States of Emergency under International Human

of appreciation regarding the declaration of a public emergency, treaty monitoring bodies have been less deferential in assessing the process through which emergency measures are adopted, monitored, and contested.[122] For example, the European Court of Human Rights has exercised its authority to determine whether the measure of derogation is a genuine response to the emergency situation, whether the measure is fully justified by the special circumstances of the emergency, and whether adequate safeguards against abuse have been provided.[123] On the other hand, the Human Rights Committee considers that it has "a duty to conduct a careful analysis… based on an objective assessment of the actual situation."[124] But in practice, the Committee does not go further than expressing general concerns about the lack of clarity and adequate safeguards.[125]

In the context of international armed conflict, Geneva Convention IV prohibits internment of protected civilians or placing them in assigned residence unless the security of the detaining power makes it absolutely necessary.[126] Also, in occupied territories, these measures can be ordered only for imperative reasons of security.[127] The deprivation of liberty, when it is not absolutely necessary for imperative reasons of security, constitutes a grave breach of the Convention.[128] In practice, however, it would be difficult to establish an unlawful deprivation of liberty "in view of the extended powers granted in this matter to States."[129]

Having noted the discretion reserved to the detaining power on this matter, the *Delalić* Tribunal abstained from determining whether the internment "actually was necessary

Rights Law: Theory, Legal Doctrine, and Politics," *Michigan Journal of International Law* 34 (2013) 491, 526–56.

122 Gross and Aoláin, *supra* note 21, 258–65.

123 *A and Others v. UK*, *supra* note 26, para. 184; *Aksoy v. Turkey*, *supra* note 26, paras. 78, 83–84; *Brannigan and McBride v. UK*, *supra* note 26, paras. 51, 63–65.

124 HRC, General Comment No. 29, *supra* note 7, para. 6.

125 See, for example, HRC, Concluding Observations: Tunisia, UN Doc. CCPR/C/TUN/CO/6 (Apr. 24, 2020) para. 29; HRC, Concluding Observations: Armenia, UN Doc. CCPR/C/ARM/CO/2 (Aug. 31, 2012) para. 11; HRC, Concluding Observations: Thailand, UN Doc. CCPR/CO/84/THA (July 8, 2005) para. 13; HRC, Consideration of Reports: Azerbaijan, UN Doc. CCPR/C/79/Add.38 (Aug. 3, 1994) para. 7; Report of the Human Rights Committee, UN Doc. A/47/40 (1992) 30 para. 137 (Poland), 51 para. 223 (Ecuador), 82 para. 345 (Peru), 94 para. 393 (Colombia); Report of the Human Rights Committee, UN Doc. A/46/40 (1991) 14 para. 56 (Canada), 28–29 para. 113 (Finland), 37 para. 150 (Spain), 60 para. 241 (Morocco), 68 paras. 267–68 (India), 91 para. 370 (UK), 106 para. 424 (Panama), 114–15 paras. 456–57 (Sri Lanka), 124 para. 496 (Sudan), 132 para. 537 (Madagascar), 142 paras. 576–77 (Jordan); Report of the Human Rights Committee, UN Doc. A/43/40 (1988) 14 para. 53 (Trinidad and Tobago), 23–24 para. 96 (Zambia); Report of the Human Rights Committee, UN Doc. A/42/40 (1987) 42 para. 156 (El Salvador).

126 Geneva Convention IV, *supra* note 50, art. 42. For discussion regarding the interpretation of security, see chapter 4.II.

127 Geneva Convention IV, *supra* note 50, art. 78; ICRC Commentary, *supra* note 51, 367–68.

128 Geneva Convention IV, *supra* note 50, art. 147.

129 ICRC Commentary, *supra* note 51, 599.

for the detaining forces, and therefore justifiable under international law."[130] Instead, as discussed above, the Trial Chamber rendered its judgment based on the absence of any serious and legitimate reason to conclude that the detainees posed a particular risk to the security of the detaining power.[131] On the other hand, the Inter-American Commission on Human Rights found security detention unjustifiable under Article 78 of Geneva Convention IV, due to insufficient information about the regular procedures to be followed.[132]

The range of different standards discussed above demonstrates a lack of uniformity in the application of necessity as a general principle regulating the choice of means in realizing the justificatory value of security. At one end of the spectrum, the minimalist approach brings the test of necessity close to little more than the requirement to provide relevant and sufficient reasons for justification as discussed above in section II. The same test, at the other end of the spectrum, can be construed to be strict and objective, leaving no room for any measure of discretion or subjective judgement by the parties themselves. The margin of appreciation doctrine in the European context acknowledges this wide spectrum of review standards, allowing for flexible adjustment depending on the value of competing rights and interests within reasonable parameters.

It is difficult to identify a uniform theory of necessity that provides a coherent explanation for these different standards of the test. Judge Kooijmans has sought to justify a strict test when the means chosen directly affects the rights and interests of others, but this position was not shared by the *Delalić* Tribunal. Judge Simma's reliance on peremptory norms is too restrictive and his teleological justification fails to explain the different approaches adopted between the Human Rights Committee and the European Court of Human Rights. The structural differences among these bodies and the institutional settings in which they operate do not help us understand why the Human Rights Committee takes a more interventionist approach than the European Court of Human Rights or why the *Delalić* Tribunal did not adopt the strict approach as the International Court of Justice did in *Nicaragua* and *Oil Platforms*.

In general, however, international courts and treaty monitoring bodies find it appropriate to adopt a double standard of review, applying a stricter standard to the need for interference

130 *Delalić I*, *supra* note 51, para. 1131.

131 Ibid., para. 1135. The Appeals Chamber similarly observes that "there must be an assessment that each civilian taken into detention poses a *particular risk* to the security of the State": *Delalić II*, *supra* note 56, para. 327 (emphasis original). See also *Ajuri*, *supra* note 55, paras. 24, 27 (denying assigned residence of those who themselves do not pose any danger for deterrent purposes).

132 *Coard v. US*, IACHR Report No. 109/99 (Sep. 29, 1999) paras. 53–58.

with the rights and interests of others than to the political evaluation of security interests and the threats thereto. This double standard is reflective of the general inclination, inherent in the judicial or quasi-judicial authority vested in these organs, against reviewing the political determination of a security threat.[133] The choice of means, on the other hand, is more susceptible to objective determination because of the variety of procedural and substantive conditions that must be met in political decision-making processes.

In this respect, the Human Rights Committee's interventionist position stands as an anomaly, stretching the test of necessity too far beyond the choice of means. The *Delalić* judgment, on the other hand, may be seen as overly deferential and losing its precedential value as it converges with detention requirements buttressed through the application of international human rights law during armed conflict.[134] Judicial deference loses its force further, as the focus of inquiry shifts away from the choice of means to the degree of interference with other protected rights and interests.

IV. Proportionality

The principle of proportionality has the potential to operate as a restraint upon the degree of justifiable interference with competing rights and interests protected under international law. Unlike the requirement of necessity, there is usually no express reference to it in the text of a treaty.[135] However, the test of proportionality emanates from the justificatory value of security as a corollary to the general restraint upon the choice of means to protect security interests.

It is debatable whether proportionality is established as a general principle of international law.[136] Nonetheless, the test of proportionality has been developed through judicial considerations in various contexts. For example, the test of proportionality has been developed:

133 See, for example, Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge: Cambridge University Press, 2016) 88–90; Stephen Tierney, "Determining the State of Exception: What Role for Parliament and the Courts?" *Modern Law Review* 68 (2005) 668.

134 HRC, General Comment No. 35: Article 9 (Liberty and Security of Persons), UN Doc. CCPR/C/GC/35 (Dec. 16, 2014) para. 15. See also Zelalem Mogessie Teferra, "National Security and the Right to Liberty in Armed Conflict; The Legality and Limits of Security Detention in International Humanitarian Law," *International Review of the Red Cross* 98 (2016) 961; Jelena Pejic, "Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and Other Situations of Violence," *International Review of the Red Cross* 87 (2005) 375.

135 Cf. Treaty on European Union (Consolidated Version) art. 5(4), Dec. 13, 2007 (entered into force Dec. 1, 2009) OJ C 326/13; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 51(5)(b), 57(2)(b), June 8, 1977 (entered into force Dec. 7, 1978) 1125 UNTS 3.

136 D. W. Greig, "Reciprocity, Proportionality, and the Law of Treaties," *Virginia Journal of International Law* 34 (1994) 295, 322.

- as a requirement under customary international law for the exercise of the right of self-defense;[137]
- as a requisite element of the requirement of necessity prescribed by a treaty provision;[138]
- as an interpretive aid to determine the legitimate extent of trade-restrictive measures and remedies available under international trade law;[139] and
- as a general principle of law applicable in the context of criminal punishment.[140]

The test of proportionality applicable to the justification of security measures operates differently to the assessment of proportionality applied in the context of remedial measures. By proportionality in the latter sense, there must be a degree of equivalence between the alleged breach and remedial measures against it. For example, countermeasures against an internationally wrongful act "must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."[141] Such a degree of equivalence is not a requisite element of proportionality when the imperative interest of security is at stake. Instead, proportionality is measured by reference to the legitimate purpose to be achieved, such as halting or repelling an armed attack in self-defense.[142]

There is room for disagreement in evaluating the proportion between the legitimate purpose of security measures and the degree of infringement upon or interference with the competing rights to be sacrificed. In the context of self-defense, for example, the legitimate aim of halting or repelling an armed attack can be construed broadly to include

137 See *Oil Platforms* judgment, *supra* note 14, 198–99 para. 77; *Nuclear Weapons* advisory opinion, *supra* note 57, 245 para. 41; *Nicaragua* judgment, *supra* note 57, 94 para. 176.

138 See *Oil Platforms* judgment, *supra* note 14, 238 para. 48 (Judge Higgins separate opinion); HRC, General Comment No. 34, *supra* note 81, para. 34; HRC, General Comment No. 27, *supra* note 83, para. 14; *Handyside v. UK*, *supra* note 39, paras. 49, 58; *Lohé Issa Konaté v. Burkina Faso*, Application No. 004/2013, Judgment of African Court on Human and People's Rights (Dec. 5, 2014) para. 145. See also Legg, *supra* note 99, 178–81; Jeremy McBride, "Proportionality and the European Convention on Human Rights," in *The Principle of Proportionality in the Laws of Europe*, ed. Evelyn Ellis (Portland, OR: Hart Publishing, 1999) 23.

139 See, for example, Alexia Herwig and Asja Serdarevic, "Standard of Review for Necessity and Proportionality Analysis in EU and WTO Law: Why Differences in Standards of Review Are Legitimate," in *Deference in International Courts and Tribunals*, ed. Lukasz Gruszczynski and Wouter Werner (Oxford: Oxford University Press, 2014) 209; Andrew D. Mitchell, *Legal Principles in WTO Disputes* (Cambridge: Cambridge University Press, 2010) 177–237.

140 *Prosecutor v. Blaškić*, Case No. ICTY-95-14-T, Judgment (Mar. 3, 2000) para. 796.

141 Articles on Responsibility of States for Internationally Wrongful Acts art. 51, UNGA Res. 56/83, Annex (Dec. 12, 2001). See also *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 1997 ICJ Rep. 7, para. 85; *Air Services Agreement of 27 March 1946 (US v. France)*, Award (Dec. 9, 1978) XVIII RIAA 417, 443 para. 83; *Tallinn Manual 2.0*, *supra* note 71, r. 23.

142 *Tallinn Manual 2.0*, *supra* note 71, r. 72 para. 5; Ago, Addendum, *supra* note 71, 69 para. 121. See also Ruys, *supra* note 74, 111–16; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004) 160–62.

the removal of a continuing threat and to restore the security of the party attacked.[143] However, the judicial approach to the assessment of proportionality has consistently been more restrictive.[144] In *Nicaragua*, the International Court of Justice observed that the US military activities, such as the mining of the Nicaraguan waters and the attacks on Nicaraguan ports and oil installations, could not have been proportionate to the objective of disrupting the aid provided from Nicaragua to the Salvadorian armed opposition, no matter how uncertain the exact scale of that aid was.[145] In *Oil Platforms*, the US military action against the Iranian oil platforms was not regarded as a proportionate use of force to protect the essential security interests of the United States.[146] In *Armed Activities in the Congo*, the taking of airports and towns located at a considerable distance from the border area was considered disproportionate as a response to transborder attacks.[147]

Similarly, the use of lethal force for the purposes of law enforcement has been subject to a strict test of proportionality, regardless of the legal context in which it takes place.[148] The Human Rights Committee has extended strict proportionality to the assessment of arbitrariness in the deprivation of liberty.[149] It has also been applied to freedom of expression by prescribing that the restriction must be the least intrusive instrument among those which might achieve the relevant protective function.[150] Likewise, the Inter-American Court of Human Rights has observed that "any restrictions… must be

143 See, for example, Law of War Manual, rev. ed. (Office of the General Counsel, US Department of Defense, 2016) s. 1.11.1.2. See also Yoram Dinstein, *War, Aggression and Self-Defence*, 6th ed. (Cambridge: Cambridge University Press, 2017) 285.

144 For evaluation of state practice, see, for example, Ruys, *supra* note 74, 92–94, 116–23; Green, *supra* note 74, 89–91; Gardam, *supra* note 142, 159–84.

145 *Nicaragua* judgment, *supra* note 57, 122–23 para. 237. Cf. ibid., 270 (Judge Schwebel dissenting opinion).

146 *Oil Platforms* judgment, *supra* note 14, 198–99 para. 77. For critical analysis, see, for example, Green, *supra* note 74, 86–88.

147 *Armed Activities in the Congo*, *supra* note 15, 223 para. 147, 315 paras. 33–34 (Judge Kooijmans separate opinion), 338 para. 14 (Judge Simma separate opinion).

148 See, for example, *Guyana v. Suriname*, Award (Sep. 17, 2007) XXX RIAA 1, para. 445; *M/V. 'Saiga' (No. 2) (St Vincent and the Grenadines v. Guinea)*, Judgment, 1999 ITLOS Rep. 10, 61–63 paras. 155–59; *Fisheries Jurisdiction Case (Spain v. Canada)*, Jurisdiction, 1998 ICJ Rep. 432, 466 para. 84; *Baumgarten v. Germany*, Communication No. 960/2000, UN Doc. CCPR/C/78/D/960/2000 (July 31, 2003) para. 9.4; *Suarez de Guerrero v. Colombia*, Communication No. R.11/45, UN Doc. A/37/40 (Mar. 31, 1982) 137 para. 13.3; *McCann v. UK*, Application No. 18984/91, ECtHR (Grand Chamber) Judgment (Sep. 27, 1995) para. 149; *Vélez v. Ecuador*, *supra* note 12, paras. 83–85. See also UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials paras. 5, 9, adopted at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27–Sep. 7, 1990, UN Doc. A/CONF.144/28/Rev.1 (1991) 112.

149 See, for example, *F. J. v. Australia*, Communication No. 2233/2013, UN Doc. CCPR/C/116/D/2233/2013 (Mar. 22, 2016) paras. 10.3–10.4; *F. K. A. G. v. Australia*, Communication No. 2094/2011, UN Doc. CCPR/C/108/D/2094/2011 (July 26, 2013) paras. 9.3–9.4; *M. M. M. v. Australia*, Communication No. 2136/2012, UN Doc. CCPR/C/108/D/2136/2012 (July 25, 2013) para. 10.4.

150 See, for example, *Saidov. V. Tajikistan*, Communication No. 2680/2015, UN Doc. CCPR/C/122/D/2680/2015 (Apr. 4, 2018) para. 9.8; HRC, General Comment No. 34, *supra* note 81, para. 34.

the least restrictive of possible means to achieve a compelling public interest."[151] In international armed conflict, moreover, the internment of civilians or placing them in assigned residence has been restricted to cases where security cannot be safeguarded by other, less severe means.[152]

By contrast, the WTO Dispute Settlement Panel did not go further than imposing a minimum standard of plausibility. That is, trade-restrictive measures must not be implausible as the means of protecting essential security interests.[153] However, this deferential standard is rather attributed to the discretionary language ("it considers") that Article XXI of the 1994 General Agreement on Tariffs and Trade employs for the protection of essential security interests.[154] Indeed, a stricter standard of proportionality has been applied to general exceptions under Article XX,[155] which cannot be used "as a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[156] In the absence of an equivalent obligation, there is no need to determine or balance the extent of trade restrictions for the protection of essential security interests by seeking alternative measures that are reasonably available to it without violating the prescribed norm.[157]

In Europe, the test of proportionality has sometimes been subsumed in the margin of appreciation and, in such cases, it does not serve any distinct purpose in establishing an appropriate standard of review.[158] However, it has also been applied separately to the margin of appreciation as a means of screening government policies and filtering

151 Report on Terrorism and Human Rights, IACHR OEA/Ser.L/V/II.116 (Oct. 22, 2002) Executive Summary para. 34. See also *Chiriboga v. Ecuador*, Judgment (May 6, 2008) IACtHR Series C No. 179, paras. 62–63 (regarding the right to property); *Herrera-Ulloa v. Costa Rica*, Judgment (July 2, 2004) IACtHR Series C No. 107, para. 123; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*, Advisory Opinion OC-5/85 (Nov. 13, 1985) IACtHR Series A No. 5, para. 46.

152 See, for example, *Delalić I*, *supra* note 51, para. 571; *Ajuri*, *supra* note 55, paras. 25–26.

153 *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (Apr. 5, 2019) WT/DS512/R, para. 7.138.

