

Human Rights, Positive Obligations and the

Development of a Right to Security

by

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**A thesis submitted in partial fulfilment for the
requirements for the degree of PhD (by Published Work)**

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Abstract

In this PhD by Published Work the author is advocating a right to security broadly grounded in 'communitarian' ideals. The 'absolutist' state theory of, say, Thomas Hobbes, to protect society from collapse, pays too little attention to genuine fears that the state can actually pose a threat to security; in giving the state significant powers of security, it can undermine the very values one is seeking to secure; and is there actual evidence that substantial gains in state power over the last fifteen years or so, since '9/11', for example, have actually made nations more safe? But liberalism, at least the form suggested by, say, Ronald Dworkin, in being unprepared to accept a balance between rights and security, seemingly overlooks threats that undermine the very freedoms liberals like Dworkin wish to protect. And the liberal philosophy, at least its John Locke traditions, of absolute freedoms is too individualistic and attaches too little weight to responsibilities. Plotting a course, therefore, through these criticisms of state absolutism and liberalism one therefore 'finds' communitarianism as a philosophy to support a right to security. The author's 'communitarian', right to security is based on an expansive interpretation of 'positive' duties of the state, to protect, say, the rights to life of individuals from violations by non-state actors such as suspected terrorists. The author is therefore not proposing an autonomous right to security; he is developing an existing one. And as the author still sees his right to security as largely a justiciable one enforceable before the courts, his approach is a more moderate aspect of communitarianism embracing some liberal ideas of constitutionalism such as judicial review.

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 - ii) Ian Turner, 'Article 2 of the ECHR, the Investigative Obligation and the Shooting of Jean Charles de Menezes' [2009] 5 *Web Journal of Current Legal Issues* <http://www.bailii.org/uk/other/journals/WebJCLI/2009/issue5/turner5.html> (accessed 30th October 2014).
 - iii) Ian Turner, 'The Prevention of Terrorism: in Support of Control Orders, and Beyond' (2011) 62(3) *Northern Ireland Legal Quarterly*, 335-359.
 - iv) Ian Turner, 'Is there a Human Right to Armed Police in Britain?' [2015] *Covert Policing, Terrorism and Intelligence Law Review*, 1-18.
 - v) Ian Turner, 'Freedom from Torture in the 'War on Terror': is it Absolute?' (2011) 23(3) *Terrorism and Political Violence*, 419-437.
 - vi) Ian Turner, 'Human Rights and Anti-Terrorism: A 'Positive' Legal Duty to Infringe Freedom from Torture' (2012) 35(11) *Studies in Conflict and Terrorism*, 760-778.

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**Refereed
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I was a contributor to the Lancashire Law School's successful Research Excellence Framework (REF) 2014 submission.

1. 'Human Rights, Positive Obligations and Measures to Prevent Human Trafficking in the UK' (2015) 1(4) *Journal of Human Trafficking* 296.
2. 'Is there a Human Right to Armed Police in Britain?' [2015] *Covert Policing, Terrorism and Intelligence Law Review* 1.
3. 'Positive Obligations and Article 4 of the European Convention on Human Rights: a Defence of the UK's Human Rights Act 1998' (2014) 18(1) *International Journal of Human Rights* 94.
4. 'Human Rights and Anti-Terrorism: A Positive Legal Duty to Infringe Freedom from Torture?' (2012) 35 *Studies in Conflict and Terrorism* 760.
5. 'The Prevention of Terrorism: in Support of Control Orders, and Beyond' (2011) 62(3) *Northern Ireland Legal Quarterly* 335.
6. 'Freedom from Torture in the 'War on Terror': is it Absolute?' (2011) 23(3) *Terrorism and Political Violence* 419.
7. 'Judicial Review, Irrationality and the Limits of Intervention by the courts' (2010) 21(2) *King's Law Journal* 311.
8. 'Article 2 of the ECHR, the Investigative Obligation and the Shooting of Jean Charles de Menezes' [2009] 5 *Web Journal of Current Legal Issues*.
9. 'Irrationality, the Human Rights Act and the Limits of Merits-Review' (2009) 18(1) *Nottingham Law Journal* 18.
10. 'Suicide Terrorism, Article 2 of the ECHR and the Shooting of Jean Charles de Menezes' [2008] 4 *Web Journal of Current Legal Issues*.
11. 'Judicial Review, Irrationality and the Legitimacy of Merits-Review' (2008) 29(3) *Liverpool Law Review* 309.
12. 'Judicial Review, Irrationality and the Review of Merits' (2006) 15(2) *Nottingham Law Journal* 37.
13. 'Commonhold: The Commonhold and Leasehold Reform Act 2002' 37(1) (2003) *Law Teacher* 105.

**Books, Book
Chapters and
Reviews**

1. 'CTSA 2015 and the Risk of Being Drawn Into Terrorism' *Lexis Nexis News*. 1 April 2015
<https://www.lexisnexis.com/uk/lexispsl/immigration/document/412012/5FN3-3BP1-DYW7-W54B-00000-00/CTSA-2015-and-the-risk-of-being-drawn-into-terrorism-> (legislative commentary)
2. 'Criminal Law' (2006) 40(2) *Law Teacher* (book review) 231.
3. 'Key Facts: Human Rights' (2005) 39(5) *Law Teacher* 405 (book review).
4. 'The Changing Constitution' (2005) 39(1) *Law Teacher* 117 (book review).
5. 'Public Law in a Multi-Layered Constitution' (2004) 38(3) *Law Teacher* 443 (book review).

6. 'Local Authorities and Human Rights' (2004) 30(3) *Local Government Studies* 445 (book review).
7. 'Property Law' (2003) 37(3) *Law Teacher* 380 (book review).
8. 'Property Law: Cases and Materials' (2003) 37(3) *Law Teacher* 380 (book review).
9. 'A New Landlord and Tenant' (2002) 36(2) *Law Teacher* 268 (book review).
10. 'The English Legal System' (2002) 36(1) *Law Teacher* 83 (book review).

**Conference,
Workshop and
Symposium
papers**

1. 'A Communitarian Justification for Measures to Prevent Terrorism in the UK.' '21st Century Challenges, 21st Century Solutions: New approaches to Crime and Security Policy' The Crime and Security Policy Network Symposium 2015, University of Central Lancashire, 9 September 2015.
2. 'Transnational Security and Human Rights: Bridging the Divide.' 'Transnational Security and Human Rights' Institute for International and Comparative Law Workshop, University of Central Lancashire, 2 July 2015.
3. 'Human Rights and the Protection of Victims of Human Trafficking in the UK' 'Exploring the Provision of Support for Trafficking Victims Across the UK and Within Europe' Institute for International and Comparative Law Workshop, University of Central Lancashire, 19 June 2015.
4. 'A Positive Human Right to Security' 'Rights in Conflict: Socio-Legal and Critical Approaches to Human Rights' Centre for Criminal Justice and Human Rights Symposium, University College Cork, 8-9 June 2015.