154 See chapter 3.II.B. See also Glyn Ayres and Andrew D. Mitchell, "General and Security Exceptions under the GATT 1994 and the GATS," in *International Trade Law and the WTO*, ed. Indira Carr, Shawkat Alam, and Md Jahid Hossain Bhuiyan (Sydney: Federation Press, 2013) 226, 266.

155 See, for example, *Brazil – Measures Affecting Imports of Retreaded Tyres: Report of the Appellate Body* (Dec. 3, 2007) WT//DS332/AB/R, paras. 150–51 (requiring a "material contribution" to the achievement of the policy objective); *Korea – Beef*, *supra* note 64, paras. 163–64; *US – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body* (Oct. 12, 1998) WT/DS58/AB/R, para. 159. See also Herwig and Serdarevic, *supra* note 139, 217–19; Mitchell, *supra* note 139, 195–99 and literature cited therein.

156 General Agreement on Tariffs and Trade art. XX, Annex A to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 (entered into force Jan. 1, 1995) 1867 UNTS 187.

157 *Russia – Traffic in Transit*, *supra* note 153, paras. 7.108, 7.147.

158 Gerards, *supra* note 109, 501–2.

out impermissible reasons.[159] In assessing the proportionality of rights-restrictive measures, the European Court of Human Rights tends to make a holistic analysis having regard to the circumstances of each case.[160] This practice inevitably renders the standard of review obscure. The assessment of proportionality sometimes hinges upon whether the reasons provided are relevant and sufficient.[161] The nature and severity of rights-restrictive measures or the penalty imposed are also taken into account when assessing proportionality.[162] In some cases, the Court sought to identify a reasonable relationship of proportionality between the legitimate aim pursued and the means employed,[163] whereas in other cases, consideration was given to the availability of less restrictive measures.[164]

In *Belmarsh Prison*, the Court explained its approach to the assessment of proportionality in the context of derogation during a public emergency, as follows: "It should in principle follow the judgment of the House of Lords on the question of the proportionality of the applicants' detention, unless it can be shown that the national court misinterpreted the Convention or the Court's case law or reached a conclusion which was manifestly unreasonable."[165] The deference to national courts is derived from structural limitations imposed on the Court as a regional supervisory organ with its subsidiary role for the protection of human rights.[166] This structural reason for deferring to national courts on the assessment of proportionality must be distinguished from a margin of appreciation accorded to national authorities as a doctrine of judicial restraint. This is because the former is premised upon the effective fact-finding and strict application of the European human rights jurisprudence by national courts, whereas the latter is driven by considerations of judicial economy.

159 George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007) 104.

160 *Sidiropoulos v. Greece*, Application No. 26695/95, ECtHR (Chamber) Judgment (July 10, 1998) para. 40; *Zana v. Turkey*, *supra* note 33, paras. 55–56; *Vogt v. Germany*, Application No. 17851/91, ECtHR (Grand Chamber) Judgment (Sep. 26, 1995) para. 57.

161 *Segerstedt-Wiberg v. Sweden*, Application No. 62332/00, ECtHR (Second Section) Judgment (June 6, 2006) para. 90; *United Community Party of Turkey v. Turkey*, *supra* note 43, paras. 54–61; *Vogt v. Germany*, *supra* note 160, para. 61.

162 See, for example, *Refah Partisi (The Welfare Party) v. Turkey*, Application Nos. 41340/98, 41342/98, 41343/98, 41344/98, ECtHR (Grand Chamber) Judgment (Feb. 13, 2003) paras. 133–34; *Ceylan v. Turkey*, *supra* note 104, para. 37; *Karatas v. Turkey*, Application No. 23168/94, ECtHR (Grand Chamber) Judgment (July 8, 1999) para. 53.

163 See, for example, *Pasko v. Russia*, *supra* note 34, para. 87; *Tinnelly & Sons v. UK*, Application No. 20390/92, ECtHR (Chamber) Judgment (July 10, 1998) para. 76; *Hadjianastassiou v. Greece*, *supra* note 32, para. 47.

164 See, for example, *Sidiropoulos v. Greece*, *supra* note 160, paras. 46–47.

165 *A and Others v. UK*, *supra* note 26, para. 182.

166 Ibid., para. 154. See also Alastair Mowbray, "Subsidiarity and the European Convention on Human Rights," *Human Rights Law Review* 15 (2015) 313, 326–29.

It is thus conceivable that a range of different standards of test discussed above are attributed to the structural settings in which the judicial or quasi-judicial authority is exercised, as well as the textual basis upon which requisite conditions are constructed. However, there is a degree of uniformity in the application of strict proportionality where fundamental values are at stake, against which security justification must be validated. For example, the justificatory value of security tends to be strictly weighed against the maintenance of international peace and security, the preservation of life, and in the European context, the foundations of a democratic society. Such a strict standard becomes difficult to sustain as the competing values become less fundamental or lack universal acceptance.

The strict assessment of proportionality necessarily involves an exercise of judgement on the availability and adequacy of various means to achieve a legitimate policy goal in the process of judicial reasoning. Judicial and treaty monitoring bodies have to make fact-specific determinations as the basis for balancing competing—and, often, incommensurable—interests under the attendant circumstances. Criticisms can therefore be levelled at judicial decisions for making an arbitrary choice by prioritizing certain values over others,[167] or for excessively limiting the range of acceptable means to address security threats as the state perceives them. The adequacy of such a restrictive approach is further challenged when full information cannot be disclosed for security reasons or when proportionality is strictly applied without having due regard to the diverse set of uncertainties confronting national authorities.

Caution must also be exercised against an intuitive use of proportionality in balancing competing rights and interests,[168] especially where its application is excluded or limited. For example, the prohibition of torture and cruel, inhuman, or degrading treatment is absolute,[169] and therefore in no circumstances can be derogated from on the basis of balancing the rights of individuals against the collective interests of a society, even if those individuals are suspected of posing a danger to national security.[170] The Refugee

167 See Martin Luterán, "The Lost Meaning of Proportionality," in *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, ed. Grant Huscroft, Bradley W. Miller, and Grégoire Webber (Cambridge: Cambridge University Press, 2014) 21, 36–41. But see Timothy Endicott, "Proportionality and Incommensurability," in *Proportionality and the Rule of Law*, 311.

168 See James Spigelman, "The Forgotten Freedom: Freedom from Fear," *International & Comparative Law Quarterly* 59 (2010) 543, 568; Jeremy Waldron, "Security and Liberty: The Imagery of Balance," *Journal of Political Philosophy* 11 (2003) 191, 196–97.

169 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(2), Dec. 10, 1984 (entered into force June 26, 1987) 1465 UNTS 85; ICCPR, *supra* note 6, art. 7.

170 See, for example, *Jamshidian v. Belarus*, Communication No. 2471/2014, UN Doc. CCPR/C/121/D/2471/2014 (Nov. 8, 2017) para. 9.5; *Saadi v. Italy*, Application No. 37201/06, ECtHR (Grand Chamber) Judgment (Feb.

Convention, on the other hand, recognizes an exception to the prohibition of refoulement when there are "reasonable grounds" for regarding a refugee as a danger to national security.[171] In *Zaoui v. Attorney-General*, the Supreme Court of New Zealand dismissed the idea that a refugee could be deported depending on the level of a threat to his or her life or liberty upon return when considered and measured against the level of danger that the individual was reasonably perceived to pose to national security.[172] Instead, the Court adopted a test of arbitrariness, observing that the threat to national security "must be based on reasonable grounds and the threatened harm must be substantial."[173] There is no legal basis under international law for a general proposition that the security of an individual yields to the security of the community.[174]

The test of proportionality, when applied as a corollary to the requirement of necessity, has the effect of limiting the extent of permissible interference with competing rights and interests that are protected under the relevant rule of international law. As such, the same test cannot be applied in such a way as to interfere with other rules of international law, such as sovereign immunity,[175] as a legal mechanism to reconcile normative conflicts.

This limitation also means that the test of proportionality does not operate as an independent legal principle for restraining security measures when there is no legal basis for its application. For example, proportionality does not operate to constrain the scale and effect of collective enforcement measures authorized by the UN Security Council, separate

28, 2008) paras. 138–39; *Chahal v. UK*, Application No. 22414/93, ECtHR (Grand Chamber) Judgment (Nov. 15, 1996) paras. 79–81. See also Taylor, *supra* note 37, 175.

171 Convention Relating to the Status of Refugees art. 33(2), July 28, 1951 (entered into force Apr. 22, 1954) 189 UNTS 137.

172 *Zaoui v. Attorney-General (No. 2)* [2006] 1 NZLR 289, paras. 19–45.

173 Ibid., para. 45. See also *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 29; Andrea Zimmermann and Philipp Wennholz, "Article 33, para. 2," in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, ed. Andreas Zimmermann (Oxford: Oxford University Press, 2011) 1396, 1415; Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion," in *Refugee Protection in International Law*, ed. Erika Feller, Volker Türk and Frances Nicholson (Cambridge: Cambridge University Press, 2009) 87, 135 para. 168; James C. Hathaway and Colin J. Harvey, "Framing Refugee Protection in the New World Disorder," *Cornell International Law Journal* 34 (2001) 257, 294–96.

174 Cf. M. Tulli Ciceronis, *De Legibus*, ed. J. G. F. Powell (Oxford: Oxford University Press, 2006) bk. III §8 ("salus populi suprema lex esto" [the safety of the people should be the supreme law]). Note, however, that the New Zealand court introduced a notion of complementary protection in obiter dicta, requiring the Minister not to certify the continued presence of a person as a threat to national security when there are substantial grounds for believing that, as a result of the deportation, the person would be in danger of being arbitrarily deprived of life or of being subjected to torture or to cruel, inhuman, or degrading treatment or punishment. For a critical commentary, see Rodger Haines, "National Security and *Non-Refoulement* in New Zealand: Commentary on *Zaoui v. Attorney-General (No. 2)*," in *Forced Migration, Human Rights and Security*, ed. Jane McAdam (Portland, OR: Hart Publishing, 2008) 63.

175 See, for example, *Jones v. UK*, Application Nos. 34356/06, 40528/06, ECtHR (Fourth Section) Judgment (Jan. 14, 2014) para. 189; *Al-Adsani v. UK*, Application No. 35763/97, ECtHR (Grand Chamber) Judgment (Nov. 21, 2001) para. 56; *Waite and Kennedy v. Germany*, Application No. 26083/94, ECtHR (Grand Chamber) Judgment (Feb. 18, 1999) paras. 72–73.

to the substantive legal limit imposed under the applicable rules of international law.[176] As will be discussed in chapter 6, the test of proportionality may nonetheless operate as a judicial tool in the application of the relevant rules of international law to the national implementation of collective security measures.

V. Concluding Observations

The recourse to the concept of security, as a means of justifying derogatory measures that interfere with the rights and interests protected under international law, must be supported with relevant and sufficient reasons. This requirement is partly derived from the obligation to interpret and implement treaty provisions in good faith. Yet it is more generally applied as the burden of proof upon the state relying on instrumental rules to seek security justification. It forms part of the general criteria for validating instrumental rules relied upon for justification, enabling judicial assessment of whether the requisite elements of justification are satisfied for the valid application of relevant rules. As such, reasoned arguments are not required for the purposes of reviewing the merits of justification, but rather as the basis for judicial application of relevant criteria to prevent an abuse of security justification.

This chapter has also examined the requirements of necessity and proportionality that are commonly identified in various rules of international law as the requisite elements of justification. The justificatory value of security is generally constrained insofar as the choice of means is limited to what is necessary to realize that value and, by implication, to the extent proportionate to the legitimate objective to be achieved. These requirements are not general principles of international law that impose obligations on states as independent legal constraint on the exercise of their powers. Rather, necessity and proportionality operate as legal standards that are derived, through judicial application, from the requisite elements of justification as variably formulated in different rules of international law for their valid application. The tests of necessity and proportionality have enabled international courts and treaty monitoring bodies to adopt a double standard of review, applying a stricter standard to the need for and the degree of interference with the rights and interests of others than to the political evaluation of security interests and the threats to them.

Nevertheless, there are different standards that adjudicators have adopted in the application of these tests. The diversity in the standard of review may well be attributed

176 Cf. Gardam, *supra* note 142, 201–12 (arguing that the requirement of proportionality can be derived from the purposes and principles of the UN Charter).

to the different structural settings in which judicial authority is exercised or the textual basis upon which the requisite elements of justification are constructed. A stricter application of these tests requires adjudicators to make fact-specific determinations necessary to assess the availability and adequacy of response options. The strict standard involves the risk of making an arbitrary choice and excessively limiting the range of acceptable means to address security threats.

A deferential standard, on the other hand, could amount to an abrogation of judicial authority as a participant in the process of identifying, testing, and challenging reasoned arguments that are put forward as justification for derogatory measures in the imperative interest of security. A balanced approach can be pursued by shifting the focus of judicial inquiry to exculpatory evidence and process-based review, or by limiting the application of a strict standard to cases where fundamental values are at stake.

6

INSTITUTIONALIZING SECURITY

I. Introduction

The empowering value of security, as discussed in chapter 1, section IV, facilitates the development of institutions, which contributes to normalcy and containment of extra-legal response to security threats. In international relations, modern efforts to institutionalize concerted reaction to contemporary security threats have taken a variety of forms including: general international institutions such as the United Nations (UN) for the collective maintenance of international peace and security;[1] specialized expert bodies such as the International Maritime Organization,[2] the World Health Organization (WHO),[3] and the International Atomic Energy Agency;[4] and informal, trans-governmental networks to coordinate policy response to transnational security issues.[5] The operation of these institutions amounts to an exercise of international public authority when it affects the rights and interests of individuals directly.

As the concept of security evolves, these institutions have found the need, or an opportunity, to expand the scope of their activities to meet new security challenges. Some

1 Charter of the United Nations, June 26, 1945 (entered into force Oct. 24, 1945) 59 Stat. 1031, TS No. 993, 1 UNTS XVI. For the historical development of collective security and its legal and institutional aspects, see especially Nicholas Tsagourias and Nigel D. White, *Collective Security: Theory, Law and Practice* (Cambridge: Cambridge University Press, 2013) 3–114.

2 Convention on the International Maritime Organization, Mar. 6, 1948 (entered into force Mar. 17, 1958) 289 UNTS 3, as amended by IMO Doc. A.358(IX) (Nov. 14, 1975) and A.371(X) (Nov. 9, 1977). See, for example, Chie Kojima, "Building International Maritime Security Institutions: Public and Private Initiatives," in *Legal Perspectives on Security Institutions*, ed. Hitoshi Nasu and Kim Rubenstein (Cambridge: Cambridge University Press, 2015) 95–119.

3 Constitution of the World Health Organization, July 22, 1946 (entered into force Apr. 7, 1948) 14 UNTS 185. See, for example, J. Benton Heath, "Global Emergency Power in the Age of Ebola," *Harvard International Law Journal* 57 (2016) 1; Adam Kamradt-Scott, "The World Health Organization, Global Health Security and International Law," in Nasu and Rubenstein, eds., *supra* note 2, 225; Tine Hanrieder and Christian Kreuder-Sonnen, "WHO Decides on the Exception? Securitization and Emergency Governance in Global Health," *Security Dialogue* 45 (2014) 331.

4 Statute of the International Atomic Energy Agency, Oct. 23, 1956 (entered into force July 29, 1957) 8 UST 1093, TIAS No. 3873, 276 UNTS 3. See, for example, Kalman A. Robertson, "The Evolution of the Nuclear Non-Proliferation Regime: The International Atomic Energy Agency and its Legitimacy," in Nasu and Rubenstein, eds., *supra* note 2, 205–24.

5 See Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004) 33–64.

institutions were not originally designed or competent to address security issues but have subsequently adapted through operational activities.[6] Such institutional evolution, driven by the imperative interest of security, has the potential to generate friction with existing rules of international law, disrupting the intricate balance of competing interests that has been sustained within current legal frameworks.

This chapter addresses the normative tension that arises from the expansion of institutional powers and competence in the imperative interest of security, with a focus on international organizations whose operations are governed by international law.[7] In particular, this chapter examines various doctrinal bases for and legal constraints on the expansion of institutional powers and competence, with a view to examining whether the rule of law in international relations extends to the exercise of international public authority.

The rise of international public authority has generated a range of accountability issues, due to hegemonic influences and the lack of democratic processes in decision-making.[8] While an entirely new field of study has been cultivated to address these issues,[9] the focus of this chapter is limited to the judicial approach to the legal constraint on the expansion of institutional powers as a collective response to security threats.

II. Securitization and Institutional Evolution

As autonomous entities capable of operating on the international plane, international institutions have the potential to evolve. Institutional evolution is inherent in operational activities that are carried out in the constantly changing political and legal environment. However, institutional evolution necessarily takes place within an organizational structure and through internal decision-making processes as the institution shapes its response to the changing security environment.[10] The emergence of a new security issue, through

6 See chapter 1.IV.

7 Cf. Draft Articles on the Responsibility of International Organizations art. 2(a), UN Doc. A/66/10 (2011) (defining international organization as "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality").

8 See, for example, Armin von Bogdandy et al., eds., *The Exercise of Public Authority by International Institutions* (Berlin: Springer, 2010); Thomas D. Zweifel, *International Organizations and Democracy: Accountability, Politics, and Power* (Boulder, CO: Lynne Rienner, 2006); Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca, NY: Cornell University Press, 2004); B. S. Chimni, "International Institutions Today: An Imperial Global State in the Making," *European Journal of International Law* 15 (2004) 1; Eric Stein, "International Integration and Democracy: No Love at First Sight," *American Journal of International Law* 95 (2001) 489.

9 See Sabino Cassese, ed., *Research Handbook on Global Administrative Law* (Cheltenham: Edward Elgar, 2016) and literature cited therein.

10 See, for example, Emil J. Kirchner, "Regional and Global Security: Changing Threats and Institutional

the political process of securitization, is not conclusive of the need for institutional evolution or its direction. Rather, the normative impact of securitization on the exercise of institutional powers and competence depends, ultimately, upon the political decision that the institution makes as to how it incorporates an emergency measure within its legal structure.

The UN represents an institutional response to security threats, in which the Security Council has primary responsibility for the maintenance of international peace and security.[11] The scope of the Council's competence has expanded through the interpretation of Charter provisions, with the subsequent practice of the Council playing a significant role when there is general support among member states.[12] Most illustrative in this respect is the Council's practice in expanding the concept of a threat to the peace within the meaning of Article 39 of the Charter, upon which the Council is authorized to exercise its enforcement powers. This concept has been liberally applied to accommodate a wide range of contemporary issues beyond what was envisaged at the inception of the UN, such as the mass influx of asylum seekers, human rights violations, terrorism, piracy, and the proliferation of weapons of mass destruction.[13]

However, institutional expansion is necessarily incremental due to the political process of institutional decision-making. The Security Council is often cautious about setting a precedent in developing its response to a novel issue, emphasizing the exceptional nature of the situation.[14] The Council has also been vigilant in ensuring that the security agenda falls within its competence by identifying a direct link to conflict and stability.[15] Indeed,

Responses," in *Global Security Governance: Competing Perceptions of Security in the Twenty-First Century*, ed. Emil J. Kirchner and James Sperling (Abingdon: Routledge, 2007) 3; Cheryl Shanks, Harold K. Jacobson, and Jeffrey H. Kaplan, "Inertia and Change in the Constellation of International Governmental Organizations, 1981–1992," *International Organization* 50 (1995) 593.

11 UN Charter, *supra* note 1, art. 24. For further analysis of its meaning for the institutional competence of the Security Council, see Anne Peters, "Article 24," in *The Charter of the United Nations: A Commentary*, ed. Bruno Simma et al., 3rd ed. (Oxford: Oxford University Press, 2012) 761, 766; Hitoshi Nasu, "The UN Security Council's Responsibility and the 'Responsibility to Protect'," *Max Planck Yearbook of United Nations Law* 15 (2011) 377, 390–91.

12 Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969 (entered into force Jan. 27, 1980) 1155 UNTS 331 [hereinafter VCLT]. See Nico Krisch, "Introduction to Chapter VII: The General Framework," in Simma et al., eds., *supra* note 11, 1237, 1256. Cf. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 ICJ Rep. 66, 81 para. 27 [hereinafter *Nuclear Weapons (WHO)* advisory opinion]; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, 1998 ICJ Rep. 275, 305–7 paras. 65–67.

13 See generally Nico Krisch, "Article 39," in Simma et al., eds., *supra* note 11, 1272, 1280–91 and literature cited therein.

14 See Inger Österdahl, "The Exception as the Rule: Lawmaking on Force and Human Rights by the UN Security Council," *Journal of Conflict & Security Law* 10 (2005) 1.

15 See Hitoshi Nasu, "The Global Security Agenda: Securitization of Everything?" in *Oxford Handbook of the International Law of Global Security*, ed. Robin Geiß and Nils Melzer (Oxford: Oxford University Press,

despite calls for intervention, the Council did not even agree to place on its agenda the humanitarian crisis that unfolded in Myanmar in the aftermath of the 2008 Cyclone Nargis.[16] Sir Gerald Fitzmaurice cautioned that an expansion of institutional competence based on political compromises and tacit agreement is not presumed to be a convenient substitution for formal amendment.[17] The potential for an expansive interpretation of institutional competence by recourse to subsequent practice is thus limited.

An expansive interpretation of institutional competence must also be distinguished from an expansion of institutional powers exercised in the course of forming collective response to a security threat. The Security Council has exercised its enforcement powers under the aegis of Chapter VII of the Charter, with a variety of measures that are not specifically provided for in the Charter but would otherwise fall within the original scope of its competence.[18] It is plausible to justify such an expansion, for example, as an exercise of general enforcement powers granted under Article 24 of the Charter.[19] Alternatively, the text of a specific provision may be expansively interpreted, as was done with Article 41 of the Charter, which was found to provide the legal basis for establishing the International Criminal Tribunal for the Former Yugoslavia.[20] However, the expansion of institutional powers is subject to various rules of international law that apply to the institution, as will be discussed in the next section.

An arbitrary exercise of institutional authority by securitizing specific situations could have a negative impact on institutional legitimacy. For example, critics have argued that the Council's decisions are tainted with a double standard or privatized in the interest

2021) 37, 42–44; Hitoshi Nasu, "The Place of Human Security in Collective Security," *Journal of Conflict & Security Law* 18 (2013) 95, 105–20.

16 See Rebecca Barber, "The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study," *Journal of Conflict & Security Law* 14 (2009) 3.

17 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16, 282 (Judge Fitzmaurice dissenting opinion). See also Pollux, "The Interpretation of the Charter," *British Year Book of International Law* 23 (1946) 54, 69.

18 See *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, 1962 ICJ Rep. 151, 168. Cf. *Prosecutor v. Tadić*, Case No. ICTY-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) para. 32.

19 See *Namibia* advisory opinion, *supra* note 17, 52 para. 110. See also Nigel D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (Manchester: Manchester University Press, 1997) 63–67; T. 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," *Netherlands Yearbook of International Law* 26 (1995) 33, 68–72. Cf. Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London: Stevens & Sons, 1950) 283. The general powers of the Security Council as an organ of the UN must be distinguished from the implied powers of the UN as an institution, which will be discussed later.

20 *Tadić*, *supra* note 18, para. 35.

of great powers.[21] However, these issues are of little legal significance for an expansive interpretation of the Council's competence. As discussed in chapter 3, the Council's determination under Article 39 of the Charter is widely considered discretionary and, as such, is deemed non-justiciable or preserved due to judicial deference. Rather, as will be discussed below, the focus of legal control over the exercise of collective enforcement powers has shifted toward the legality and validity of measures adopted by the Council (or the national implementation thereof) and away from the political characterization of an issue as such.

The expansion of institutional competence may involve amending the constituent instrument to institutionalize the collective response to a security threat. For example, an expansion of institutional authority achieved through operational practices was codified under the Treaty of the Economic Community of Western African States (ECOWAS).[22] Originally established to accelerate economic growth and development in West Africa, ECOWAS expanded its role in the field of regional peace and security by adopting the Protocol on Non-Aggression in 1978 and the Protocol Relating to Mutual Assistance on Defence Matters in 1981.[23] Nevertheless, its decision to deploy a peacekeeping mission in Liberia on August 24, 1990, was fraught with legal problems due to the lack of a clear legal basis and procedural irregularities.[24] These problems were subsequently addressed when the constituent treaty was amended to authorize ECOWAS to "establish a general peace and security observation system and peace-keeping forces."[25]

Likewise, WHO's competence to address global health security threats has broadened through a series of institutional decisions,[26] including amendments to the International

21 See, for example, Edward C. Luck, *UN Security Council: Practice and Promise* (Abingdon: Routledge, 2006) 23–34; John Quigley, "The 'Privatization' of Security Council Enforcement Action: A Threat to Multilateralism," *Michigan Journal of International Law* 17 (1996) 249; Thomas M. Franck, "Of Gnats and Camels: Is There a Double Standard at the United Nations?" *American Journal of International Law* 78 (1984) 811.

22 Treaty of the Economic Community of Western African States, May 28, 1975 (entered into force June 20, 1975) 1010 UNTS 17.

23 Protocol on Non-Aggression, Apr. 22, 1978 (entered into force May 13, 1982) 1690 UNTS 39; Protocol Relating to Mutual Assistance on Defence Matters, May 29, 1981 (entered into force Sep. 30, 1986) 1690 UNTS 51.

24 For details, see especially Katharina P. Coleman, *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (Cambridge: Cambridge University Press, 2007) 77–80; Georg Nolte, "Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 53 (1993) 603, 614–16.

25 Treaty of the Economic Community of West African States art. 58, July 24, 1993 (entered into force Aug. 23, 1995) 2373 UNTS 233.

26 See, for example, WHA Res. 64.5 "Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and Other Benefits" (May 24, 2011); WHA Res. 54.14 "Global Health Security: Epidemic Alert and Response" (May 21, 2001).

Health Regulations – the overarching legal framework that sets out obligations for its member states to implement in the event of a public health emergency.[27] Originally, WHO had a very limited competence and capacity to monitor a few diseases, such as cholera, plague, and yellow fever, without any independent authority to gather information on outbreaks of such diseases. With the higher incidence of infectious disease that emerged in the 1990s and various shortfalls in the efficacy of disease outbreak control, WHO began developing and testing a range of new mechanisms and procedures, such as the Global Outbreak Alert and Response Network allowing for internet-based information gathering from non-governmental sources.[28] These initiatives, which successfully contained the spread of Severe Acute Respiratory Syndrome in early 2003,[29] led to the codification of WHO's emergency powers in the 2005 revision to the International Health Regulations.[30]

In Europe, the emergence of the sovereign debt crisis in early 2010 prompted several emergency credit facilities within and outside the European Union (EU). Based on the principle of conferred competence,[31] the EU has authority to grant financial assistance when a member state is "in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control."[32] The EU exercised this authority by establishing the European Financial Stabilisation Mechanism in accordance with the conditions and procedures set by Council Regulation 407/2010.[33] However, austerity measures were imposed on Greece and Portugal under the structural adjustment programs that were introduced and monitored by the European Commission, in conjunction with the European Central Bank and the International Monetary Fund. This arrangement raised questions about the reach of Union competences because it was seen as

27 International Health Regulations, July 25, 1969 (entered into force Jan. 1, 1971) WHA Res. 22.46, 764 UNTS 3, as amended by WHA Res. 26.55, May 23, 1973 (entered into force Jan. 1, 1974) 943 UNTS 428, WHA Res. 34.13, May 20, 1981 (entered into force Jan. 1, 1982) 1286 UNTS 390, and WHA Res. 58.3, May 23, 2005 (entered into force June 15, 2007) 2509 UNTS 79.

28 Global Outbreak Alert and Response: Report of a WHO Meeting, WHO/CDS/CSR/2000.3 (Apr. 26–28, 2000).

29 For details, see David P. Fidler, *SARS, Governance and the Globalization of Disease* (Basingstoke: Palgrave Macmillan, 2004) 77–105; David L. Heymann and Guenael Rodier, "SARS: A Global Response to an International Threat," *Brown Journal of World Affairs* 10 (2004) 185, 187–94.

30 International Health Regulations, May 23, 2005 (entered into force June 15, 2007) 2509 UNTS 79. For further analysis, see David P. Fidler and Lawrence O. Gostin, "The New International Health Regulations: An Historical Development for International Law and Public Health," *Journal of Law, Medicine and Ethics* 34 (2006) 85; David P. Fidler, "From International Sanitary Conventions to Global Health Security: The New International Health Regulations," *Chinese Journal of International Law* 4 (2005) 325.

31 Treaty on the Functioning of the European Union (Consolidated Version) art. 2, Dec. 13, 2007 (entered into force Dec. 1, 2009) OJ C 326/47.

32 Ibid., art. 122(2).

33 Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, 2010 OJ L 118/1.

infringing upon the fiscal sovereignty and budgetary autonomy of EU member states.[34] The stability mechanism was subsequently regularized into a permanent body through a formal amendment to the constituent treaty,[35] which was upheld as legally valid in accordance with the allocation of EU competences.[36]

These episodes demonstrate a rupture in the expansion of institutional competence that needed to be rectified by regularizing the institutional authority to adopt new emergency measures. Although the political process of securitization can thus be institutionalized through treaty amendment, it cannot rectify the initial rupture created as a result of taking emergency action outside the original competence. This rupture is not, at least in theory, reconcilable with the basic premise of the law of international institutions because international organizations, as entities created by sovereign states, may only act within their competence to perform the functions bestowed upon them.[37] Any decision or measure adopted without the competence to do so is deemed invalid under the doctrine of ultra vires, as will be discussed in the next section.

There are three doctrinal grounds that have the potential to contain this rupture within the framework of international law. The first is the doctrine of implied powers or its variation, which subscribes to the idea that an international institution has autonomous powers that are not expressly provided for in its constituent instrument. Such powers are derived, by necessary implications, from the constituent instrument as a whole or from some particular provision thereof.[38] This doctrine could be liberally applied where an exercise of institutional powers aims to further the purposes of the institution and is not expressly prohibited by its constituent instrument.[39] However, as the Appeals Chamber of

34 See Christian Kreuder-Sonnen, *Emergency Powers of International Organizations: Between Normalization and Containment* (Oxford: Oxford University Press, 2019) 121–23 and literature cited therein.

35 Council Decision 2011/199/EU of 6 April 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, 2011 OJ L 91/1; Treaty Establishing the European Stability Mechanism, Feb. 2, 2012 (entered into force Sep. 27, 2012).

36 Case C-370/12, *Pringle v. Ireland*, ECLI:EU:C:2012:756, paras. 55–76.

37 *Nuclear Weapons (WHO)* advisory opinion, *supra* note 12, 78 para. 25; *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion, 1927 PCIJ Rep. Series B No. 14, 64 para. 179. See also Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, 6th rev. ed. (Leiden: Brill, 2018) 165–68; Nigel D. White, *The Law of International Organisations*, 3rd ed. (Manchester: Manchester University Press, 2017) 121–29; Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge: Cambridge University Press, 2005) 194–96; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions*, 5th ed. (London: Sweet and Maxwell, 2001) 292–93.

38 *Certain Expenses* advisory opinion, *supra* note 18, 159; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Rep. 174, 182; *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)*, Advisory Opinion, 1926 PCIJ Rep. Series B No. 13, 18.

39 See Schermers and Blokker, *supra* note 37, 197–99; White, *supra* note 37, 132–42; Viljam Engström, *Constructing the Powers of International Institutions* (Leiden: Martinus Nijhoff, 2012) 39–59; Finn Seyersted, *United Nations Force in the Law of Peace and War* (Leiden: Sijthoff, 1966) 154–55.

the International Criminal Tribunal for the Former Yugoslavia observed, "Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization."[40] The doctrine of implied powers or its variation cannot justify an expansion of institutional powers beyond the institution's jurisdictional limits, which define the parameters of its operation.

The second is the doctrine of customary powers, derived from institutional practice when repeated in a consistent manner. The International Court of Justice recognized the potential for institutional evolution through customary practice when it upheld the practice of voluntary abstention by a permanent member of the Security Council as consistent with the requirement of "concurring votes" for the adoption of a resolution.[41] In the *Namibia* advisory opinion, the Court found abundant evidence in Security Council proceedings over a long period of time to show that the practice of voluntary abstention had been consistently and uniformly interpreted as not constituting a bar to the adoption of resolutions.[42] In the *Palestinian Wall* advisory opinion, the Court relied on the customary practice of the General Assembly in finding that the interpretation of Article 12 of the Charter, which purported to limit the Assembly's competence,[43] subsequently evolved.[44]

Such institutional practice must not be confused with subsequent practice as a method of treaty interpretation.[45] The former concerns the organizational operation of the institution or a particular organ thereof, whereas the latter is derived from the conduct of member states.[46] The established practice of an institution forms part of the "rules of

40 *Tadić*, *supra* note 18, para 28. See also Opinion 2/94, 1996 ECR I-1759, paras. 29–30; *Certain Expenses* advisory opinion, *supra* note 18, 230 (Judge Winiarski dissenting opinion); *Reparation* advisory opinion, *supra* note 38, 198 (Judge Hackworth dissenting opinion, cautioning that "[p]owers not expressed cannot freely be implied"); *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 ICJ Rep. 47, 80 (Judge Hackworth dissenting opinion, observing that the doctrine of implied powers "is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers").

41 Under Article 27(3) of the UN Charter, the adoption of a resolution requires an affirmative vote of nine members, including the concurrent votes of the permanent members.

42 *Namibia* advisory opinion, *supra* note 17, 22 para. 22.

43 Article 12 of the Charter reads: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

44 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Rep. 136, 149–50 para. 27. Cf. ibid., 223–24 (Judge Kooijmans separate opinion).

45 VCLT, *supra* note 12, art. 31(3)(b).

46 For further analysis, see Third Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, prepared by Georg Nolte, UN Doc. A/CN.4/683 (Apr. 7, 2015) paras. 43–56; Richard Gardiner, *Treaty Interpretation*, 2nd ed. (Oxford: Oxford University Press, 2015) 281–85 and literature cited therein; Julian Arato, "Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations," *Yale Journal of International Law* 38 (2013) 289, 316–32; José E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005) 87–90; Amerasinghe, *supra* note 37, 51–55.

the organization" that regulate the institutional powers and functions.[47] Yet it is open to debate whether institutional practice could be used to modify institutional competence itself, not merely the manner or circumstances in which institutional powers may be exercised.[48] Moreover, the doctrine based on customary practice within the institution cannot adequately explain an instantaneous expansion of institutional competence in the imperative interest of security.