**Blogs and
Social Media**

1. 'Reforming Britain's Human Rights Laws: Gotcha Part II' *Lancashire Law School Blog* 13 January 2015
<https://uclanlaw.wordpress.com/category/human-rights-2/>
2. "'Gotcha!' The Conservatives' Plans to Reform Britain's Human Rights Laws" *Lancashire Law School Blog* 3 October 2014
<https://uclanlaw.wordpress.com/category/human-rights-2/>
3. 'In Support of the Human Rights Act 1998' *Lancashire Law School Blog* 3 July 2014
<https://uclanlaw.wordpress.com/category/human-rights-2/>
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I am the Director of Studies of three PhDs. I am also the second supervisor of two PhDs, two MPhils/PhDs and one LLM by Research. These all involve students researching human rights; in the situations where I am the Director of Studies, most of the students are assessing violations of human rights in the 'War on Terror'.

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Human Rights, Positive Obligations and the Development of a Right to Security

Introduction

The title of this PhD by Published work is 'Human Rights, 'Positive' Obligations and the Development of a Right to Security'. It was not the author's intention from the publication of the first article in this study that he would undertake doctoral research, so of course each published work here is not the same as an individual chapter of a regular PhD. It would be drafted several times and then revised again once a draft thesis has been completed, to make the latter, say, more focused and cohesive. But as the author began to be published more in the fields of human rights and anti-terrorism, he noticed a theme developing: conceptual and policy issues and dilemmas concerning a 'group' 'right to security'. So there is an underlying nexus between the articles presented in this study, the purpose of which this piece of work is to expressly articulate these in terms of an 'overarching' thesis.

On the face of it, the author's publications to date, which are all single-authored and featured in peer reviewed academic journals from 2008 to 2015, should satisfy the 'originality' criterion of a PhD. They are a unique collection of case studies that draw on the 'law in action'¹ and 'social-legal'² approaches to legal research (though not ignoring 'black-

¹ See, for example, Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*. Pearson Education Ltd, 2007, at pp.125-131.

letter'/doctrinal³ analyses in the process). That said, they also illustrate the significant utility and practical reach of 'positive' obligations imposed upon the state by, say, the European Convention on Human Rights (ECHR). These include: Article 2(1), the right to life; Article 3, the freedom from torture and inhuman and degrading punishment and treatment; and Article 4(1), the freedom from slavery and servitude. Ordinarily, human rights are defined as acting 'negatively', in that they reflect a traditional, liberal desire to restrain curtailments of individual freedom by the state; they are 'freedoms from' governmental intrusion. Article 3 of the ECHR, for example, is the 'freedom from' torture. But, and this is rarely addressed within, say, liberal discourse, the right also acts 'positively', in that it obliges the state to prevent violations of the freedom by *non-state actors* such as suspected terrorists. The aim of this 'overarching' thesis is to marry the author's published case studies on 'positive' obligations with the philosophies of, say, communitarianism, which supersede an apparent one-sided negative freedom from perspective upon rights, to supply a theoretical base to a 'group' 'right of security'. This concern with underlying theoretical underpinnings is currently lacking from the author's academic writing, at least as an express topic in its own right. But before tackling this, the author will discuss the 'right to security' – or at least refer to its many possible interpretations.

Explaining a right to security

² *Ibid.*, at pp.118-181.

³ *Ibid.*, at pp.44-118.

Surprisingly, explaining the nature of a right to security is elusive. Powell, for example, has expressed concern at the failure of human rights law to define exactly what the concept of security is: it is merely assumed that security is clearly understood and can be taken for granted.⁴ In simple terms, Hein van Kempen says that security is described as freedom from threat, danger, vulnerability, menace, force and attack.⁵ But the ‘rather basic nature of this definition’ should not disguise the fact that there are many different forms of security, and that the meaning of this conception is both developing and highly contested.⁶ Nonetheless, he says that human rights law presupposes four different concepts of security: ‘negative individual security against the state’; ‘international security’; ‘security as justification to limit human rights’; and ‘positive state obligation to offer security to individuals against other individuals’.⁷ To this, this author would add a fifth concept, ‘positive individual security against the state’, which will be clarified below.

In most discussions of security there is a tendency to concentrate on ‘negative individual security against the state’, such as Article 5(1) of the ECHR – ‘Everyone has a right to liberty and security of person’ – and particularly the ‘liberty’ element of the right – protecting a person from ‘arbitrary state’ interference – at the expense of ‘security’. Again, an ideological

⁴ Rhonda Powell, ‘The Concept of Security’ *University of Oxford Socio-Legal Review*, June 2012
http://www.csls.ox.ac.uk/oslr/Papers/Entries/2012/6/21_Rhonda_Powell_files/Powell%20%282012%29%20The%20Concept%20of%20Security.pdf (accessed 10th October 2014), at p.4.

⁵ Piet Hein van Kempen, ‘Four Concepts of Security – A Human Rights Perspective’ (2013) 13(1) *Human Rights Law Review*, 1-23, at p.1.

⁶ *Ibid.*

⁷ *Ibid.*

bias of liberalism is such that several human rights commentators from that tradition examine only 'liberty', paying no regard at all to 'security'.⁸ Here, liberalism sets up its own conception of liberty as if it were a norm, relegating security as – at most – a mere exception or qualifier. The following sections explain these five approaches to security in more detail.

1. 'Negative individual security against the state'

The right to security is an example of a 'First Generation', 'civil and political', 'negative' right; a 'freedom from' state intrusion. 'First Generation' rights protect individuals from 'arbitrary' killing, torture, slavery etc by the state. This 'substantive' right to security of the individual (distinguishing it from, say, its 'procedural' element⁹) is expressly provided for by several international and regional human rights documents. For example, Article 3 of the Universal Declaration of Human Rights (UDHR) states: 'Everyone has the right to life, liberty and security of person' and Article 9(1) of the International Covenant on Civil and Political Rights

⁸ Eg. Javid Rehman, *International Human Rights Law*. 2nd ed. Pearson, 2010, at pp.200-203; Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*. Cambridge University Press, 2013, at pp.338-345.

⁹ For example, Article 9(1) of the ICCPR also discusses the 'procedural' elements of the right: 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' What these 'procedural' rights are, are stated in Articles 9(2)-9(4); these include knowing the grounds for a detention by the state and the charges against a person, being brought promptly before a judge and being entitled to trial within a reasonable time or to release. Articles 5(1) of the ECHR is similar in wording to Article 9(1) of the ICCPR, and Articles 5(2)-5(4) of the ECHR provide similar 'procedural' safeguards to Articles 9(2)-9(4) of the ICCPR.

(ICCPR) states: 'Everyone has the right to liberty and security of person.' Regionally, there is also Article 5(1) of the ECHR, which was quoted above.