The third is the doctrine of constitutional interpretation. The international instrument founding an international organization is often described as a "living instrument." Its constitutional status within the institution, so the argument goes, justifies a teleological interpretation.[49] The International Court of Justice has indeed recognized the special character of constituent treaties by virtue of their aim to create new subjects of law endowed with a certain degree of autonomy.[50] However, such characterization of constituent instruments appears to have a limited impact on the expansion of institutional competence. This is because international institutions are typically assigned multiple, and even competing, objectives, as the Court so found in the *Whaling* case regarding the International Whaling Commission.[51]

Despite the subsequent practice of the Commission oriented toward the prohibition of commercial whaling, the Court dismissed the teleological approach as the basis for a restrictive or expansive interpretation of Article VIII of the International Convention for the Regulation of Whaling.[52] This judgment effectively restrained the Commission's competence in regulating whaling activities under a special permit issued by contracting states for the purposes of scientific research.[53] According to Judge Greenwood, the

47 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 2(1)(j), Mar. 21, 1986 (not in force). See also Christopher Peters, "Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?" *Goettingen Journal of International Law* 3 (2011) 617, 626–29.

48 See *Namibia* advisory opinion, *supra* note 17, 282 paras. 93–94 (Judge Fitzmaurice dissenting opinion); *Certain Expenses* advisory opinion, *supra* note 18, 189–90 (Judge Spender separate opinion).

49 See, for example, Daniel Moeckli and Nigel D. White, "Treaties as 'Living Instruments'," in *The Conceptual and Contextual Perspectives on the Modern Law of Treaties*, ed. Michael J. Bowman and Dino Kritsiotis (Cambridge: Cambridge University Press, 2018) 136, 138–43; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden: Martinus Nijhoff, 2009) 129–36; Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Portland, OR: Hart Publishing, 2007) 113–23; Alvarez, *supra* note 46, 100–8; Bruno Simma, "From Bilateralism to Community Interest in International Law," *Recueil des Cours* 250 (1994) 217, 258–62.

50 *Nuclear Weapons (WHO)* advisory opinion, *supra* note 12, 75 para. 19; *Certain Expenses* advisory opinion, *supra* note 18, 157; *Voting Procedures on Questions Relating to Reports and Petitions concerning the Territory of South-West Africa*, Advisory Opinion, 1955 ICJ Rep. 67, 106 (Judge Lauterpacht separate opinion).

51 *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Judgment, 2014 ICJ Rep. 226, 251 para. 56.

52 Ibid., 251–52 paras. 57–58. Cf. ibid., 390–91 paras. 25–27 (Judge Yusuf dissenting opinion).

53 International Convention for the Regulation of Whaling art. VIII(1), Dec. 2, 1946 (entered into force Nov.

adaptation of the Whaling Convention to changing circumstances through amendment is sufficient to accommodate the need to interpret and apply the treaty as a "living instrument."[54] The doctrine of constitutional interpretation cannot circumvent the formal process of amendment to expand institutional competence.

It is thus plausible that none of these doctrines could provide a sufficient legal basis for institutional evolution in the form of an enlarged competence to address a new security threat, especially when the change is instantaneous. The only remaining explanation that validates an expansion of institutional competence in the imperative interest of security is that it is a political fact that warrants judicial recognition. The Permanent Court of International Justice adopted this position when it examined the jurisdiction of the European Commission in the contested sector of the Danube River between Galatz and Brăila, prior to the codification of its scope in Article 6 of the Definitive Statute of the Danube.[55] The issue was whether the pre-existing conditions and limits preserved in the 1921 Danube Statute could have been inferred from the 1883 Treaty of London,[56] which extended the scope of the Commission's authority from Galatz to Brăila without Romania's signature or accession as one of the parties.[57] In light of the divergence of views that had arisen under the Treaty of London, the Court concluded that the Commission's authority and its scope as codified in the Danube Statute referred to the "conditions which existed *in fact* before the war in the contested sector" (emphasis added).[58] In other words, the Court gave judicial recognition to the political fact associated with the expansion of the Commission's authority.

Importantly, this judicial recognition was based on the understanding that the Danube Statute was designed to give effect to the pre-existing political conditions. When general agreement exists among member states, there is unlikely to be any difficulty in recognizing the institutional practice developed out of competence as a political fact.[59] In such a situation, the

10, 1948) 62 Stat. 1716, TIAS No. 1849, 161 UNTS 72. It reads, in relevant part: "Notwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research… and the killing, taking, or treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention."

54 *Whaling* judgment, *supra* note 51, 408 (Judge Greenwood separate opinion).

55 Convention Instituting the Definitive Statute of the Danube art. 6, July 23, 1921 (entered into force Oct. 1, 1922) 26 LNTS 173. It reads: "The authority of the European Commission extends, under the same conditions as before, and without any modification of its existing limits, over the maritime Danube, that is to say, from the Mouths of the river to the point where the authority of the International Commission commences."

56 Treaty between Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey Relative to the Navigation of the Danube, Mar. 10, 1883, 161 CTS 353.

57 *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion, 1927 PCIJ Rep. Series B No. 14, 22–26.

58 Ibid., 28.

59 Compliance with pre-existing norms may facilitate general agreement as shown in the recourse and adherence to

legality of a decision made out of competence will be muted, particularly when the institutional practice constitutes an "emergency amendment" to the constituent instrument for the purposes of immediate and effective response to security threats.

In its *Certain Expenses* advisory opinion, the International Court of Justice hinted at such an idea when it affirmed the Security Council's authority to exercise enforcement powers in the absence of special agreements under Article 43 of the Charter.[60] The Court observed that "it cannot be said that the Charter has left the Security Council impotent in the face of *an emergency situation* when agreements under Article 43 have not been concluded" (emphasis added).[61] If, however, the institutional authority was purportedly exercised outside its competence over objections, its legal validity could well be open to challenge,[62] as will be discussed in the following section.

III. Legal Constraints on Institutional Evolution

International institutions must operate within the bounds of international law and their constituent instrument.[63] Accordingly, any new measure adopted in the exercise of institutional authority to address a security threat is, in theory, regulated under international law. However, judicial attempts to review the legality of an international organization's decisions are fragmented. Indeed, the idea of judicial review in relation to Security Council resolutions has generated extensive literature.[64] The differences in judicial approaches to the review of institutional activities stem primarily from the remit of judicial authority and the scope of discretion granted under the constituent instrument in the exercise of institutional authority.

peacekeeping doctrines in the process of institutional evolution in Africa: Hitoshi Nasu, "Institutional Evolution in Africa and the 'Peace-Keeping Institution'," in Nasu and Rubenstein, eds., *supra* note 2, 167, 186–88.

60 Article 43 of the Charter reads in part: "All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security…." During the early years of the UN, the Security Council was not considered to have the power to undertake military action in the absence of such special agreements: see Leland M. Goodrich, Edvard Hambro and Anne Patricia Simons, *Charter of the United Nations: Commentary and Documents*, 3rd rev. ed. (New York: Columbia University Press, 1969) 315–17, 629–32; Kelsen, *supra* note 19, 756.

61 *Certain Expenses* advisory opinion, *supra* note 18, 167.

62 Ibid., 196 (Judge Spender separate opinion).

63 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980 ICJ Rep. 73, 89–90 [hereinafter *WHO Agreement* advisory opinion]; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, 1960 ICJ Rep. 150, 171 [hereinafter *IMCO* advisory opinion]; *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948 ICJ Rep. 57, 64.

64 See, for example, August Reinisch, "Should Judges Second-Guess the UN Security Council?" *International Organizations Law Review* 6 (2009) 257 and literature cited therein.

As the principal judicial organ of the UN, the International Court of Justice has exercised its judicial authority to examine the validity of institutional decisions and their conformity with international law when the issue arises in the course of resolving the matter properly seized within its jurisdiction.[65] The Court has done so notwithstanding the fact that it is not vested with the general powers of judicial review or appellate jurisdiction.[66] In contrast, views are divided as to whether international tribunals, established by the Security Council as subsidiary bodies, are empowered to review the legality or validity of Council decisions.[67]

The remit of judicial authority must be distinguished from the issue of judicial propriety in reviewing institutional decisions. As examined in chapter 3, certain institutional decisions, such as the Security Council's determination of a threat to the peace under Article 39 of the Charter, are considered discretionary in nature and may thus be found non-justiciable or may remain unchallenged due to the exercise of judicial deference. However, the scope of such discretion can be a subject of dispute, as has been the case with the Security Council's exercise of enforcement powers.[68]

For example, when the legal basis for establishing the International Criminal Tribunal for the Former Yugoslavia was challenged against the indictment of Duško Tadić, the Appeals Chamber of the Tribunal adopted the position that the discretion given to the Council under Chapter VII was not unfettered, but was limited to the measures provided for in Articles 41 and 42 of the Charter.[69] The Special Tribunal for Lebanon, on the other hand, disagreed by holding that the Security Council retained the "sole and exclusive prerogative" and "broad discretion" in determining which measures are appropriate to give

65 See, for example, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 2010 ICJ Rep. 403, 439 para. 85; *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan),* Judgment, 1972 ICJ Rep. 46, 60–61 para. 26; *Namibia* advisory opinion, *supra* note 17, 45 para. 89, 143–44 (Judge Onyeama separate opinion); *IMCO* advisory opinion, *supra* note 63, 171. See also *East Timor (Portugal v. Australia)*, Judgment, 1995 ICJ Rep. 90, 251 para. 86 (Judge Skubiszewski dissenting opinion).

66 See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK)*, Preliminary Objections, 1998 ICJ Rep. 9, 73–81 (Judge Schwebel dissenting opinion); *Certain Expenses* advisory opinion, *supra* note 18, 168; Documents of the United Nations Conference on International Organization (UN Information Organizations, 1945) vol. XII, 48–50, 65–66. See also Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Dordrecht: Martinus Nijhoff, 1993).

67 Compare, for example, *Tadić*, *supra* note 18, paras. 21–22; with *Prosecutor v. Ayyash*, Case No. STL-11-01/PT/AC/AR90.1, Decision on the Defence Appeals against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal" (Oct. 24, 2012) paras. 41–44.

68 Compare, for example, *Namibia* advisory opinion, *supra* note 17, 52 para. 110 (acknowledging the general powers of the Security Council for the maintenance of international peace and security under Article 24 of the Charter beyond those specifically stipulated); with ibid., 293 para. 112 (Judge Fitzmaurice dissenting opinion, interpreting the same clause more narrowly in light of the specific powers laid down in the Charter).

69 *Tadić*, *supra* note 18, para. 32.

effect to its decisions.[70] As Judge Paragwanath observes in his dissent,[71] the latter position does not bode well with the rule of law, leaving doors wide open for an arbitrary exercise of collective enforcement powers.

As evident from the analytical framework of security developed in chapter 1, the exercise of discretion for institutionalizing collective response to a security threat must be distinguished from the use of discretionary powers in identifying a security threat. Even though an international organization may be granted discretion in exercising its powers, the application of discretion to institutional operations is qualitatively different from the essentially political process of securitization. This is because the exercise of institutional powers affects the rights and interests of member states or other entities and individuals.

The discretionary nature of institutional powers, or disagreement over the precise remit of institutional authority, does not necessarily preclude judicial authority to review the exercise of discretion. Rather, it falls squarely within the province of judicial authority to ensure that collective security measures adopted in the exercise of discretionary powers do not exceed the legal limits imposed on the operation of the international organization.[72] The extent to which judicial authority may be asserted to validate such security measures must be determined by reference to the jurisdictional, substantive, and other potential legal limits to the exercise of institutional powers.

A. Jurisdictional Limit

The constituent instrument of an international organization plays a dual function by providing legal grounds for the exercise of institutional powers and, simultaneously, regulating how such powers are to be exercised. The first source of legal limit relates to the notion of vires, which defines the formal attributes of institutional authority. These formal attributes limit the extent to which the international organization, or an organ thereof, is authorized to exercise institutional powers and set the procedural requirements for its decision-making. An institutional act committed ultra vires may nonetheless fall within the competence of the organization or may exceed it.[73] The observation of the jurisdictional

70 *Ayyash*, *supra* note 67, para. 52.

71 bid., Judge Baragwanath separate and partially dissenting opinion paras. 44, 66 and 78. See also Mariya Nikolova and Manuel J. Ventura, "The Special Tribunal for Lebanon Declines to Review UN Security Council Action: Retreating from *Tadić*'s Legacy in the Ayyash Jurisdiction and Legality Decisions," *Journal of International Criminal Justice* 11 (2013) 615, 629–33.

72 See J. E. S. Fawcett, "*Détournement de Pouvoir* by International Organizations," *British Year Book of International Law* 33 (1957) 311.

73 Draft Articles on the Responsibility of International Organizations, with Commentaries, *Yearbook of the International Law Commission* II, pt. 2 (2011) 46, 60.

limit accords with the formal conception of the rule of law, as opposed to the substantive aspect of it, which involves normative judgment upon the actual content of the law.[74] The question is whether the jurisdictional limit is strictly enforced in the event of an emergency where an institutional response is developed without satisfying jurisdictional requirements for the exercise of institutional powers.

The issue of jurisdictional limit is not immune from judicial scrutiny. Indeed, the International Court of Justice found in its 1960 advisory opinion that the members of the Maritime Safety Committee, elected by the Assembly of the Inter-Governmental Maritime Consultative Organization, failed to meet the "largest ship-owning nations" requirement according to the registered tonnage.[75] The constituent instrument of the Organization provided two requirements for electing fourteen members of the Maritime Safety Committee: first, "having an important interest in maritime safety"; and second, not less than eight being "the largest ship-owning nations."[76] In the majority view of the Court, the second requirement was a separate, objective condition that was considered to "have a mandatory and imperative sense and precisely carry out the intention of the framers of the Convention."[77] Dissenting Judges Klaestad and Moreno Quintana, on the other hand, interpreted the second requirement as contingent upon the first requirement, which provided the Assembly a discretionary power or a measure of appreciation.[78] However, the Court failed to clarify the legal consequence of this Organization's decision when it had not followed its internal decision-making rules and requirements.[79]

Two years later, the Court had an opportunity to address this question when the expenditures associated with the operation of UN peacekeeping forces in the Middle East and the Congo were challenged as having failed to constitute "expenses of the Organization" within the meaning of Article 17(2) of the UN Charter.[80] While adopting a teleological approach by interpreting the "expenses of the Organization" with reference

74 For details, see Paul Craig, "Formal and Substantive Conception of the Rule of Law: An Analytical Framework," *Public Law* (1997) 467.

75 *IMCO* advisory opinion, *supra* note 63, 170–71.

76 Convention on the International Maritime Organization art. 28(a), Mar. 6, 1948 (entered into force Mar. 17, 1958) 9 UST 621, TIAS No. 4044, 289 UNTS 3.

77 *IMCO* advisory opinion, *supra* note 63, 165.

78 Ibid., 174–75 (Judge Klaestad dissenting opinion), 177–78 (Judge Moreno Quintana dissenting opinion).

79 For further analysis, see Ebere Osieke, "The Legal Validity of Ultra Vires Decisions of International Organizations," *American Journal of International Law* 77 (1983) 239, 244–45; Dan Ciobanu, *Preliminary Objections: Related to the Jurisdiction of the United Nations Political Organs* (The Hague: Martinus Nijhoff, 1975) 74–75; Elihu Lauterpacht, "The Legal Effect of Illegal Acts of International Organisations," in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (London: Stevens & Sons, 1965) 88, 100–6.

80 *Certain Expenses* advisory opinion, *supra* note 18, 167.

to the purposes of the UN, the Court made two pertinent observations regarding the legal consequence of an institutional act that oversteps the jurisdictional boundary:

i. The institutional act purported to fulfill one of the stated purposes of the institution is presumed not to be ultra vires; and

ii. The institutional act adopted ultra vires due to irregularity as a matter of the internal structure of the institution is not necessarily invalid vis-à-vis third parties.[81]

The first thesis is now established in the Court's jurisprudence, with general agreement that an institutional act is prima facie deemed valid.[82] This thesis is derived from the understanding that international institutions have an inherent power to make an initial determination about the boundaries of their own jurisdiction.[83] However, the presumption is rebuttable in that sovereign states, as members of the institution, retain the right to challenge and protest against the institutional decision as ultra vires.[84] Accordingly, an institutional act purported to address a new security threat in pursuance of the institutional objectives must be deemed valid "unless and until it is rebutted and the contrary position is established."[85]

The second thesis concerns the legal effect of an institutional act committed ultra vires with respect to third parties. In its commentary on the Draft Articles on the Responsibility of International Organizations, the International Law Commission observes that this thesis reflects policy considerations in the interest of third parties so that when their rights are infringed upon, they are not deprived of redress because of procedural irregularities vitiating the institutional act.[86] In other words, an artificial line has been drawn to create a dual legal structure within which the validity of an institutional act does not affect its lawfulness vis-

81 Ibid., 168.

82 *Nuclear Weapons (WHO)* advisory opinion, *supra* note 12, 83 para. 29; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK)*, Provisional Measures, 1992 ICJ Rep. 3, 15 paras. 39–40; *Namibia* advisory opinion, *supra* note 17, 22 para. 20.

83 See "Report of Special Subcommittee of Committee IV/2: The Interpretation of the Charter," in Documents of the United Nations Conference on International Organization (UN Information Organization, 1945) vol. XIII, 831–32 ("In the course of the operation from day to day of the various organs of the Organization, it is inevitable that each organ will interpret each part of the Charter as are applicable to its particular functions").

84 See *Certain Expenses* advisory opinion, *supra* note 18, 196–97 (Judge Spender separate opinion), 304 (Judge Bustamante dissenting opinion); *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980 ICJ Rep. 73, 104 (Judge Gros separate opinion). See also Nicolas Angelet, "Protest against Security Council Decisions," in *International Law: Theory and Practice, Essays in Honour of Eric Suy*, ed. Karel Wellens (The Hague: Martinus Nijhoff, 1998) 277, 279–81; Karl Doebring, "Unlawful Resolutions of the Security Council and their Legal Consequences," *Max Planck Yearbook of United Nations Law* 1 (1997) 91, 92–99.

85 *Certain Expenses* advisory opinion, *supra* note 18, 204 (Judge Fitzmaurice separate opinion).

86 ILC Draft Articles on the Responsibility of International Organizations, *supra* note 73, 61 para. 6.

à-vis third parties whose rights are affected.[87] As such, the second thesis provides little clue as to what an invalid decision means internally for institutional operations,[88] especially when the institutional decision duly complies with all relevant rules of form.[89] Rather, the dual structure enables judicial authority to review the legality of an institutional act without determining its internal validity, as will be discussed in the next section.

The EU Court of Justice has addressed the question of vires in a liberal manner.[90] In preliminary rulings on the successive decisions of the European Central Bank to maintain price stability, the Court assessed the division of competences between the EU and its member states as provided for in Article 119 of the Treaty of the Functioning of the European Union. Under this clause, the Union was to have exclusive competence in the area of monetary policy within the Eurosystem, whereas the adoption of an economic policy was to be based on close coordination with member states. In determining whether the financial measures fell within the area of monetary policy, the EU Court adopted a teleological approach with reference to the objectives of each measure and the instruments provided for achieving them.

In so doing, the Court discounted the indirect effect that these measures might bear upon economic policy.[91] In the context of EU law, the principle of proportionality could have qualified the impact of this liberal interpretation on the scope of institutional competence.[92] However, the EU Court deferred to the European Central Bank by granting it broad discretion in the absence of a manifest error of assessment.[93] The German Constitutional Court challenged this deferential position, criticizing the EU Court's judgment as methodologically "incomprehensible" and failing to test the underlying

87 Note, however, that consent dispensing an international organization with the performance of an obligation must be "valid" in accordance with the rules of the organization concerned: ibid., 71 para. 5. This inconsistent approach would mean that according to the ILC, an institutional act committed with the consent of the party concerned but without authority to do so might remain wrongful.

88 Cf. *Certain Expenses* advisory opinion, *supra* note 18, 222–23 (Judge Morelli separate opinion, considering the legal consequence as absolute nullity but "only in especially serious cases that an act of the Organization could be regarded as invalid"). For further analysis, see R. Y. Jennings, "Nullity and Effectiveness in International Law," in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (London: Stevens & Sons, 1965) 64, 68–71; Ciobanu, *supra* note 79, 76–77; Lauterpacht, *supra* note 79, 112–14.

89 See *Nuclear Weapons (WHO)* advisory opinion, *supra* note 12, 82 para. 29 (observing that "the question whether a resolution has been duly adopted from a procedural point of view and the question whether that resolution has been adopted intra vires are two separate issues").

90 See generally Paul Craig, "The ECJ and Ultra Vires Action: A Conceptual Analysis," *Common Market Law Review* 48 (2011) 395.

91 Case C-493/17, *Weiss*, ECLI:EU:C:2018:1000, paras. 53–70; Case C-62/14, *Gauweiler v. Deutscher Bundestag*, ECLI:EU:C:2015:400, paras. 46–65.

92 Treaty on European Union (Consolidated Version) art. 5, Dec. 13, 2007 (entered into force Dec. 1, 2009) OJ C 326/01.

93 *Weiss*, *supra* note 91, paras. 73, 91–92; *Gauweiler*, *supra* note 91, paras. 68, 75.

assumptions against other indications that militate against the classification of financial measures as monetary policy.[94]

The doctrine of ultra vires, as a rule of law standard relying on the formal attributes of institutional authority, has thus proven to be ineffective in reconciling tensions arising from the expansion of institutional authority.[95] The presumption of validity—in conjunction with various doctrines of powers in support of autonomous institutional evolution, as discussed in section II—leaves little room for judicial intervention in restricting the exercise of institutional powers to the jurisdictional limit as originally envisaged.

Although the presumption is rebuttable upon challenge, the separation of the internal validity and the external legality of an institutional act further reduces opportunities to examine the jurisdictional basis for an exercise of institutional powers as the collective response to a security threat. The principle of proportionality, even if it is applied as in the context of EU law, does not necessarily help articulate the jurisdictional limit when a deferential position is adopted. The doctrine of ultra vires is unlikely to contribute, as one of the general criteria for validating security measures, to the judicial assessment of an expansive exercise of institutional powers in the imperative interest of security.

B. Substantive Limit

The second source of legal limit is derived from substantive obligations binding upon the international organization under international law. In its advisory opinion on the *Interpretation of the Agreement between the WHO and Egypt*, the International Court of Justice referred to three types of obligations incumbent upon international organizations: those under general rules of international law; those derived from their constituent instruments; and those arising from international agreements to which they are party.[96] It is thus plausible to restrict an exercise of institutional powers in response to security threats by applying these substantive rules of international law through judicial determination.

However, the precise boundary of international obligations that constitute substantive rules capable of judicial application can be contentious. The International Law Commission acknowledges that a failure to follow the internal rules of the organization would not

94 Judgment of the Second Senate (May 5, 2020) 2 BvR 859/15, paras. 133–41 (Federal Constitutional Court).

95 See also Gill, *supra* note 19, 110–11; Ciobanu, *supra* note 79, 73–74. Cf. Alexander Orakhelashvili, *Collective Security* (Oxford: Oxford University Press, 2011) 336–43 (identifying several Security Council resolutions as ultra vires).

96 *WHO Agreement* advisory opinion, *supra* note 63, 89–90 para. 37.

necessarily constitute a breach of an international legal obligation.[97] The Commission has otherwise remained silent on the issue of whether the internal rules of an international organization form part of international law.

The extent to which customary international law is binding upon an international organization is also open to debate. This uncertainty is, in part, derived from the indeterminacy of a rule inherent in customary international law and its scope of application. Clarification is thus required on its applicability to international organizations, as illustrated by the UN Secretary-General's Bulletin affirming that the fundamental principles and rules of international humanitarian law apply to UN forces when they are involved in an armed conflict.[98] Further, the legal capacity of an international organization to conclude or accept a treaty may be constrained by the internal rules of the organization,[99] or due to specific requirements under a particular treaty.[100]

The boundary of international obligations has most extensively been debated in the field of international human rights law. The UN is generally considered to be bound to respect human rights, but the sources of this obligation are variously identified.[101] For example, human rights may be considered part of the purposes and principles of the UN, and therefore, the obligation to respect human rights arises as an internal rule of the organization.[102] The UN's obligation to respect human rights has also been justified to the extent that human rights are protected under customary international law.[103] Yet another argument goes that the obligation of an international organization to protect human rights is derived from, and incidental to, human rights treaty obligations that each

97 ILC Draft Articles on the Responsibility of International Organizations, *supra* note 73, 63–64.

98 Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13 (Aug. 6, 1999). See also T. D. Gill et al., eds., *Leuven Manual on the International Law Applicable to Peace Operations* (Cambridge: Cambridge University Press, 2017) r. 6.1.

99 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 6, Mar. 21, 1986 (not in force). See, for example, Opinion 2/13, ECLI:EU:C:2014:2454, paras. 178–258; Opinion 2/94, 1996 ECR I-1759, paras. 34–35 (denying the EU's competence to accede to the European Convention on Human Rights).

100 See, for example, Convention on International Liability for Damage Caused by Space Objects art. XXII(1), Mar. 29, 1972 (entered into force Sep. 1, 1972).

101 See generally Scott Sheeran and Catherine Bevilacqua, "The UN Security Council and International Human Rights Obligations: Towards a Theory of Constraints and Derogation," in *Routledge Handbook of International Human Rights Law*, ed. Scott Sheeran and Nigel Rodley (Abingdon: Routledge, 2014) 371, 382–88 and literature cited therein.

102 See, for example, Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge: Cambridge University Press, 2011) 74–75; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Portland, OR: Hart Publishing, 2004) 198–204.

103 *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy (Jan. 31, 2007) para. 48; *The Netherlands v. Nuhanović*, Case No. 12/03324, Judgment of Supreme Court of the Netherlands (Sep. 6, 2013) para. 3.15.2. See also *Leuven Manual*, *supra* note 98, r. 5.1 para. 3.

member state has accepted.[104] This argument is based on the idea that states cannot evade their obligations under international law by creating an international organization that would not be subject to the same obligations.[105] The exact scope of obligations binding upon the international organization may differ, depending on the reasoning adopted and the rules of human rights law that are considered to be applicable.

The application of international human rights law on any of these grounds necessarily raises questions about human rights limitations and derogation. This issue is central to the balancing of competing individual and community interests in emergency situations.[106] However, unlike national authorities, no limitation or derogation is available to protect the interest of international organizations in complying with human rights standards that they are bound to respect.[107] This is because human rights limitations and the regime of derogation, as examined in chapters 2 and 5, are manifestations of the protective and justificatory value of security reserved within the international agreement for the exercise of sovereign authority. The fundamental premise upon which security measures are employed is different when institutional powers are exercised as the collective response to a security threat, which is based on the empowering value of security.[108] The institution itself has no security interest,[109] against which its obligation to protect and respect human rights must be balanced in the exercise of institutional authority.

The fact that international law does not recognize the security interest of international organizations also diminishes their legal capacity to claim circumstances precluding wrongfulness, such as self-defense and the plea of necessity. For example, international organizations are not entitled to self-defense analogous to the right of national self-defense, which is reserved as a sovereign prerogative under international law.[110] The International Law Commission refers to the right of self-defense in the context of

104 See, for example, Case 4/73, *Nold v. Commission*, 1974 ECR 491, 507; Committee on Economic, Social and Cultural Rights, General Comment No. 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc. E/C.12/1997/8 (Dec. 12, 1997) paras. 8, 11.

105 *Rwamakuba*, *supra* note 103, para. 48; *Waite and Kennedy v. Germany*, Application No. 26083/94, ECtHR (Grand Chamber) Judgment (Feb. 18, 1999) para. 67; *Matthews v. UK*, Application No. 24833/94, ECtHR (Grand Chamber) Judgment (Feb. 18, 1999) para. 32.

106 Dominic McGoldrick, "The Interface between Public Emergency Powers and International Law," *International Journal of Constitutional Law* 2 (2004) 380, 383.

107 Dieter Fleck, "The Law Applicable to Peace Operations," in *The Oxford Handbook of International Law in Armed Conflict*, ed. Andrew Clapham and Paola Gaeta (Oxford: Oxford University Press, 2014) 206, 234–35. Cf. Sheeran and Bevilacqua, *supra* note 101, 396–98.

108 See chapter 1.IV.

109 On the legal regime as a referent object of security, see chapter 1.II.D.

110 For problems with the use of analogy in the work of the International Law Commission on the responsibility of international organizations, see Fernando L. Bordin, *The Analogy between States and International Organizations* (Cambridge: Cambridge University Press, 2019).

peacekeeping as evidence of its availability to international organizations.[111] However, this right is derived from the functional necessity of peacekeeping operations.[112] It is the peacekeepers who operate in the field, not the organization itself, that may assert the right of self-defense to the extent necessary to fulfill their mandate.

Moreover, as discussed previously, an international organization is not entitled to invoke the plea of necessity to protect its own interest.[113] According to the International Law Commission, an international organization may instead invoke the plea of necessity to protect the essential interests of its member states or of the international community as a whole to the extent that the organization is authorized, in accordance with the principle of speciality, to perform such a function.[114]

In the UN context, the Security Council can override or modify human rights obligations, and arguably those under international humanitarian law,[115] by operation of Article 103 of the Charter.[116] Yet this provision stipulates a "conflict of laws" rule, which gives the obligations derived from the Charter an overriding legal effect when UN member states are simultaneously subject to conflicting obligations.[117] The "conflict of laws" rule does not authorize the UN to derogate from its own obligations under international human rights or humanitarian law, whether these are derived from its own purposes and principles or binding under customary international law.

The issue of derogation by international organizations must be distinguished from the Security Council's powers to authorize action in contravention of international law rules that are binding on its member states, such as sovereignty and the principle of non-intervention. The absence of derogatory powers means that the Security Council cannot derogate from its own obligations imposed by the constituent instrument or under customary international law. Together with the varying range of human rights treaty commitments among member states,[118] the absence of derogatory powers militates

111 ILC Draft Articles on the Responsibility of International Organizations, *supra* note 73, 71.
112 For details, see Hitoshi Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter* (Leiden: Martinus Nijhoff, 2009) 180–88.
113 See chapter 1.II.B.
114 ILC Draft Articles on the Responsibility of International Organizations, *supra* note 73, 75 para. 4.
115 *Leuven Manual*, *supra* note 98, r. 5.7 para. 5, r. 6.1 para. 3.
116 Article 103 of the UN Charter reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreements, their obligations under the present Charter shall prevail."
117 See Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, prepared by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (Apr. 13, 2006) paras. 283, 333–35; *Lockerbie* provisional measures, *supra* note 82, 15 para. 39; Marko Milanović, "Norm Conflict in International Law: Whither Human Rights?" *Duke Journal of Comparative and International Law* 20 (2009) 69, 76–79.
118 *Leuven Manual*, *supra* note 98, r. 5.1 para. 2.

against the idea that the institutional response to a security threat must respect a full range of human rights. It is difficult to sustain the position that international organizations are held accountable for human rights violations beyond those generally considered to be peremptory norms and non-derogable,[119] in the absence of an internal rule of the organization or a specific international agreement that suggests otherwise.

These difficulties notwithstanding, an international organization may undertake to protect or respect a wider range of human rights as a matter of policy.[120] Moreover, its member states are not necessarily absolved of their responsibility for violating human rights in breach of their own obligations when implementing the institutional response to a security threat.[121] Indeed, judicial intervention at the national and supra-national levels has grown in relation to the national implementation of collective security decisions made by an international organization.[122]

This development is inevitable as the expansion of institutional authority, in response to a broader range of contemporary security threats,[123] increasingly encroaches upon the rights and interests of individuals and private entities without any judicial remedy at the international level. An accountability gap has emerged because the institutional act cannot be directly challenged before an international judicial body, and international organizations enjoy jurisdictional immunity before national courts.[124]

The judgment of the EU Court of Justice in *Kadi* paved the way for solving this problem.[125] The judgment sparked an extensive debate in literature because the Court's decision, in effect, was perceived to have prioritized the application of the EU law over

119 See Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006) ch. 12.

120 For example, Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces, UN Doc. A/67/775-S/2013/110 (Feb. 25, 2013).

121 See, for example. *Nuhanović*, *supra* note 103, paras. 3.11.2, 3.17.3; *Munaf v. Geren*. 553 U.S. 674, 685–88 (S.Ct. 2008).

122 See, for example, *Sayadi and Vinck v. Belgium*, Communication No. 1472/2006, UN Doc. CCPR/C/94/D/1472/2006 (Oct. 22, 2008) paras. 10.6–10.8, 10.12–10.13 (asserting the Human Rights Committee's competence, and duty, to consider the compatibility with the Covenant of the national implementation of Security Council sanctions and finding a violation of the applicants' freedom of movement and privacy). But see ibid., Individual Opinions (Dissenting) by Wedgwood and Shearer; Marko Milanović, "The Human Rights Committee's Views in *Sayadi v. Belgium*: A Missed Opportunity," *Goettingen Journal of International Law* 1 (2009) 519.

123 See chapter 1.III.

124 See, for example, *Stichting Mothers of Srebrenica v. The Netherlands*, Application No. 65542/12, ECtHR (Grand Chamber) Judgment (June 11, 2013) paras. 141–42, 154; *Waite and Kennedy*, *supra* note 105, para. 63. Note, however, that international organizations are not absolved from bearing responsibility for the damage arising from their act: *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 ICJ Rep. 62, 88–89 para. 66.

125 Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, 2008 ECR I-6351.

the obligations to implement UN Security Council decisions.[126] However, a careful reading of the judgment suggests that instead of prioritizing one legal regime over the other, the Court segregated the legality of the Security Council decision itself from the responsibility arising under the EU law in the course of its implementation. The EU Court states:

> the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.[127]

It is debatable to what extent Security Council Resolution 1267,[128] which imposed the sanction regime at issue, left room for an interpretive choice in the implementation of the sanction.[129] Even if the terms of the resolution clearly did not leave such room, the Court would still have found a breach to the extent that the contested measure infringed upon the principles of liberty, democracy, and respect for fundamental freedoms. In the Court's view, these principles constituted the "very foundations of the Community legal order,"[130] from which no derogation could have been permitted under the EU law.

In *Abdelrazik v. Canada*, Justice Zinn of the Federal Court of Canada found a violation of the applicant's constitutional right to enter Canada, characterizing the sanction regime "as a denial of basic legal remedies and as untenable under the principles of international human rights."[131] Similarly, the Supreme Court of the United Kingdom (UK) declared

126 See, for example, August Reinisch, "Introduction," in *Challenging Acts of International Organizations Before National Courts*, ed. August Reinisch (Oxford: Oxford University Press, 2010) 1 and literature cited at fn. 8; "Forum: Perspectives on the Kadi Case," *International Organizations Law Review* 5 (2008) 323–79.

127 *Kadi and Al Barakaat*, *supra* note 125, para. 298.

128 UNSC Res. 1267 "Afghanistan" (Oct. 15, 1999).

129 Compare, for example, Peter Hilpold, "UN Sanctions Before the ECJ: The Kadi Case," in Reinisch, ed., *supra* note 126, 18, 34; with Erika de Wet, "Holding the United Nations Security Council Accountable for Human Rights Violations Through Domestic and Regional Courts: A Case of 'Be Careful What You Wish For?" in *Sanctions, Accountability and Governance in a Globalised World*, ed. Jeremy Farrall and Kim Rubenstein (Cambridge: Cambridge University Press, 2009) 143, 148.