It will be recalled that in most discussions of the 'substantive' right to security of the person, there is a tendency to concentrate on the 'liberty' element at the expense of the 'security' aspect. This ideological bias is perhaps no coincidence in the light of cases where the right has been examined. For example, the European Court of Human Rights (ECtHR) in *East African Asians v. United Kingdom*¹⁰ ruled that 'security of person' must be understood in the context of a public authority's arbitrary interference with an individual's physical liberty.¹¹ But the ECtHR in the later case of *Kurt v. Turkey*¹² did give a more expansive interpretation of Article 5(1) of the ECHR, beyond the arbitrary detention of the individual. Here the court interpreted cases of an officially unacknowledged detention – 'disappearances' – as serious breaches of the right to security of the person, through the *de facto* removal of institutional safeguards, such as accounting for a detained person's whereabouts, which, in this particular context, the state had a positive duty to provide:

'What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result

¹⁰ (1973) 3 EHRR 76.

¹¹ *Ibid.*, at p.89. Here UK passport holders of Asian origin who had been living in East Africa were denied permission to remain in the UK.

¹² (1998) 27 EHRR 373. The case concerned the disappearance of a Turkish citizen after his arrest by Turkish authorities. Requests by his family for information and an investigation as to his whereabouts were unsuccessful.

in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.’¹³

Thus, the ‘negative’ right to security of the person can derive some independent substantive content from a presumed right to liberty. Other approaches to the right to security are explored in the following sub-sections.

2. ‘Security as justification to limit human rights’

Many individual human rights, whether they be guaranteed by international, regional and/or domestic instruments, are ‘qualified’, in that they can be infringed by the state for legitimate purposes, one of which is safeguarding security. Article 19(2) of the ICCPR states: ‘Everyone shall have the right to freedom of expression...’ But according to Article 19(3) there are express limits to this freedom: ‘The exercise of the rights provided for in paragraph 2 carries with it special duties and responsibilities. It may therefore be subject to certain restrictions...(b) For the protection of national security or of public order...’ Regionally, Article 10(1) of the ECHR is the right to freedom of expression but it is qualified, too, by Article 10(2), in the interests of national security, territorial integrity or public safety,

¹³ [123]. The court said that having assumed control over an individual it was incumbent on the authorities to account for his or her whereabouts: ‘For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.’ [124]

for the prevention of disorder or crime etc. In addition to such 'qualifications' of general applicability, human rights law also provides for 'derogations', suspending specified freedoms in, say, times of 'public emergency threatening the life of the nation'. Article 4 (1) of the ICCPR, for example, permits derogations in such circumstances 'to the extent strictly required by the exigencies of the situation.'¹⁴

3. 'Positive individual security against the state'

Under human rights law an individual's right to security can also be interpreted as an example of a 'Second Generation', 'economic, social and cultural', 'positive' right of the individual; a 'right to' secure a collectively funded public service of various kinds, including pensions, social security and educational opportunities. For example Article 22 of the UDHR states: 'Everyone, as a member of society, has the right to social security...' Similarly, Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states: 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.'¹⁵

¹⁴ But, according to Article 4(2) of the ICCPR, some fundamental rights such as freedom from torture, as per Article 7 of the ICCPR, and freedom from slavery, as per Article 8(1) of the ICCPR, can never be suspended. (For regional derogations such as those permitting suspensions of some ECHR rights, see Article 15 of the ECHR.) Human rights law also recognises 'reservations' which are a caveat to a state's acceptance of a treaty. The United States, for example, has five reservations in relation to the ICCPR. Article 7 of the ICCPR is the prohibition on torture. One of America's reservations is that the country's obligations under Article 7 extend only as far as its domestic constitutional limits on torture, that is, the Eighth Amendment to its Constitution, the prohibition on cruel and unusual punishment.

¹⁵ Unlike its companion agreement, the ICCPR, the ICESCR is more of a 'promotional' convention. This is because it is not intended for immediate implementation; the state

4. 'International or collective security'

The right to security also extends to a 'Third Generation', 'collective' right of peoples and groups of individuals. For example, Article 23(1) of the African Charter on Human and Peoples' Rights (ACHPR) states: 'All peoples shall have the right to national and international peace and security.' The Charter of the United Nations (UN) recognises collective rights to security, too: for example, one of the purposes of the UN, as per Article 1(1) of the Charter, is 'to maintain international peace and security...' To that end, Article 2 obliges members of the UN to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered' and must 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...' To monitor compliance with these obligations, the Charter has created an executive body, the UN Security Council (UNSC), which is in permanent session at UN headquarters in New York. Article 24(1) of the Charter confers primary responsibility for the maintenance of international peace and security on the UNSC. This is not merely an ideal or aspiration but a rule backed up by sanctions. For example, in disputes between nations of the UN, which threaten international peace and security, the Security Council may authorise, say, economic or diplomatic sanctions, as per Article 41 of the Charter, or the use of military action, as per Article 42.¹⁶

parties, as per Article 2, having agreed only to take steps toward 'achieving progressively the full realization of the rights recognized in the...Covenant' and then subject to 'the maximum of [their] available resources'.

¹⁶ Regional security such as that concerning Europe is also maintained by the Statute of the Council of Europe (the 'London Treaty'), 1949, establishing the Council of Europe (CoE). And encompassing European states, as well as, say, the United States and Canada, there is: the

International or collective security is also maintained by the four Geneva Conventions, 1949. Geneva IV, for example, aims to protect civilians in armed conflicts. This policy is extended by the First and Second Protocols, 1977. Article 48 of Protocol I states that Parties to a conflict shall at all times distinguish between the civilian population and combatants and between civilian and military objectives and, accordingly, shall direct their operations only against military ones. Thus, citizens shall not be the object of attack, as per Article 51(2). States are duty-bound, legally, to take all feasible precautions in choosing weapons and methods of warfare which avoid incidental loss of life, injury to civilians and damage to civilian objects such as homes, schools, hospitals and places of worship, as per Article 52. Most states in the world have ratified Protocol I so it is now widely considered to be 'customary international law'.¹⁷ This status means that the Protocol even binds states that have not ratified it, such as the USA, Israel, India and Pakistan. State parties to the Protocol (and the four Geneva Conventions) are under an express obligation to search for suspected offenders, regardless of their nationality and of the place of the offence, and either bring them before their own courts or hand them over to another party for trial.¹⁸ In international law this principle is known as 'universal jurisdiction'. Article 1 of the 'Rome Statute' establishes the International Criminal Court (ICC), in the Hague, the Netherlands, which has jurisdiction, since July 2002, to try individuals accused of the 'most serious crimes of

North Atlantic ('Washington') Treaty, 1949, establishing the North Atlantic Treaty Organisation (NATO); and the Helsinki Final Act, 1975, establishing the Organisation for Security and Cooperation in Europe (OSCE).

¹⁷ International Committee of the Red Cross, *Appeal by the International Committee of the Red Cross on the 20th Anniversary of the Adoption of the Additional Protocols of 1977* 31st October 1997 <https://www.icrc.org/eng/resources/documents/article/other/57jnu.htm> (accessed 12th March 2015).