130 *Kadi and Al Barakaat*, *supra* note 125, paras. 303–304; Cases C-584/10 P, C-593/10 P, and C-595/10 P, *Commission and Council v. Kadi*, ECLI:EU:C:2013:518, paras. 97, 132–34. See also Inger Österdahl, "Human Rights Before Security in Kadi and Beyond," in *International Law and Changing Perceptions of Security*, ed. Jonas Ebbesson et al. (Leiden: Brill, 2014) 327, 330–36; Erika de Wet, "From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions," *Chinese Journal of International Law* 12 (2013) 787, 798–99.

131 *Abdelrazik v. Canada* [2009] FC 580, para. 51. For commentary, see Antonios Tzanakopoulos, "United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in *Abdelrazik v. Canada*," *Journal of International Criminal Justice* 8 (2010) 249.

in *Treasury v. Ahmed* that domestic measures infringing upon fundamental rights for the purposes of implementing Security Council resolutions were ultra vires under the general wording of the United Nations Act 1946 (UK).[132] In *Nada v. Switzerland*, the European Court of Human Rights found a lack of effective remedy in breach of Article 13 of the European Convention on Human Rights, noting further that there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing their own review mechanisms.[133]

In *Al-Dulimi and Montana Management Inc v. Switzerland*, the European Court of Human Rights justified this dualist approach by noting practical consequences of the sanction regime as it interfered with the Convention rights of those affected.[134] The Court observes:

> Being drawn up by bodies whose role is limited to the individual application of political decisions taken by the Security Council, these lists nevertheless reflect choices of which the consequences for the persons concerned may be so weighty that they cannot be implemented without affording the right to appropriate review, which is all the more indispensable as such lists are usually compiled in circumstances of international crises and are based on information sources which tend not to be conducive to the safeguards required by such measures.[135]

The consideration of practical consequences for the individuals concerned "in circumstances of international crises" is significant. This case involved the right to fair trial under Article 6(1) of the European Convention on Human Rights, which would have been derogable in situations of public emergency threatening the life of the nation.[136]

It is evident that these national and regional approaches are heavily influenced by the principle of the rule of law as one of the fundamental components of European public order.[137] As such, caution must be exercised in universally applying them as general criteria. There would be obvious difficulties if these national and regional approaches were

132 *Ahmed v. Her Majesty's Treasury* [2010] 2 AC 534, paras. 75, 81 (Lord Hope, with whom Lord Walker and Lady Hale agreed).

133 *Nada v. Switzerland*, Application No. 10593/08, ECtHR (Grand Chamber) Judgment (Sep. 12, 2012) para. 212.

134 *Al-Dulimi and Montana Management Inc v. Switzerland*, Application No. 5809/08, ECtHR (Grand Chamber) Judgment (June 21, 2016) para. 145.

135 Ibid.

136 Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(2), Nov. 4, 1950 (entered into force Sep. 3, 1953) 213 UNTS 221. See also *Al-Dulimi*, *supra* note 134, Judge Nussberger dissenting opinion, section B-1.

137 *Al-Dulimi*, *supra* note 134, para. 145. On the doctrine of equivalent protection prevailing in the European jurisprudence, see Elisa Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine* (Leiden: Brill, 2017); Verdirame, *supra* note 102, 359–72.

to be universally applied as general criteria for validating the national implementation of collective security measures. These difficulties are not only normative regarding the degree to which international security interests can be accommodated within the framework of national or regional legal order.

There are also practical implications, as the European Court of Human Rights alluded to in *Behrami and Saramati v. France, Germany and Norway*.[138] Although this judgment was controversial for its flawed reasoning,[139] the Court made a pertinent observation as follows:

> Since operations established by UNSC [UN Security Council] Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations.[140]

In other words, the exact legal requirements for the national implementation of collective security measures may vary, depending on the applicability of different rules of international law and the interpretation thereof as relevant to each member state.[141]

This variation involves the risk of divergent assessments of the same obligation, which undermine the credibility of the collective security system.[142] Such divergence would effectively mean granting each state the right to interpret its obligations under collective security measures differently. In practice, states may be inclined to implement their

138 *Behrami v. France and Saramati v. France, Germany and Norway*, Application Nos. 71412/01, 78166/01, Admissibility, ECtHR (Grand Chamber) Decision (May 2, 2007).

139 The controversy arose from the "ultimate authority and control" test adopted for attribution of the conduct (ibid., para. 140), conflating the attribution issue and jurisdictional scope in the other parts of the judgment (ibid., para. 151). For details, see Yohei Okada, "What's Wrong with Behrami and Saramati? Revisiting the Dichotomy between UN Peacekeeping and UN-authorized Operations in Terms of Attribution," *Journal of Conflict and Security Law* 24 (2019) 343 and literature cited therein; Marko Milanović and Tatjana Papić, "As Bad as It Gets: The European Court of Human Rights's 'Behrami and Saramati' Decision and General International Law," *International & Comparative Law Quarterly* 58 (2009) 267.

140 *Behrami and Saramati*, *supra* note 138, para. 149.

141 On diverging interpretations in different jurisdictions, see *R v. Secretary of State for the Home Department; ex parte Adan* [2001] 2 AC 477, 510 (Lord Slynn observing that divergent interpretations are not contrary to the comity of nations or offensive to other states); *Morris v. KLM Royal Dutch Airlines* [2002] 2 AC 628, para. 81 (Lord Hope observing that a discriminating approach is required if national decisions conflict or if there is no clear agreement between contracting parties).

142 See, for example, Machiko Kanetake, "Subsidiarity in the Maintenance of International Peace and Security," *Law and Contemporary Problems* 79 (2016) 165, 185–86; Anthony Aust, "The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioner's View," in *Review of the Security Council by Member States*, ed. Erika de Wet and André Nollkaemper (Cambridge: Intersentia, 2003) 31, 36–38.

obligations more or less uniformly or the resolution itself may be phrased in a way that leaves leeway for member states to tailor implementing measures to local realities. Yet the potential for diverse implementation may even imply their right to disobey the institutional decision made as the collective response to a security threat.

The right of member states to disobey a Security Council decision has been debated in cases where the decision was deemed invalid or challenged as unlawful.[143] However, such an option is generally considered the last resort, and there is a strong presumption against normative conflict in international law.[144] This interpretive presumption operates in tandem with the principle of systemic integration, as provided in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[145]

The doctrine of interpretive presumption finds its application in *Al-Jedda v. UK*.[146] The European Court of Human Rights adopted this doctrine in interpreting the terms of a Security Council resolution in light of the purposes and principles of the UN, of which the respect for human rights and fundamental freedoms formed an essential part. In the relevant part of the judgment, the Court observed:

> there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.[147]

It is clear from this judgment that interpretive presumption is conditioned upon the ambiguity in the terms of a resolution. As such, the doctrine has an obvious limit where a clear provision leaves no ambiguity for a presumptive reading in conformity with applicable human rights standards.[148]

143 See Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford: Oxford University Press, 2011) and literature cited therein.

144 ILC Draft Articles on the Responsibility of International Organizations, *supra* note 73, paras. 37–43. See also Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2009) 240–44.

145 VCLT, *supra* note 12, art. 31(3)(c) (referring to "any relevant rules of international law applicable in the relations between the parties"). See generally Panos Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration* (Leiden: Brill, 2015) and literature cited therein.

146 *Al-Jedda v. UK*, Application No. 27021/08, ECtHR (Grand Chamber) Judgment (July 7, 2011). See also Milanović, *supra* note 117, 98–101.

147 *Al-Jedda*, *supra* note 146, para. 102.

148 Ibid., para. 105.

This limitation of presumption gives rise to difficulties that confronted the same Court in the aforementioned cases, *Nada* and *Al-Dulimi*. These cases concerned sanctions that were imposed in a clear language, leaving no latitude in their implementation. However, in these cases, the doctrine of interpretive presumption was twisted into a reverse presumption that demanded compliance with applicable human rights standards in the absence of clear language contrary to them.[149] The reversal of presumption was based on the *Kadi*-style separation of Security Council decisions from their national implementation. In her dissenting opinion, Judge Nussberger criticized this reasoning as it "turns the obligation to state clearly and explicitly what is intended into an assumption that what is not clearly and explicitly stated is not intended."[150]

Flaws in reverse presumption are evident in the reasoning of the majority judgment in those cases. In *Nada*, the Court employed reverse presumption only in relation to the right to an effective remedy, while finding a breach of the right to privacy for failing to show that all possible measures had been explored to adapt the sanctions regime to the applicant's individual situation without circumventing compliance with it.[151] In *Al-Dulimi*, the Court accepted that the Swiss authorities were unable to assess the appropriateness of the sanctions entailed by the listing of the applicant. On that basis, the Court qualified the extent of fair trial obligations identified as a result of reverse presumption by prescribing, instead, "a duty to ensure that the listing was not arbitrary."[152]

In both cases, these evaluations were developed in the context of proportionality assessment. This suggests that their reasoning should be understood as a judicial application of necessity and proportionality, as discussed in chapter 5, rather than as an application of interpretive presumption. It is plausible to understand the Court's intention accordingly in qualifying the extent of the obligation that competed with the national implementation of a collective security measure.

This perspective brings us back to the line of reasoning originally adopted by the UK House of Lords in *Al-Jedda*. In its unanimous judgment, the House of Lords accepted that the right to liberty was qualified by the legal regime established pursuant

149 *Nada*, *supra* note 133, para. 212; *Al-Dulimi*, *supra* note 134, para. 146. See also Stephan Hollenberg, "The Diverging Approaches of the European Court of Human Rights in the Cases of *Nada* and *Al-Dulimi*," *International & Comparative Law Quarterly* 64 (2015) 445, 452–53; de Wet, *supra* note 130, 806–7.

150 *Al-Dulimi*, *supra* note 134, Judge Nussberger dissenting opinion, section B-1.

151 *Nada*, *supra* note 133, paras. 177–80, 195–98.

152 *Al-Dulimi*, *supra* note 134, para. 150. As a positive assessment from a policy perspective, see Kushtrim Istrefi, "The Policy Effects of the Decisions of the European Courts on Targeted Sanctions," in *How International Law Works in Times of Crisis*, ed. George Ulrich and Ineta Ziemele (Oxford: Oxford University Press, 2019) 93, 99–102.

to Security Council resolutions, in the form of an implicit recognition of security interests as discussed in chapter 2. Lord Bingham, with whom the other Law Lords agreed, reconciled the competing interests by ruling that "the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR [UN Security Council Resolution] 1546 and successive resolutions, but must ensure that the detainee's rights under Article 5 [the right to liberty] are not infringed to any greater extent than is inherent in such detention."[153] The relevant question that could have followed is, therefore, the precise scope of authorization for security detention and the coextensive qualification of the right to liberty.[154] In light of the subsequent development of jurisprudence examined above,[155] the interpretive presumption developed by the European Court of Human Rights in *Al-Jedda* was rather superficial and untenable where there is little interpretive scope. The presumption abrogated the need to balance competing interests by resorting to a legal technicality based on the lack of clear and explicit language.

The alternative approach is to turn the judicial evaluation of conformity by national authorities with their competing legal obligations into a question of proportionality. Indeed, the different judicial approaches to the national implementation of collective security measures can be reframed into judicial criteria, with variation in the requisite level of proportionality. What adjudicators are asking, in essence, is whether the degree of restrictions imposed on individual rights and freedoms is proportionate to the effective implementation of collective security measures. Some judges would regard the degree of restrictions as proportionate in the absence of arbitrariness,[156] while others might not be satisfied unless restrictions were limited to the absolute minimum required to implement the institutional decision.[157] Although the precise standard of review thus differs, there is clear evidence to suggest that the test of proportionality has the potential to operate

153 *R (on the application of Al-Jedda) v. Secretary of State for Defence* [2008] AC 332, para. 39.

154 Ibid., paras. 127–29 (Baroness Hale). See also *Al-Waheed and Mohammed (Serdar) v. Ministry of Defence* [2017] AC 821, 877–86 paras. 84–110 (Lord Sumption), 893–94 paras. 132–34 (Lord Wilson).

155 Note, further, the problematic application of interpretive presumption against international humanitarian law as a valid legal basis for detention in international armed conflict: see *Al-Jedda*, *supra* note 153, para. 107. For critical analysis, see Jelena Pejic, "The European Court of Human Rights' *Al-Jedda* Judgment: The Oversight of International Humanitarian Law," *International Review of the Red Cross* 93 (2011) 837. The Court's approach was subsequently revised in *Hassan v. UK*, Application No. 29750/09, ECtHR (Grand Chamber) Judgment (Sep. 16, 2014) paras. 99–106.

156 See, for example, *Sayadi and Vinck*, *supra* note 122, Individual Opinion of Shearer paras. 5–6 (observing that the state party acted in good faith to discharge its obligations under the UN law); *Al-Dulimi*, *supra* note 134, para. 150.

157 See, for example, *Sayadi and Vinck*, *supra* note 122, Individual Opinion of Rodley para. 8; *Al-Jedda*, *supra* note 153, para. 39 (Lord Bingham).

as one of the general criteria for validating the exercise of institutional powers as the collective response to a security threat.

C. Public Law Analogies

International organizations are increasingly making autonomous decisions that affect not only member states but also individuals. This growing practice has caused extensive debate regarding various accountability issues and mechanisms to address them.[158] The traditional system of political accountability, based on the consent of sovereign states, has been seen as ineffective in regulating the acts of international organizations to address security threats, especially peacekeeping operations and targeted sanctions. In response, a growing literature advocates for regulatory constraints on the exercise of international public authority.[159] This body of literature attempts to address the issue of accountability deficit in the global administrative space – distinct from inter-state relations governed by international law and the domestic regulatory space subject to municipal law – by drawing public law analogies.

The idea of regulating the exercise of international public authority through legal constraints has been explored by identifying various administrative law principles, such as legality, rationality, access to justice, and proportionality as potential standards for the legitimate exercise of institutional powers.[160] Some of these observations are derived from institutional practices and intra-institutional rules,[161] while others rely on the general principles of law in the sense of Article 38(1)(c) of the Statute of the International Court of

158 See generally Gisela Hirschmann, *Accountability in Global Governance: Pluralist Accountability in Global Governance* (Oxford: Oxford University Press, 2020); Stian Øby Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (Cambridge: Cambridge University Press, 2020); Magdalena Pacholska, *Complicity and the Law of International Organizations: Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations* (Cheltenham: Edward Elgar, 2020); Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparation Gap* (Oxford: Oxford University Press, 2017); Jan Wouters et al., eds., *Accountability for Human Rights Violations by International Organisations* (Cambridge: Intersentia, 2010).

159 See, for example, Eyal Benvenisti, *The Law of Global Governance* (Leiden: Brill, 2014) ch. IV; von Bogdandy et al., eds., *supra* note 8; Jochen von Bernstorff, "Procedures of Decision-Making and the Role of Law in International Organizations," *German Law Journal* 9 (2008) 1939; Benedict Kingsbury, Nico Krisch and Richard B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68 (2005) 15.

160 See, for example, Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law," *European Journal of International Law* 20 (2009) 23, 32–33; Daniel C. Esty, "Global Governance at the Supranational Scale: Globalizing Administrative Law," *Yale Law Journal* 115 (2006) 1490, 1524–37.

161 Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge: Cambridge University Press, 2015) 712–39; Benedict Kingsbury, "Global Administrative Law in the Institutional Practice of Global Regulatory Governance," *World Bank Legal Review* 3 (2011) 3; Sabino Cassese, "Administrative Law Without the State? The Challenge of Global Regulation," *New York University Journal of International Law and Politics* 37 (2005) 663.

Justice by drawing an analogy from domestic administrative law principles.[162]

However, the application of domestic administrative law principles by analogy is problematic when it fails to accommodate functional differences in the exercise of international public authority as compared to national authorities. These principles must also be capable of application with a degree of universality that transcends diverse value systems and the pluralistic structure of international legal order.[163] The development of these domestic law principles is part and parcel of the institutional design of domestic legal order. These principles cannot be mechanically transposed to international legal order to address its pathologies through judicial adaptation.[164]

In the context of employment disputes within international organizations, administrative tribunals have developed and applied administrative law principles, such as access to judicial remedy, with reference to various sources of law.[165] In the 1954 *Effect of Awards* advisory opinion, the International Court of Justice stressed the significance of judicial remedy in the administration of an international organization, stating, "It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them."[166] Nevertheless, two years later, the Court set aside the claim of inequality between an international organization and its employees with respect to access to judicial remedy. This inequality of access was not considered "antecedent to the examination of the question" because it did not affect the manner in which the Court handled the case.[167]

162 Eirik Bjorge, "Public Law Sources and Analogies of International Law," *Victoria University of Wellington Law Review* 49 (2018) 533; Imogen Saunders, "General Principles of Law and a Source-Based Approach to the Regulation of International Security Institutions," in Nasu and Rubenstein, eds., *supra* note 2, 123. But see Nico Krisch and Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order," *European Journal of International Law* 17 (2006) 1, 12.

163 Carol Harlow, "Global Administrative Law: The Quest for Principles and Values," *European Journal of International Law* 17 (2006) 187; Nico Krisch, "The Pluralism of Global Administrative Law," *European Journal of International Law* 17 (2006) 247; Kingsbury, Krisch and Stewart, *supra* note 159, 30–31.

164 David Dyzenhaus, "The Rule of (Administrative) Law in International Law," *Law and Contemporary Problems* 68 (2005) 127, 151.

165 See generally Spyridon Flogaitis, "Administrative Law of International Organizations: With Special Regard to the United Nations," *Revue européenne de droit public* 18 (2006) 271; Amerasinghe, *supra* note 37, 288–94; Philip C. Jessup, *Transnational Law* (New Haven, CT: Yale University Press, 1956) 83–93.

166 *Effect of Awards* advisory opinion, *supra* note 40, 57.

167 *Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made against the United Nations Educational Scientific and Cultural Organization*, Advisory Opinion, 1956 ICJ Rep. 77, 85.

Since then, the principle of equality before courts has been established in the jurisprudence of international human rights law, including equal access to appeal procedures, unless distinctions can be justified on objective and reasonable grounds.[168] Yet the General Assembly decided in 1995 to remove appeal procedures for a review of UN Administrative Tribunal decisions because the mechanism was "not proved to be a constructive or useful element in the adjudication of staff disputes within the Organization."[169]

This decision led the Court, in its 2012 advisory opinion, to the finding that there was no "such justification for the provision for review of the Tribunal's decisions which favours the employer to the disadvantage of the staff member."[170] Such deficiencies in the system, in the words of Judge Greenwood, "cannot be allowed to persist into the future… and it is very much to be hoped that a new procedure for challenging judgments of the Tribunal can be put in place within a short period of time."[171]

The reluctance to recognize administrative law principles would likely be stronger when the act of an international organization concerned was an institutionalized collective response to security threats. Public law analogies collapse in emergency situations because the rationale underpinning various administrative law principles does not necessarily cater to the imperative interest of security. Public authorities are often granted discretion so that they can effectively operate under the uncertainties and complexities of a crisis. The exercise of collective enforcement powers by the UN Security Council, for example, could be described as extra-legal emergency measures,[172] an analogy that suggests little scope for extending the rule of law to an

168 HRC, General Comment No. 32: Article 14 (Right to Equality Before Courts and Tribunals and to a Fair Trial), UN Doc. CCPR/C/GC/32 (Aug. 23, 2007) paras. 8–9, 13.

169 UNGA Res. 50/54 "Review of the Procedure Provided for under Article 11 of the Statute of the Administrative Tribunal of the United Nations" (Dec. 11, 1995) preamble.

170 *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, 2012 ICJ Rep. 10, 27 para. 39. This Opinion refers to the review procedure set out in Article XII of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization, which provides: "In any case in which the Executive Board of an international organization… challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice."

171 Ibid., 96 (Judge Greenwood declaration).

172 See, for example, Anna Hood, "The United Nations Security Council's Legislative Phase and the Rise of Emergency International Law-Making," in Nasu and Rubenstein, eds., *supra* note 2, 141; Devon Whittle, "The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action," *European Journal of International Law* 26 (2015) 671; Jared Schott, "Chapter VII As Exception: Security Council Action and the Regulative Ideal of Emergency," *Northwestern Journal of International Human Rights* 6 (2007) 24.

exercise of such powers.[173]

However, judicial control is not the only means of realizing the rule of law over the exercise of international public authority as the collective response to a security threat.[174] As Judge Schwebel observed, many legal systems rely "not upon judicial review but on self-censorship by the organ concerned or by its members or on review by another political organ."[175] Indeed, the conundrum of UN targeted sanctions and de-listing procedures has in practice been addressed through a gradual growth of due process procedures and internal review mechanisms.[176]

The requirement that discretionary powers be legally authorized and regulated does not necessarily mean that the exercise of these powers must be judicially reviewable.[177] The issue of accountability arises because sovereign states bypass traditional accountability mechanisms by enabling international organizations to exercise international public authority on their behalf.[178] As such, a solution to their accountability issues necessarily lies beyond the traditional divide between political accountability and legal responsibility. The accountability gap that arises as a result must be filled by exploring alternative forms of restraint, such as self-regulation and dialogue.[179] In cases where security measures are institutionalized under international law, the development of accountability mechanisms must necessarily form an integral part of the collective response to security threats.

IV. Concluding Observations

With the expansion of the security agenda, various international institutions have found the need, or an opportunity, to expand their institutional competence and powers in the development of collective responses to new security threats. Such institutional evolution has the potential to cause a normative conflict with the well-established principle of

173 Cf. Simon Chesterman, *The UN Security Council and the Rule of Law* (Vienna: Institute for International Law and Justice, 2008); Jeremy M. Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007); Hitoshi Nasu, "Chapter VII Powers and the Rule of Law: The Jurisdictional Limits," *Australian Year Book of International Law* 26 (2007) 87, 99–113.

174 Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933) 386.

175 *Lockerbie* preliminary objections, *supra* note 66, 76.

176 For details, see Kushtrim Istrefi, *European Judicial Responses to Security Council Resolutions: A Consequentialist Assessment* (Leiden: Brill, 2018) 135–72; Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford: Oxford University Press, 2016) ch. 2.

177 Timothy Endicott, "The Reason of the Law," *American Journal of Jurisprudence* 48 (2003) 83, 87–95.

178 See generally Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2007).

179 For the author's earlier work in this regard, see Hitoshi Nasu, "Who Guards the Guardian?: Towards Regulation of the UN Security Council' Chapter VII Powers Through Dialogue," in Farrall and Rubenstein, eds., *supra* note 129, 123; Nasu, *supra* note 112, 262–75.

international law, which requires international organizations to operate within the bounds of international law and their constituent instrument. In practice, however, various legal techniques have been employed to avoid a normative conflict in stretching the institutional competence and powers beyond the parameters originally envisaged. These techniques include:

- an expansive interpretation through subsequent practice when there is general agreement among member states;
- a formal amendment to the constituent treaty, with the potential for judicial recognition of the emergency institutional practice developed out of competence during the intervening period as a political fact;
- the employment of various doctrines in support of autonomous institutional evolution under the law of international institutions; and
- the presumption of validity in the autonomous determination of an international organization about the boundaries of its own jurisdiction.

The availability of these legal techniques has left little room for judicial intervention as a means of restricting the exercise of institutional powers in the imperative interest of security to the jurisdictional limit as originally envisaged.

Judicial means to assess the legality of institutional decisions are also limited. This is partly due to uncertainty regarding the precise boundary of legal obligations applicable to the international organization. In addition, the legal mechanisms for are so under-developed that individuals and private entities whose rights and interests are adversely affected by institutional decisions have little recourse to challenge the exercise of international public authority directly. As a result, the focus of judicial practice has shifted to national and supra-national fora, where the national implementation of collective security decisions has been severed from the act of an international organization itself for the purposes of providing effective remedy.

However, caution must be exercised in adopting these national and supra-national approaches as general criteria for validating security measures. There are normative and practical difficulties with the idea that a full range of human rights protection must be universally prioritized over the collective protection of shared security interests. Legal techniques, such as the doctrine of interpretive presumption, have obvious limits as judicial tools in balancing competing interests. Instead, this chapter has demonstrated that the different judicial approaches to the national implementation of collective security measures can be considered as variations in the requisite level of proportionality.

This finding is akin to the implicit recognition of security interests in judicial practice. As examined in chapter 2, the judicial recognition of security interests has been used to qualify the extent of the obligation through treaty interpretation even without an express reference to the protection of security interests in the text of a treaty. In a similar way, the judicial recognition of collective security interests as a political fact can be used to qualify the extent of the obligation that competes with the national implementation of a collective security measure.

Although the precise standard of review may vary among different forums and even individual adjudicators, the test of proportionality can thus claim its potential as one of the general criteria for validating collective security measures adopted in the exercise of institutional powers. However, this observation involves a degree of speculation because it has not been tested in contexts other than human rights law. On the other hand, judicial reluctance to recognize administrative law principles would likely prevail when the act of an international organization institutionalizes the collective response to a security threat.

CONCLUSION

The principal function of international law, even at its primitive stage as the means of regulating international relations, is the preservation of peace, order and stability.[1] Sir Hersch Lauterpacht, writing in 1933, described international law as "an individualistic system of law… in which the law refuses to interfere with the legally recognized self-assertion and freedom of action of the individual members of the community, even if such conduct is contrary to principles of justice and social solidarity."[2] J. L. Brierly likewise observed that reasonable beings would believe that "order and not chaos is the governing principle of the world in which they have to live."[3] The prevention of violence for the maintenance of peace and security remains the fundamental precept of international law in the twenty-first century.

The preservation of peace and security as the fundamental precept of international law has since then developed and diversified to encompass a greater range of values for survival (as the referent object of security), sources of instability, and means to address security threats. However, security is narrowly conceptualized in the existing body of international law when it is evaluated within the broader framework of analysis set forth in chapter 1. As demonstrated in chapter 2, international law is skewed toward the protection of national security, with a limited and context-specific extension to other security interests, such as the security of person and human security. National security concerns may even be accommodated through judicial interpretation, in cases where a new threat has emerged after the rule's formation, within the confines of legal construction in accordance with the general rule of treaty interpretation.[4]

The selective and distorted concept of security in the normative discourse of international law is inherent in its sovereignty-based structure and sets the condition under which the concept of security is woven into the fabric of international law in its formation. However, tensions emerge when the concept is applied in practice to assume the juridical quality of a security claim in a specific legal context—for example, when the

1 Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933) 72.
2 Ibid., 307.
3 Andrew Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations*, 7th ed. (Oxford: Oxford University Press, 2012) 53.
4 See chapter 2.III.B and chapter 4.

concept manifests as a jurisdictional bar to international adjudication, when the concept is invoked to justify derogatory action, and when an international institution expands its powers and competence in the collective response to a security threat.

The imperative interest of security, on the one hand, demands that discretion be reserved for the exercise of sovereign authority in the realm of national security or for the exercise of collective enforcement powers invested in an international organization. Discretion enables sovereign states and international organizations to exercise their authority flexibly in response to the dynamic shift in social conditions and practices or as their subjective perception of security changes. The public interest of accountability, on the other hand, demands legal control and constraint be imposed on the exercise of such discretion through international adjudication.

The judicial pursuit of objectivity in the legal evaluation of security-based pleas is instrumental to the realization of the rule of law in international relations. Immanuel Kant observed that every state ought to demand its neighbours submit themselves to adjudication "for the sake of its own security."[5] Lon Fuller considered adjudication to be central to a mode of social ordering, describing it as "a device which gives formal and institutional expression to the influence of reasoned argument in human affairs."[6] The effectiveness of international law, as an independent system of governance in international relations, hinges upon the judicial ability to determine the validity of security-based pleas in an objective and consistent manner. Judicial objectivity is critical for the internal and structural integrity of international law as a legal system, irrespective of the legitimacy of adjudicatory outcomes or their enforceability in individual cases.

However, the role of international adjudication for the maintenance of international legal order has not uniformly been appreciated in practice when the imperative interest of security is engaged. In some cases, a dispute settlement body has deferred to national authorities on their evaluation of the factual basis for the adoption of security measures.[7] In other cases, judicial authority was asserted to evaluate evidence for the assessment of a security threat or the necessity of derogatory measures adopted in response to it.[8] The

5 Immanuel Kant, *Perpetual Peace*, trans. M. C. Smith (London: Allen & Unwin, 1903) 129, 134.

6 Lon L. Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth Winston (Portland, OR: Hart Publishing, 2001) 109.

7 See, for example, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 2008 ICJ Rep. 177, 230 para. 148; *Ireland v. UK*, Application No. 5310/71, ECtHR (Plenary) Judgment (Jan. 18, 1978) para. 207.

8 See, for example, *Oil Platforms (Iran v. US)*, Judgment, 2003 ICJ Rep. 161, 195–99 paras. 71–78; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, 1986 ICJ Rep. 14, 122 para. 237, 141 para. 282; *Denmark, Norway, Sweden, and Netherlands v. Greece*, Application Nos. 3321/67, 3322/67,

divergent and inconsistent practices among adjudicators involve the risk of impairing an effective operation of international adjudication as a means of realizing the rule of law in international relations.

The judicial approach to security-based pleas has oscillated between judicial activism and conservatism, pursuing an objective determination of their validity in some cases and deferring to the subjective assessment of political authorities elsewhere. These diverse and inconsistent approaches are not conducive to the identification of general, non-instrumental criteria that validates the subjective evaluation of a security threat or the response thereto regardless of the legal context in which it is brought into effect. The analysis of judicial and quasi-judicial practices in the preceding chapters has nonetheless identified three principles that have the potential for general criteria: the principle of good faith, the principle of legality, and the principle of proportionality.

General Criterion 1: The Principle of Good Faith

The case can be made that an exercise of discretion in defense of a security interest must be made bona fide for it to be legally valid. This criterion implies that any discretion granted under the rule of international law must be exercised genuinely in pursuit of the security interest which the discretion is designed to protect and not in a way that is calculated to cause any unreasonable prejudice to other legitimate interests protected under international law.[9] It is an application of the principle of good faith,[10] as a general principle of law, to the exercise of discretion in the same way that its application to the exercise of rights and powers underpins the doctrines of abuse of rights and *détournement de pouvoir*.

Abuse of rights, according to Lauterpacht, must "exist in the background in any system of administration of justice in which courts are not purely mechanical agencies."[11] In his view, judicial intervention is necessary to determine when the exercise of a legal right "has

3323/67, 3344/67, ECHR Report (May 31, 1968) 72–76 paras. 154–65, 100 paras. 206–7, reprinted in *Yearbook of the European Convention on Human Rights 1969: The Greek Case* (The Hague: Martinus Nijhoff, 1972).

9 Cf. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953) 131–32.

10 See, for example, *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Judgment, 2014 ICJ Rep. 226, 422 para. 9 (Judge Xue separate opinion); *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948 ICJ Rep. 57, 80 (Judge Azevedo individual opinion). See also Ulf Linderfalk, "Good Faith and the Exercise of Treaty-Based Discretionary Powers," in *Exceptions in International Law*, ed. Lorand Bartels and Federica Paddeu (Oxford: Oxford University Press, 2020) 259–73; Robert Kolb, *Good Faith in International Law* (Portland, OR: Hart Publishing, 2017) 6.

11 Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958) 165.

degenerated into abuse of a right" by drawing the line in each case.[12] In practice, abuse of rights has been invoked in the decisions of international courts and tribunals.[13] Nevertheless, the extent to which abuse of rights might be judicially endorsed as an independent standard of review remains unsettled. This is, in part, because this doctrine has increasingly become redundant as a greater range of rights are formulated in qualified terms with specific requirements.[14]

As examined in chapter 2, national security interests are afforded legal protection with various formulations. There is little need to rely on the assessment of bona fides in cases where the legal protection of national security is subject to specific restrictions. For example, the legality of military action in the exercise of the right of self-defense is determined in accordance with its requisite conditions, such as the gravity threshold of an armed attack, necessity, and proportionality, rather than whether the right is arbitrarily exercised. On the other hand, the assessment of bona fides might be the only means of ensuring legal control in cases where states reserve to themselves the exclusive competence or discretion to determine what constitutes a threat to national security.

Judicial practice in this area is fluctuated, with divergent positions adopted in regard to the legal effect of automatic reservations and self-judging clauses.[15] At any rate, the assessment of bona fides must be distinguished from abuse of rights, which brings good faith into operation as a regulatory factor in reconciling the exercise of conflicting rights.[16] The judicial assessment of bona fides in the exercise of discretion is more akin to judicial review in national legal systems as a means of ensuring that, in the public interest of accountability, discretion be exercised reasonably, honestly, in conformity with the object of the law, and with due regard to the interests of others.[17] The powers of judicial review, comparable to those of national courts, are not inherent in the judicial function of international courts and tribunals. As such, the use of judicial authority to assess the bona fide exercise of discretion necessarily implies a paradigmatic shift in the constitutional relationship between sovereign states and international judicial or treaty monitoring institutions.[18]

12 Ibid., 162.
13 For a survey of relevant jurisprudence, see Michael Byers, "Abuse of Rights: An Old Principle, A New Age," *McGill Law Journal* 47 (2002) 389, 399–402.
14 Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law*, 9th ed. (Oxford: Oxford University Press, 1992) vol. I, 407–408; George Schwarzenberger, "Uses and Abuses of the "Abuse of Rights" in International Law," *Transactions of the Grotius Society* 42 (1956) 147, 148–67.
15 See chapter 3.II.
16 Schwarzenberger, *supra* note 14, 153–54, 165–66.
17 Cheng, *supra* note 9, 134.
18 See chapter 3.III.

There is also an inherent difficulty with the finding of mala fides because of the presumption in favor of good faith, with the burden of proof resting with the party making an allegation of abuse or misuse.[19] In general, international judicial and treaty monitoring institutions are inclined to adopt a deferential approach to national authorities on their subjective evaluation of facts concerning the existence and nature of security threats.[20] Judicial deference may be seen as appropriate due to the lack of expertise or the lack of sufficient evidence when it is found to be an insurmountable obstacle to the proper administration of justice.[21] Deferring to national authorities does not mean that they enjoy unlimited discretion in choosing measures to address a threat to national security as they see it. Nonetheless, the judicial ability to assess the bona fides in the choice of security measures is compromised in the absence of complete and sufficient information.

A possible solution developed in the practice of international adjudication is to require national authorities to provide relevant and sufficient reasons for adopting a particular security measure.[22] This solution, in effect, shifts the burden of proof to national authorities as an integral element of justification for derogatory measures. The burden of proof has also enabled adjudicators to impose procedural safeguards against the arbitrary exercise of discretion. Its role for a bona fide assessment is promising as an objective means of ensuring that the exercise of discretion is capable of reasoned justification. However, there must be a degree of uniformity in the judicial approach to the standards of evidence required to establish the factual basis for justifying security measures.