¹⁸ International Committee of the Red Cross, *United Nations, General Assembly, 65th session, Sixth Committee, item 86, statement by the ICRC, New York*. 15th October 2010 <https://www.icrc.org/eng/resources/documents/statement/united-nations-universal-jurisdiction-statement-2010-10-15.htm> (accessed 12th March 2015).

international concern’ – ‘Genocide’, ‘Crime Against Humanity’ and ‘War Crimes’ – as per Articles 6, 7 and 8 of the Rome Statute respectively.¹⁹ (But, as per Articles 12-13, the ICC does not have the power to exercise ‘universal jurisdiction’.²⁰)

Collective security is sometimes referred to as ‘human security’, or at least ‘human security’ is an element of ‘collective security’.²¹ ‘Human security’ was one of a number of international principles agreed at the World Summit in 2005. These were subsequently adopted by a resolution of the High Level Plenary Meeting of the UN General Assembly in September 2005.²² In specific reference to ‘human security’, paragraph 143 of the Resolution affirms a link between human rights and state activity oriented towards provisions designed to provide security for those in a condition of fear and poverty.²³

¹⁹ A person tried and convicted at the ICC is Thomas Lubanga – see, for example: David Johnson, ‘Thomas Lubanga Sentenced to 14 Years for Congo War Crimes’ *The Guardian*. 10th July 2012 <http://www.theguardian.com/law/2012/jul/10/icc-sentences-thomas-lubanga-14-years> (accessed 12th March 2015).

²⁰ The ICC has jurisdiction only over: i) nationals of states that have signed up to the Rome Statute ii) individuals who have committed crimes in territories that have signed up to the Rome Statute and iii) a State not party to the Statute, where it decides to accept the court’s jurisdiction over a specific crime that has been committed within its territory, or by one of its nationals.

²¹ Hitoshi Nasu, ‘The Place of Human Security in Collective Security’ (2013) 18(1) *Journal of Conflict and Security Law*, 85-102, at p.97.

²² UN General Assembly, ‘2005 World Summit Outcome’ A/RES/60/1, September 2005. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1. In 2012 the UN General Assembly expanded on its earlier human security resolution – see: – UN General Assembly, ‘Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome’ A/RES/66/290, September 2012. http://www.un.org/en/ga/search/view_doc.asp?symbol=%20A/RES/66/290.

²³ Hitoshi Nasu, *op.cit.*, at p.99. Nasu also notes a broader approach to human security, encompassing a wide range of security issues such as economic security, energy security and environmental security. But he says that this expanded conception of human security has been criticised for being all-encompassing with an endless list of security issues, making the notion too ambiguous to be of any use for policy-making (at p.100). For those who advocate a more expansive approach to security such as access to resources, water or

According to this approach, human security is not conceived abstractly as a right-in-principle with little attention to its practical enforcement and context. Instead, it is squarely placed within the context of violence and conflict, such as the impact of sanctions on civilians, the protection of civilians, children and women in armed conflict, and the regulation of the arms trade. It was this conception of human security which provided a theoretical foundation for the development of the ‘responsibility to protect’ concept to protect civilian populations.²⁴

The ‘responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’ (‘R2P’) was also a principle endorsed at the UN World Summit in 2005.²⁵ Here emphasis must be placed upon the phrase ‘responsibility’, to note that this affirms a duty on states not to remain neutral in the face of genocide whether at home, within the immediate region or even globally. Of note is paragraph 138 of the resolution adopted by the High Level Plenary Meeting of the UN General Assembly in 2005. This imposes not only positive obligations on countries to protect their civilians (‘Pillar I’), but also duties upon the international community to help states meet those obligations (‘Pillar II’). If a state has ‘manifestly failed’ in its duty to protect, then paragraph 139 of the resolution refers to obligations to take concrete and collective interventionist measures on a case by case basis (‘Pillar III’).

health, see, for example: Sandra Fredman, ‘The Positive Right to Security’ in Benjamin J. Goold and Liora Lazarus (eds), *Security and Human Rights*. Hart Publishing, 2007, 307-324.

²⁴ *Ibid.* On this issue, see also: S Neil Macfarlane, ‘Human Security and the Law of States’ in Benjamin J. Goold and Liora Lazarus (eds), *op.cit.*, 346-361.

²⁵ UN General Assembly, ‘2005 World Summit Outcome’ A/RES/60/1, September, 2005. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1

Internationally, therefore, 'Pillar I' of 'R2P', for example, obliges states to take positive measures to protect their civilian populations from serious harms such as genocide and crimes against humanity. Contrary to the traditional liberal hostility to the state, and support for the exemption of non-state actors from human rights obligations, 'R2P' applies even where the harm has been inflicted by third parties such as armed rebel groups. Such a 'positive' duty, enforceable against non-state actors, is well developed in human rights law. (The state should have had knowledge of the threat but did not act reasonably in averting it.) This approach to security is discussed in the next sub-section.

5. 'Positive state obligation to offer security to individuals against other individuals'

The final security concept is one which this author has devoted much of his academic writing, and sought to expand for reasons of public protection. This concept requires states to take 'positive' measures to prevent harms committed by non-state actors. In protecting individuals from violations of rights by third parties – killing, torture, enforced disappearance, slavery, for example – states are positively obliged to criminalise such abuses and to actively take measures to investigate, prosecute, convict and adequately punish those found to be responsible for these human rights violations. At an international level it will be recalled that Article 9(1) of the ICCPR asserts a right to liberty and security of person. The distinctly liberal 'negative' element of the right – that is, 'freedom from' state 'intrusion' – was discussed above. However, the key point here is that this freedom also imposes a 'positive' duty on the state to formulate policies and take concrete measures

preventing infringements of the right by third parties. The UN Human Rights Committee (HRC) monitors states' compliance of the ICCPR. 'General Comment No.8' of the HRC, which references Article 9 of the ICCPR, is also coy when it comes to a discussion of the meaning and scope of 'security' (preferring to prioritise 'liberty'): devoting only eight paragraphs to this key issue out of a total of 67. That said, it does offer a broad explanation of the right's security element. Here, paragraph 7 is significant. First, in reference to the 'negative' part of the security right, it re-affirms that a right to security protects individuals against intentional infliction of bodily or mental injury by the state. This applies regardless of whether or not the victim is detained.²⁶ But the paragraph is especially important as it illustrates the 'positive' nature of the right, to include an entitlement to state action to protect individuals under threat from actual or likely harm inflicted by other individuals, including effective prosecution for past violations:

'The right to personal security also obliges States parties 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...*private actors*. States parties must take both prospective measures to prevent future injury and retrospective measures such as enforcement of criminal laws in response to past injury.'²⁷

²⁶ HRC Sixteenth session (1982), *General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6628&Lang=en (accessed 10th October 2014).

²⁷ *Ibid.* [7].

The HRC has, therefore, reinterpreted the right to security beyond the traditional ‘negative’ context of protection of individuals from ‘arbitrary’ detention by the state to taking ‘appropriate’ measures in response to, say, ‘foreseeable’ death threats by third parties. Thus, the HRC found a violation of Article 9(1) in *Jayawardena v. Sri Lanka*.²⁸ Here, the claimant alleged an infringement of his right to security, after the President of Sri Lanka had accused him in public of being involved with the terror group, the Liberation Tigers of Tamil Elam (‘LTTE’), putting his life at risk. The HRC found that these accusations by the President had caused the claimant to be a victim of threats to his security, in violation of Article 9(1).²⁹

Regionally, the concept of ‘positive’ obligations seems to be most developed in the case law of the ECHR, such as Article 3, freedom from torture and inhuman and degrading treatment and punishment;³⁰ Article 4(1), freedom from slavery and servitude,³¹ including human trafficking;³² Article 5, the right to liberty and security of person;³³ and Article 8, the right to private and family life, home and correspondence.³⁴ The important point here is that, despite the ECHR’s general reiteration of the liberal model of negative rights, in at least some instances ‘positive’ obligations can be drawn from the text of the right itself. For instance, Article 2(1) of the ECHR states that everyone’s right to life shall be protected by law. Similarly, Article 6 confers a right on individuals to receive a ‘fair trial’ by an independent and impartial court or tribunal, which requires states and perhaps regional

²⁸ CCPR/C/75/D/916/2000.

²⁹ [7.2]. Sri Lanka was also in violation of Article 9(1) by failing to investigate the complaints of the claimant about the death threats he had received [7.3].

³⁰ *MC v. Bulgaria* (2005) 40 EHRR 20.

³¹ *Siliadin v. France* (2006) 43 EHRR 15.

³² *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1.

³³ *Storck v. Germany* (2006) 43 EHRR 6.

³⁴ *Marckx v. Belgium* (1979) 2 EHRR 330; *X and Y v. Netherlands* (1985) 8 EHRR 235.

sovereign bodies to publicly fund and staff an independent and adequate legal system that is fit for purpose. (Detailed analyses of most ECHR rights and their 'positive' nature are undertaken in the attached published works so are mentioned in this piece only in passing.)

Individual protections aside, the ECHR also imposes a 'positive' duty on member states to respect human rights in general. Indeed, the full title of the ECHR is the 'Convention for the *Protection of Human Rights and Fundamental Freedoms*'.³⁵ Article 13 of the ECHR, for example, also requires states to take measures guaranteeing an effective remedy where there has been a violation of a right.³⁶ And of particular significance for the meaning and scope of a right to security there is Article 1 of the ECHR: 'The High Contracting Parties shall *secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention [my italics].' (Interestingly, we can question why security is specifically referred to in Article 5 of the ECHR but not in other articles? This does not imply that article 5 is an 'exception' reflecting the lower status afforded to security. Instead, Article 1 affirms the centrality of security built into each of the ECHR rights rendering reference to it in any particular right redundant. Powell is correct, therefore, when she claims: 'Given the duty to secure all rights in Article 1, it seems unnecessary to specifically mention security [in Article 5] at all.'³⁷)

³⁵ Dimitros Xenos, *The Positive Obligations of the State Under the European Convention of Human Rights*. Routledge, 2012, at p.11.

³⁶ *Ibid.*, at p.21.

³⁷ Rhonda Powell, 'The Right to Security of Person in European Court of Human Rights Jurisprudence' (2007) 6 *European Human Rights Law Review*, 649-662, at p.661.

This author has identified many approaches to security as a human right, encompassing both 'negative' as well as 'positive' elements, but there is a tendency to see 'liberty' and 'security' as representing the same freedom (with an ideological bias towards the former rather than the latter). In this respect, therefore, Lazarus is perplexed. She states that national security policy, say, since the September 11th ('9/11') attacks in New York and Washington in 2001, has overwhelmingly focused on the 'balance' between 'security' on the one hand and 'liberty' on the other. Given that liberty and security are articulated as part of *the same right* in most human rights documents, she suggests that this 'binary opposition...is curious'.³⁸ She concludes: amidst the extensive public debate on the appropriate balance between the maintenance of national, public and individual security on the one hand, and the protection of individual liberty on the other 'remarkably little attention has been paid to the question of what precisely is meant by the right to security in the legal sense'.³⁹ The implication of the argument here is that a human right to security, in law, could therefore be said to be 'up for grabs'. In the next section, the author seeks to provide a philosophical base for the approach to security that he has adopted in the case studies that comprise his published works forming part of this PhD by publication.

³⁸ *Ibid.* Lazarus is not alone in being perplexed at this; see, for example: Sandra Fredman, *op.cit.*, at p.307.

³⁹ *Ibid.*, at p.327.

Theoretical justifications for the author's right to security

The author's approach in his attached publications is to broaden the 'positive' legal right to security from its apparent emphasis on protection of a specific individual, or individuals, from a foreseeable harm, to a much wider group of people. The basis for doing so is, say, the 'positive' obligation imposed on states to prevent violations of the right to life by non-state actors, such as terrorists. A foundation for the author's conception of a right to security could be grounded in 'natural' law theory, especially the concept of 'natural' rights. Some natural law theorists argue that rights are not created by governments but exist as pre-political rights that are anterior to them and their legislative recognition and that legitimate governments are, in fact, created to secure these rights.

1. Hobbesian 'absolutism'

A particular feature of natural law theory has been the social-contract philosophy, a key exponent of which was Thomas Hobbes (1588-1679). Hobbes' most famous work was *Leviathan* which was first published in 1651. Hobbes lived during a turbulent time in England's history – the rule of King Charles I, the Civil War and the Cromwellian Commonwealth – so he was greatly concerned at the evil of state collapse. He sought, therefore, to effect a strong central authority that maintained peace and order. If not, anarchy, which Hobbes described as a 'state of nature', would ensue – a place where only

the strong would survive.⁴⁰ Human life in the 'state of nature' would be 'solitary, poor, nasty, brutish, and short'.⁴¹ To avoid such horrors, a tacit social contract – a bargain – between the state and the individual was, therefore, required, whereby the latter agreed to surrender many, but not all, of their rights hypothetically ascribed to them by natural law, in exchange for the former providing security from the 'state of nature'.⁴²

For the greater good of peace and order, Hobbes said that individuals had to accept 'some incommmodity'.⁴³ What might this 'incommmodity' be? He believed that 'the greatest that in any form of government can possibly happen to people in general is scarce sensible, in respect of the miseries, and horrible calamities that accompany a Civil War',⁴⁴ suggesting a significant erosion of the individual's natural rights was required in exchange for state protection. So, for Hobbes, even the burdens of oppressive government were better than a complete chaos of the kind individuals suffer in war-torn contexts where social security, policing and law enforcement have broken down.

⁴⁰ Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* 1651 <http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf> accessed 10 October 2014, Chapter XIII (accessed 12th September 2014), at p.78.

⁴¹ *Ibid.*

⁴² *Ibid.*, Chapter XIV, at p.82.

⁴³ *Ibid.*, Chapter XVIII, at p.113.

⁴⁴ *Ibid.*

Hobbes literally described the power of the sovereign in the social contract as ‘absolute’⁴⁵ – and indeed an all-powerful, authoritarian state is inferred from the degree of curtailment of the individual’s natural rights – but there were limits to the state’s power. The bargain between the individual and the sovereign was revocable: it was qualified and conditional on the latter providing effective security from the ‘state of nature’ including threats posed by non-state actors. That is, when the state ceased to fulfil its covenant of protection it had exceeded its authority and the individual no longer owed the state a duty of obedience: ‘The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them.’⁴⁶ Indeed, when the state failed to provide security, the individual then had a right to protect themselves – a ‘right to resist’⁴⁷ – there (probably) being a return to anarchy.