Furthermore, judicial restraint may be exercised when discretionary powers are granted under the constituent instrument of an international organization.[23] The discretionary nature of institutional powers itself does not necessarily preclude judicial scrutiny, even in cases where the precise remit of those powers is undefined. However, adjudicators may adopt a deferential approach to the factual findings and political judgements of the organization with a view to avoiding a position of confrontation.[24]

19 *Free Zones of Upper Savoy and District of Gex (France v. Switzerland)*, Judgment, 1932 PCIJ Rep. Series A/B No. 46, 167; *German Interests in Polish Upper Silesia (Germany v. Poland)*, Merits, 1926 PCIJ Rep. Series A No. 7, 30.

20 Cf. Andrei Mamolea, "Good Faith Review," in *Deference in International Courts and Tribunals*, ed. Lukasz Gruszczynski, and Wouter Werner (Oxford: Oxford University Press, 2014) 74, 82–84.

21 See chapter 3.IV.C and 3.IV.D.

22 See chapter 5.II.

23 See chapter 3.III, chapter 3.IV, and chapter 6.III.

24 See chapter 3.IV.B.

Various legal techniques have been employed to avoid a normative conflict arising from the expansion of institutional competence and powers in the imperative interest of security when it goes beyond the parameters originally envisaged.[25] The doctrine of ultra vires, designed to impose jurisdictional limits on the operation of an international organization according to the formal attributes of institutional authority, has not proven to be effective as a rule of law standard.[26] The application of domestic administrative law principles is also problematic as an attempt to regulate the exercise of international public authority due to various flaws.[27]

The idea of judicial control against an arbitrary exercise of institutional powers is not alien to international adjudication.[28] Yet there is insufficient jurisprudence to conclude that the doctrine of *détournement de pouvoir*, as an application of the principle of good faith, has been established to regulate the exercise of institutional powers. The focus of judicial approach has instead shifted to the assessment of legality, with the growth of judicial intervention at the national and supra-national level in relation to the national implementation of collective security decisions made by an international organization.[29]

Insofar as international public authority is concerned, its exercise through the delegation of sovereign powers must synchronize with the development of accountability mechanisms, which form an integral part of the institutional response to security threats. It remains to be seen whether and to what extent the principle of good faith, as one of the general criteria for validating security measures, may help develop judicial or quasi-judicial accountability mechanisms to regulate the exercise of international public authority in cases where security measures are institutionalized under international law.

General Criterion 2: The Principle of Legality

The second candidate for general criteria is the principle of legality. Even though national authorities and collective security institutions may enjoy the exclusive competence or discretion to determine what constitutes a threat to their security, it does not follow that they have unlimited discretion in choosing the means to address

25 See chapter 6.II.
26 See chapter 6.III.A.
27 See chapter 6.III.C.
28 See, for example, *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, 1962 ICJ Rep. 151, 220 (Judge Morelli separate opinion); *Prosecutor v. Tadić*, Case No. ICTY-94-1-T, Decision on the Defence Motion on Jurisdiction (Aug. 10, 1995) para. 15.
29 See chapter 6.III.B.

it as they deem appropriate. Judicial deference to the decision of political authorities in recognition of the imperative interest of security does not release them from the need to defend the lawfulness of a particular measure in the implementation of that decision. The objective assessment of such legal defense rests legitimately within the province of judicial authority as long as its jurisdiction is established to entertain the case.

The idea that political matters are incapable of judicial determination has been refuted on many occasions in international adjudication. Even though such an idea is widely observed in national legal systems, caution must be exercised in drawing on domestic law doctrines due to the pluralistic structure of global legal order. The idea that political questions are not subject to any legal restrictions has received little support in international law. Nor does any structural reason exist to preclude certain questions of international law from judicial determination in the imperative interest of security. One of the fundamental tenets in any legal system is that "no court may refrain from giving judgment on the grounds that the law is silent or obscure."[30]

Nonetheless, the exercise of judicial function in international adjudication is inherently limited. Indeed, the finding of non-justiciability could emerge in cases where there is a clear agreement among states that a certain matter is precluded from judicial intervention or, instead, where the subject of the dispute is not, in principle, regulated by international law but falls within the jurisdiction of national authorities.[31] Judicial discretion may also be exercised, for example, to abstain from ruling on a general question in the abstract or to avoid putting the entire international legal system into jeopardy.[32] Within these limits, however, adjudicators are expected to be capable of making an objective determination in the exercise of their judicial or quasi-judicial function within the purview of international law.

One of the challenges posed to the principle of legality in the adjudication of security-based pleas is the issue of indeterminacy.[33] This is because the dynamic evolution of threat perceptions could create a normative gap between the lawful standard of behavior that the state considers obtaining under customary international law and the judicial standard that has developed in the process of an identification

30 In re *Desgranges*, Judgment No. 11 of Administrative Tribunal of the International Labour Organization (Aug. 12, 1953) 20 ILR 523, 530.
31 See chapter 3.III.
32 See chapter 3.IV.A and 3.IV.B.
33 See chapter 1.V.

of the rule.[34] The legal protection of national security interests in the form of a general exception clause or with the use of discretionary language in the treaty also leaves room for divergent interpretations among states as their threat perceptions change.[35] However, this indeterminacy arising from the lack of clarity and certainty in the formulation of a rule itself is not necessarily inimical to the rule of law as the normative basis for constraining the exercise of discretion. The principle of legality operates in the process of international adjudication to address the issue of indeterminacy, with the interpretation and application of the rule in fact-specific contexts.

The principle of legality is a procedural requirement that any restriction upon freedom must be provided by law with sufficient precision, so that the conduct of a person or an entity can be regulated in a foreseeable manner. Although it is often associated with criminal justice,[36] there is a potential for its application to the regulation of sovereign authority as an artifact of international law.[37] This potential arises from the distillation of state practice, through international adjudication, into an authoritative statement of customary international law or from the legal construction of security clauses found in various treaties in accordance with the general rule of treaty interpretation. Despite the lack of a clear definition,[38] the concept of security and associated terms in the text of a treaty are subject to legal construction. That imposes a constraint on the extent to which subjective threat perceptions may dictate the interpretive outcome. Although there is no reason to assume that a security clause should be restrictively construed,[39] various interpretive methods reduce the impact of conceptual evolution in the ordinary meaning of security terms as the basis for their legal construction.[40]

That being said, the judicial pursuit of objectivity as a means of upholding the principle of legality has been fraught with problems due to different approaches to the legal construction of security. While in some cases an originalist position was

34 See chapter 2.II.
35 See chapter 2.III.A.
36 See, for example, Talita de Souza Dias, "Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?" *Human Rights Law Review* 19 (2019) 649; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009).
37 See, for example, Jeremy Waldron, "The Rule of International Law," *Harvard Journal of Law and Public Policy* 30 (2006) 15, 21–24; Arthur Watts, "The International Rule of Law," *German Yearbook of International Law* 36 (1993) 15, 27–30.
38 See chapter 4.II.A.
39 See chapter 4.III.
40 See chapter 4.IV.

adopted with an emphasis on textual constraints, there are other cases in which a more flexible interpretation allowed for accommodating the subjective perception of security that had emerged in state practice, or a margin of appreciation was used as an interpretive tool.[41] These divergent approaches in the practice of international adjudication are not conducive to ensuring an objective application of the law. The lack of a coherent approach creates problems with foreseeability because it is difficult to prescribe the circumstances in which the security clause may legitimately be invoked with sufficient clarity.

These problems with certainty and foreseeability can be circumvented by shifting the focus of inquiry to explicit and implicit conditions attached to the exercise of sovereign authority in the interest of national security. This is because the valid claim of security requires pertinent evidence and explanation so that a third party can make an objective assessment as to whether the requisite conditions are satisfied. The provision of evidence and explanation has indeed been recognized as an important procedural safeguard against an arbitrary exercise of powers.[42] However, no universal standard of proof has been accepted in international adjudication to establish the factual basis upon which security measures are to be justified. Instead, judicial discretion has often been exercised to ensure an effective administration of justice while recognizing the practical limits of judicial oversight, such as the lack of expertise or power to procure evidence.

In theory, the principle of legality should equally guide adjudicators in determining the legality and validity of a security measure adopted by an international organization in the exercise of its institutional authority. In practice, however, it has not proven to be effective in restricting the exercise of institutional powers to the jurisdictional limit as originally envisaged.[43] The reluctance on the part of adjudicators to strictly apply the principle of legality is derived from their concern about legal uncertainty, which results from the denial of any legal effect when the institutional act is deemed ultra vires or otherwise unlawful. In the words of Judge Morelli, legal certainty "would be very seriously jeopardized if the validity of a legal act were at all times open to challenge on the ground of its non-conformity with the legal rule."[44] Various doctrines of powers and the presumption of validity in support of autonomous institutional evolution have thus been employed in favor of ensuring legal certainty when the collective response to a security threat is institutionalized.

41 See chapter 4.II.B.
42 See chapter 5.II.
43 See chapter 6.II and 6.III.A.
44 *Certain Expenses* advisory opinion, *supra* note 28, 221 (Judge Morelli separate opinion).

General Criterion 3: The Principle of Proportionality

Proportionality is the third candidate that emerges from the practice of international adjudication. Unlike the requirement of necessity, proportionality is not necessarily expressed as a condition for the recourse to security measures. Rather, the principle of proportionality emanates from the justificatory value of security as a corollary to the general restraint upon the choice of means to protect security interests. Proportionality operates as a legal standard to limit the degree of interference with competing rights and interests that are protected under international law, rather than dictating the choice of means based on the material link with the need to address a specific threat to security.

The reason why the principle of proportionality, rather than the oft-used requirement of necessity, forms part of general criteria for validating security claims is twofold. First, proportionality is amenable to coherent application as the means of balancing competing rights and interests, with flexible adjustment of the standard for various technical reasons.[45] The divergence in the application of the test tends to be an outcome of the appreciation of different legal and structural contexts in which the test is applied, rather than indicating a lack of uniformity. By contrast, the requirement of necessity has in practice been applied with varying degrees of strictness and judicial deference without a coherent explanation for discrepancy.[46]

Second, judicial deference loses its force as the focus of inquiry moves away from the determination of a security threat on which political evaluations reign supreme.[47] The assessment of proportionality is necessarily contextual, requiring an exercise of judgement regarding the availability and adequacy of various means to achieve a specific policy goal in the process of judicial reasoning. This pragmatic focus on factual context makes it suited for judicial intervention due to institutional expertise in making fact-specific determinations.

As such, proportionality is a legitimate exercise of judicial authority as a means of imposing an effective legal constraint. On the other hand, there is room for subjectivity in the choice of means, especially when there are few procedural or substantive conditions prescribed for delimiting the scope of restrictions. Proportionality is more capable of objective determination with a view to keeping the exercise of discretion within reason.

45 See chapter 5.IV.

46 See chapter 5.III.

47 Cf. Andrew T. Guzman, "Determining the Appropriate Standard of Review in WTO Disputes," *Cornell International Law Journal* 42 (2009) 45, 69–72; Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law," *European Journal of International Law* 16 (2006) 907, 913–14.

Further, proportionality finds its application in many countries despite differences in national legal systems and traditions. With a global move toward the culture of justification, it is increasingly recognized as a "universal criterion of constitutionality."[48] The pervasiveness of this phenomenon indicates a universal appeal of proportionality as a judicial tool, due to its capacity for encouraging participatory deliberation through structured inquiries in a transparent and flexible manner.[49] Indeed, as discussed in chapter 6, the test of proportionality has the potential to rationalize judicial intervention in the national implementation of collective security decisions, while unravelling different standards of review at play.

Nevertheless, the value of proportionality as a legal test has been questioned in different areas of law. Proportionality can be seen as an illusory attempt to infuse objectivity into subjective appreciation in adjudication.[50] Criticisms can also be levelled at judicial decisions for making an arbitrary choice by prioritizing certain values over others.[51] Ambiguity abounds in the intuitive use of proportionality as a legal mechanism for balancing competing rights and interests, making it difficult to apply with consistency.

However, the principle of proportionality operates as a judicial tool to limit the extent of permissive interference with competing rights or interests protected under international law, rather than as an independent legal principle for resolving normative conflicts. As such, proportionality has no room to play in cases where the conflicting value is absolute. The test of proportionality is also adjustable to a deferential standard (for example, whether a reasonable relationship between the legitimate aim pursued and the means employed is established or whether the degree of interference is not manifestly unreasonable) when the conflicting value is not fundamental or lacks universal acceptance. The discrepancy in the assessment of proportionality can only be addressed through the adjudication of individual cases. As such, adjudicators must

48 See, for example, Moshe Cohen-Eliya and Iddo Porat, "Proportionality and the Culture of Justification," *American Journal of Comparative Law* 59 (2011) 463, 474–82; David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) 159–63.

49 Vicky C. Jackson, "Being Proportional about Proportionality: Book Review of *The Ultimate Rule of Law* by David M. Beatty," *Constitutional Commentary* 21 (2004) 803, 829–42.

50 See, for example, Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" *International Journal of Constitutional Rights* 7 (2009) 468; Jonathan F. Keiler, "The End of Proportionality," *Parameters* (2009) 53.

51 See Martin Luterán, "The Lost Meaning of Proportionality," in *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, ed. Grant Huscroft, Bradley W. Miller, and Grégoire Webber (Cambridge: Cambridge University Press, 2014) 21, 36–41. But see Timothy Endicott, "Proportionality and Incommensurability," in *Proportionality and the Rule of Law*, 311.

continuously search for ways to accommodate various case-specific factors, such as cultural diversity underpinning competing values and a wide range of uncertainties confronting states.

* * *

These three principles have the potential to operate as judicial criteria, according to which the validity of security claims can be evaluated in the legal realm. These criteria are capable of universal application to any legal context in which the concept of security is invoked and irrespective of any practical, structural, or institutional constraints that may be imposed on international adjudication. The application of these criteria allows adjudicators to adopt a deferential approach in the exercise of judicial discretion when, for example, they are assigned a subsidiary role as an international supervisory organ or relevant information is withheld for security reasons. There should be no room for the finding of non-justiciability as long as the concept of security is invoked within the purview of international law.

As this stage, however, these principles only have the potential quality to offer as universal criteria. These principles for validating security claims are not equivalent to, or derived from, natural law theories that Alfred Verdross and other modern scholars envisaged to exist.[52] Nor are they presented as deontological principles that are inherently embedded in various rules of international law. Rather, these criteria are derived from the epistemic virtues of judicial decision-making gathered through the practice of international adjudication. As such, the universal acceptability of these criteria depends on the level of integrity and uniformity with which adjudicators apply them in practice.

These epistemic virtues have emerged from the experience of constant struggle that each adjudicator has experienced in developing sufficient knowledge of security concerns—as perceived by political authorities—for adjudication on the legality of derogatory measures. The outcome of adjudication in each case has necessarily been influenced by the adjudicator's personal beliefs, intellectual virtues, and own experiences. However, the rule of law would hardly materialize in international relations if adjudicators kept relying on their own individual methodologies without developing a

52 See, for example, Alfred Verdross and Heribert Franz Koeck, "Natural Law: The Tradition of Universal Reasons and Authority," in *The Structure and Process of International Law*, ed. Ronald St. J. MacDonald and Douglas M. Johnston (Dordrecht: Martinus Nijhoff, 1983) 17.

common understanding of viable legal approaches to the assessment of security claims in an effort to reduce discrepancy and arbitrariness in their judicial reasoning.

The systematic understanding of the law and disciplined self-restraint on the part of those authorized to adjudicate is the fundamental basis for sustaining confidence in the system of international adjudication. There are reasons to be concerned about degrading confidence resulting from perceived failures in the administration of international justice systems.[53] Judicial activism, for example, by intervening with factual or political evaluations or by devising a judicial doctrine such as interpretive presumption, runs the risk of undermining the confidence on the part of states that engage with the system. The same risk is involved when the conceptual expansion in the political discourse of security is relied upon to incorporate, for example, the idea of human security and non-traditional security, into judicial reasoning without a legal basis for it.

The potential of general criteria as identified above must therefore be nurtured with studied restraint. In particular, careful consideration must be given to normative implications for the constitutional relationship between sovereign states and international judicial or treaty monitoring institutions. The application of these criteria as a means of delineating legally valid recourse to the concept of security would amount to an exercise of judicial review powers, comparable to those of national courts, without a constitutional foundation for it. An objective assessment of security claims essentially constitutes a judicial attempt to impose the rule of law over the instrumental use of international law to rationalize security policy pursued by states.

In so doing, international judicial and treaty monitoring institutions do not merely assume the authority to settle international disputes by adjudicating the rights and obligations of each party. It also entails an exercise of judicial authority to review the legal validity of security measures that states are entitled to adopt under international law. Such regulatory function cannot be presumed to be inherent in judicial authority. It involves a paradigmatic shift in the constitutional structure of international law to presume that international courts and tribunals have overriding powers to conduct such judicial review against the action or decision of a state which is reserved to itself under international law for the preservation of its own security interests.

In order to operate as an instrument to manage international relations, international

53 See, for example, A. Mark Weisburd, *Failings of the International Court of Justice* (Oxford: Oxford University Press, 2016); W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Durham, NC: Duke University Press, 1992).

law must be capable of guiding state behavior no matter how inefficient it might be. International adjudication is less likely to be viewed as a credible option for dispute settlement when the security interest of a state is at stake. The universal acceptability of general criteria is ultimately dependent on whether international judicial and treaty monitoring institutions can convince states that their security interests are better pursued by regulating the process and impact of securitization in the system of international adjudication, with a uniform application of these criteria.

The concept of security is inextricably woven into the fabric of international law. The rule of law demands readiness among states to embrace a matrix of general criteria built around it through the process of international adjudication.

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