The author finds such a theoretical approach to security particularly seductive – in the less secure world post ‘9/11’ he supports a significant ‘trade-off’ of liberal conceptions of human rights of the individual in his published works – but it ignores the reason(s) why we may be entertaining a right to security in the first place: to protect the very principles of democracy we are seeking to defend. Indeed, in condoning an oppressive government – assuming it continues to provide peace and order – Hobbes arguably failed to appreciate how the state

⁴⁵ *Ibid.*, Chapter XVII, at pp.105-106. In modern parlance Hobbesian ‘absolutism’ may be described as ‘hard power’. To become superior, or even invincible, the state must provide unequivocal support for the military, intelligence agencies and the police. The latter should not be inhibited by excessive legal rights and safeguards, which serve only to put, say, terrorists at an advantage – see, for example: Joseph S. Nye Jr, *The Paradox of American Power: Why the World’s Only Superpower Can’t Go It Alone*. Oxford University Press, 2002, at p.10.

⁴⁶ *Ibid.*, Chapter XXI, at p.136.

⁴⁷ *Ibid.*, Chapter XXI, at pp.133-134.

itself might pose a threat to security.⁴⁸ Thus, the Hobbesian model does not fully acknowledge how the modern state can simultaneously act as a guarantor of *and a threat to* the security of individuals.⁴⁹

And whilst we are facing a public emergency post '9/11', or at the very least we were in 2001, are we still in such a situation to which Hobbes was referring? That is, if we did not subscribe to the Hobbesian-style contract, would we be facing anarchy? Arguably, we would be less secure, at least collectively rather than individually, but it is safe to say that this would not result in a collapse of civil order? Finally, the author questions whether it is valid to 'trade-off' every hypothetical natural right, such as freedom from torture (see below), in the cause of security.

Notwithstanding these concerns, the author does not dismiss the 'absolutism' of Hobbes entirely, in formulating a theoretical basis for a right to security as advanced in his published works. The gross violations of human rights committed in, say, the Soviet Union and Germany under the brutal authorities of Josef Stalin and Adolf Hitler respectively, in the 1930s and 40s, were classic examples where states themselves had become grave threats to security. Indeed, there have been more recent systematic human rights abuses by authorities in Rwanda in 1994, Bosnia in 1995 and Libya in 2011, as well as the ongoing situation in Syria. (For many of those affected by these abuses, a Hobbesian 'state of nature'

⁴⁸ Liora Lazarus, 'The Right to Security' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *The Philosophical Foundations of Human Rights*. Oxford University Press, 2014, 1-21, at p.3.

⁴⁹ Ian Loader and Neil Walker, *Civilizing Security*. Cambridge University Press, 2007, at p.11.

was probably much more preferable to the fate that awaited them.) In failing, therefore, to honour the deal they have struck in providing protection, these countries have therefore delegitimised themselves, from a Hobbesian perspective, and revoked the duty of obedience, permitting the individual a 'right to resist'. Thus, in articulating some limits to the power of the state, the 'absolutism', or 'potential absolutism', of Hobbesian philosophy still has much to offer the author in constructing a theoretical justification for his right to security. That said, as with any political and constitutional theory this approach has its own limitations. The author in this 'overarching' PhD thesis is therefore developing a conceptual model which involves a modification of the Hobbesian position through the incorporation of aspects of liberalism as supported by, say John Locke.

2. Lockean liberalism

For Hobbes bad government was better than no government. Not so for John Locke (1632-1704) who was writing a generation after Hobbes. Locke's principal work, *Two Treatises of Government*, which was written between about 1679 and 1683, but not published until 1690, was a reaction to the allegedly tyrannical government of James II. Locke seemingly agreed with Hobbes that the social contract was relinquished if the state was no longer able to protect the citizen from anarchy.⁵⁰ But Locke further believed that the individual's

⁵⁰ John Locke, *Two Treatises of Government In the Former, The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown: The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government* <http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/locke/government.pdf> accessed 10 October 2014 (accessed 10th October 2014), at p.201.

obligation to obey the state, in return for security, ceased in circumstances less demanding than a breakdown of peace and order.⁵¹ Locke justified such a position thus:

'To tell people they may provide for themselves by erecting a new legislative, when, by oppression, artifice, or being delivered over to a foreign power, their old one is gone, is only to tell them they may expect relief when it is too late, and the evil is past cure. This is, in effect, no more than to bid them first be slaves...and men can never be secure from tyranny if there be no means to escape it till they are perfectly under it.'⁵²

Furthermore, again in opposition to Hobbes, Locke viewed the 'absolute' power of the sovereign as a threat to the security of individuals. He therefore advocated a minimal state whose control was limited to its preservation and could not be used 'to destroy, enslave, or designedly to impoverish the subjects.'⁵³ With a significant reduction in the sovereign's power many more individual freedoms were guaranteed: Locke identified 'natural rights' of the individual as 'life, liberty, and estate (property)' and argued that such fundamental rights could never be sacrificed in the social contract.⁵⁴

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*, at p.163.

⁵⁴ *Ibid.*

The social contract theory of Locke was particularly prevalent in the 17th and 18th Centuries and influenced the revolutions of America and France. For example, the American Declaration of Independence, on 4th July 1776, in Philadelphia, makes explicit reference to this philosophy: *‘That whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government [my italics]...’* The Declaration also recognises the fundamental importance of natural rights: *‘We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness [my italics].’* A precursor to the Declaration of Independence was the Virginia Declaration of Rights (1776). Section 3 states: *‘When any government shall be found inadequate...a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.’* Indeed, section 3 expressly refers to the state’s duty to provide security: *‘That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community...’* France’s Declaration of the Rights of Man and of the Citizen (1789) expresses similar values. In particular, Article 2 is explicit about the rights of citizens to sever the social contract in circumstances less demanding than the Hobbesian state: *‘The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression [my italics].’*⁵⁵

⁵⁵ The state’s duty to provide security, emanating from, say, social contract theory, still has contemporary resonance, especially amongst liberals. For example, following Hurricane Katrina, decimating New Orleans and the State of Louisiana in America in 2005, Ignatieff, a former Leader of the Liberal Party of Canada, argued that the US authorities had failed spectacularly in their obligations to help those affected: *‘We are American’* a

Liberal philosophy, as propounded by John Locke, is concerned about a right to security, as is the 'absolutism', or 'potential absolutism', of Thomas Hobbes. But unlike the author in his attached published works, Lockean liberalism is unwilling to surrender some fundamental, 'natural' rights such as liberty and rights to property for peace and order, because too much sacrifice by the individual is itself a threat to security. A noted opponent of, say, the social contract theory, and the liberal influenced Declaration of the Rights of Man and of the Citizen in France in particular, was Jeremy Bentham (1748-1832). Bentham also criticized the apparent neglect of liberalism to circumscribe the breadth of 'natural' rights.

3. The utilitarianism of Jeremy Bentham

Jeremy Bentham argued that contracts came from government, not government from contracts, describing the latter as 'pure fiction'. Thus, he also mocked the idea of 'natural' rights in Article 2 of the French Declaration of the Rights of Man: 'That which has no existence cannot be destroyed – that which cannot be destroyed cannot require anything to preserve it from destruction. Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts.'⁵⁶

woman...proclaimed on television. She spoke with scathing anger, but also with astonishment that she should be required to remind Americans of such a simple fact. She – not the governor, not the mayor, not the president – understood that the catastrophe was a test of the bonds of citizenship and that the government had failed the test.' – see: Michael Ignatieff, 'The Broken Contract' *New York Times*. 25th September 2005 <http://www.nytimes.com/2005/09/25/magazine/25wwln.html?pagewanted=print&r=0> (accessed 31st October 2014).

⁵⁶ Jeremy Bentham, 'Critique of the Doctrine of Inalienable, Natural Rights' <http://www.ucs.louisiana.edu/~ras2777/judpol/benthamrights.htm> (Accessed 10th January

Bentham also criticised the seeming ‘absolute’ nature of natural rights such as ‘liberty’: ‘What these...governors of mankind appear not to know, is, that all rights are made at the expense of liberty.’ He explained what he meant by this, by reference to, say, ‘Laws creative of rights of property’. He asked how was property given? He replied: ‘By restraining liberty...How is your house made yours? By debarring every one else from the liberty of entering it without your leave.’⁵⁷ This quotation is significant, not only because it taunts the apparent Lockean approach to absolute freedoms, but presumes that individuals also have ultimate responsibilities to respect the liberties – in this case the property – of others. ‘Responsibilities’ is an essential critique of liberalism prevalent in the philosophies of, say, communitarianism, which this author adopts to support his foundation for a group right to security, so will be discussed in much more detail later.

Bentham adopted a similar position in relation to the apparent absolute nature of ‘security’ as a natural right. That said, he seemed to approve of security as a concept, just not as a right that could never be abrogated, but one ‘posited’ from law,⁵⁸ meaning that the state was a source of the right:

2015).

⁵⁷ *Ibid.*

⁵⁸ For this reason Jeremy Bentham is one of the founding fathers of ‘legal positivism’, the philosophy that law emanates from legal sources such as statutes, common law etc, rather than the liberal approach, at least in its traditional forms, that laws emanated from God and governments were created to secure these laws. For other ‘legal positivists’ see, for example: John Austin, *The Province of Jurisprudence Determined* (1832); and H.L.A., *The Concept of Law* (1961).

‘We know what it is for men to live without government...to live without rights...for we see instances of such a way of life – we see it in many savage nations, or rather races of mankind: no habit of obedience, and thence no government – no government, and thence no laws – no laws, and thence no such things as rights – no security – no property.’⁵⁹

How might then security be exercised in the ‘utopia’ of Bentham? In *Introduction to the Principles of Morals*, which was first published in 1789, Bentham wrote that nature had placed mankind under the governance of two sovereign masters, pain and pleasure. It was for them alone to point out what we ought to do, as well as to determine what we shall do. They govern us in all we do, in all we say, in all we think.⁶⁰ An action may be said to be comfortable to the ‘principle of utility’, meaning with respect to the community at large, when ‘the tendency it has to augment the happiness of the community is greater than any it has to diminish it’.⁶¹ How was such an ‘exercise’ to be calculated? Government objectives must aim to ensure, by means of careful calculation, the achievement of the greatest pleasure, and the minimum degree of pain, of the greatest number.⁶²

⁵⁹ Jeremy Bentham, *op.cit.*

⁶⁰ Jeremy Bentham, ‘Of the Principle of Utility’ *Introduction to the Principles of Morals*. 1789, Chapter One. <http://www.econlib.org/library/Bentham/bnthPML.html> (Accessed 15th April 2015).

⁶¹ *Ibid.*

⁶² Jeremy Bentham, ‘Value of a Lot of Pleasure or Pain, How to be Measured’, *op.cit.* (1789), Chapter Four.

There is an underlying ‘utilitarian’ right to security pervading the author’s published works, one that ‘balances’ the right of security of the many over the individual freedoms of the few. Of course, ‘majoritarian’ rule – the greatest happiness of the greatest number – does not sit easily with liberal notions of inalienable, natural rights of the individual. Above, the author declined to surrender freedom from torture in, say, the Hobbesian social contract, but what say utilitarians about this fundamental right, especially in exceptional circumstances such as the ‘ticking bomb’ scenario? (This is not an issue addressed directly in the author’s attached works on torture so is discussed here – and later – for convenience.) Torture inflicts pain on the suspect, greatly reducing their happiness or utility. But thousands of innocent lives will be lost if the bomb explodes. So a utilitarian might argue that it is morally justified to inflict intense pain on one person if doing this will prevent death or suffering on a large scale.⁶³ Although in this situation the benefits of torture might outweigh the cost of harm to the individual, Sandel, for example, questions whether it is appropriate to do the calculation that utilitarianism requires: consequences of our actions are inherently unknowable – we do not have the benefit of hindsight.⁶⁴ Furthermore, whilst utilitarianism weighs preferences without judging them – everyone’s preferences count equally – is this so in reality?⁶⁵ And is it possible to measure and compare all values and

⁶³ Michael J Sandel, *Justice: What’s the Right Thing to Do?* Penguin Books, 2010, at p.38.

⁶⁴ *Ibid.*, at p.39.

⁶⁵ *Ibid.*, at p.41.

goods on a single scale?⁶⁶ Moreover, rights are made a matter of calculation, not principle.⁶⁷

Finally, there may just be a nagging feeling that torture, for example, is simply wrong.⁶⁸

As will be seen from many of his published works, the author is seemingly attracted to a utilitarian approach to security and human rights, but is unprepared to trade every right, such as freedom from torture, in the pursuit of group security. There is an argument for some 'balance', however, between other freedoms of the individual, to do as they please, and society's need for protection against the harm that that person may commit, which some within contemporary liberalism have sought to advance.

⁶⁶ *Ibid.*, at p.46.

⁶⁷ *Ibid.*, at p.260. Sandel says that much of the criticisms of Bentham's utilitarianism were addressed by John Stuart Mill, by recasting it as a more humane, less calculating doctrine (at p.48). Sandel refers to the following books by Mill which he says seek to reconcile individual liberty with utilitarianism (at pp.48-49): *On Liberty* (1859) and *Utilitarianism* (1861).

⁶⁸ *Ibid.*, at p.33. If so, Sandel says this leads us on to Immanuel Kant (1724-1804). He says that for the utilitarian, individuals matter, but only in the sense that each person's preferences should be counted along with everyone else's. But this utilitarian logic, if consistently applied, could sanction ways of treating persons that violate what we think of as fundamental norms of decency (at p.37). Immanuel Kant's ideas depend on the notion that we are rational beings worthy of dignity and respect (at p.105). In *Groundwork for the Metaphysics of Morals*, which was first published in 1785, Kant's morality is not about maximizing happiness, instead it is about respecting persons as ends in themselves (at p.106). Kant believed that utilitarianism left rights vulnerable (at p.106), and the greatest happiness principle did not mean that a decision was right or just (at p.106): it just meant that we were better at calculation (at p.106). To act freely was not to choose the best means to a given end; it was to choose the end itself, for its own sake (at p.109). Actions should have moral worth (at p.111). We should not be concerned about the consequences that flow from our actions, but the intention from which the act was done. What matters was the motive: because it was right, not for some ulterior motive (at p.111).

4. The contemporary liberalism of John Rawls and Ronald Dworkin

Modern perspectives on liberalism are epitomised by, say, John Rawls and Ronald Dworkin.⁶⁹ Liberalism is very much concerned with individual autonomy; people should be free to live their lives, to choose and pursue values for themselves, so the state should remain neutral (or at least act only in an advisory capacity) on issues such as these.⁷⁰ Thus, in terms of, say, freedom of expression, censorship by the state, for example, imposes the state's values on individuals, thus compromising their freedom to choose. In *A Theory of Justice* Rawls founded a conception of justice on respect for the individual. Rawls arrived at his notion of justice by considering what individuals in the 'original position', a reformulation of Hobbes' 'state of nature', would choose as principles of justice for the basic structure of society. They would decide behind a 'veil of ignorance', which prevented them from knowing their place in society, their class position or social status, their fortune in the distribution of natural assets and abilities, their intelligence and their strength. This ensured that no one was advantaged or disadvantaged in the choice of principles.⁷¹ Because of the uncertainty of the 'veil' process, Rawls believed two principles of justice would be chosen in the 'original position'. One of these was – 'each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others'.⁷² That is, each person would have the maximum amount of liberty compatible with the same amount of liberty for everyone else, which even the general welfare could not override. (Individuals

⁶⁹ Ronald Dworkin, *Taking Rights Seriously*. Duckworth, 1977.

⁷⁰ John Rawls, *A Theory of Justice*. Harvard University Press, 1971, at p.448.

⁷¹ *Ibid.*, at p.7.

⁷² *Ibid.*, at pp.60-61. For Rawls the second principle of justice was 'distributive justice'. This was concerned with the 'distribution of social and economic advantages' (at p.61), that is, goods, wealth and authority.

would not choose, say, a utilitarian approach to decision-making for fear that they would end up in the minority being oppressed by the majority.⁷³)

Dworkin has written about liberty and security post '9/11' in particular.⁷⁴ It is said that fairness to criminal suspects requires only that an appropriate 'trade-off', or 'balance', is struck between two values—freedom and security—each of which can sometimes be served only at the cost of the other. Because terrorism is a horrific threat to security, striking the balance differently for that crime is justified; and it is therefore not unfair to subject suspected terrorists to a higher risk of unjust conviction. But Dworkin disagrees: 'the familiar metaphors of trade-off and balance are deeply misleading', because they suggest a false description of the decision that the nation must make:

'If that really were our choice, it would be an easy one to make. None of the administration's decisions and proposals will affect more than a tiny number of American citizens: almost none of us will be indefinitely detained for minor violations or offenses, or have our houses searched without our knowledge, or find ourselves brought before military tribunals on grave charges carrying the death

⁷³ *Ibid.*, at pp.14-15.

⁷⁴ Ronald Dworkin, 'The Threat to Patriotism' 49(3) *New York Review of Books* 28th February 2002 <http://www.nybooks.com/articles/archives/2002/feb/28/the-threat-to-patriotism/> (accessed 16th December 2014). See further: Ronald Dworkin, 'The Threat to Patriotism' in Craig Calhoun (ed). *Understanding September 11*. New Press, 2002, at pp.273-285; and Ronald Dworkin, 'Terror and the Attack on Civil Liberties' 50(17) *New York Review of Books* 6th November 2003 <http://www.nybooks.com/articles/archives/2003/nov/06/terror-the-attack-on-civil-liberties/> (accessed 16th December 2014).

penalty. Most of us pay almost nothing in personal freedom when such measures are used against those the President suspects of terrorism.’⁷⁵

Dworkin also notes that the rights that have evolved are those that are deemed the minimum owed to anyone who is accused of a serious crime and pursued and tried within the system of criminal justice. He believes that fairness requires, as a matter of equal concern for anyone who might be innocent, that these rights are extended to everyone brought into the system; people accused of more serious crimes should not be entitled to less protection: ‘If they are innocent, the injustice of convicting and punishing them is at least as great as the injustice in convicting some other innocent person for a less serious crime. So we must reject the balancing argument—it is confused and false.’⁷⁶ Thus, unlike the author in his published works, Dworkin appears to dismiss any idea about a balance between liberty and security, even post ‘9/11’.⁷⁷ Other contemporary liberal writers such as Jeremy Waldron have also criticised such a trade-off but not rejected such an exercise out of hand.⁷⁸

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Does this therefore contradict what he has said elsewhere? Dworkin is seemingly not averse to some balance ‘to prevent catastrophe’ such that we ‘need not go so far as to say the State is *never* justified in overriding [a] right’ – see: Ronald Dworkin, *op.cit.* (1977), at p.191.

⁷⁸ Jeremy Waldron, ‘Security and Liberty: The Image of Balance’ (2003) 11(2) *Journal of Political Philosophy*, 191-210.

5. Contemporary liberalism receptive to 'balance', post '9/11'

In seemingly echoing Bentham's rejection of Lockean liberalism, Waldron argues that liberty cannot be comprehensive even under the most favourable circumstances—'nobody argues for anarchy'—and security has to be given some weight in determining how much liberty people should have. So there is always a balance to be struck.⁷⁹ And that the balance is 'bound to change' as the threat to security becomes graver or more imminent.⁸⁰ That said, Waldron thinks the 'balancing rhetoric' needs to be subjected to 'careful scrutiny', and calls for, say, evidence justifying greater security:

'If we do remain receptive to the need to compromise civil liberty, we must insist that those who talk the balancing-talk step up to the plate with some actual predictions about effectiveness. We should not give up our liberties, or anyone else's liberties, for the sake of purely symbolic gains in the war against terrorism.'⁸¹

Supporting a balance between security and liberty – a reconciliation between the two principles – but presenting differing liberal opinions about where such a balance should lie was the purpose of a collection of essays, *Human Rights in the 'War on Terror'*.⁸² One of the

⁷⁹ *Ibid.*, at p.192.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Richard Ashby Wilson, 'Human Rights in the 'War on Terror'' in Richard Ashby Wilson (ed), *Human Rights in the 'War on Terror'*. Cambridge University Press, 2005, 1-36. Benjamin

contributors to the collection, David Luban, presents a strong liberal defence of human rights at the expense of security,⁸³ and shares similar concerns about the liberty/security trade-off previously expressed by Dworkin and Waldron.⁸⁴ He believes that we are almost in a state of ‘perpetual emergency’: ‘9/11’ was an emergency but we are still facing threats to liberty several years later.⁸⁵ And in response to claims that those who seek to destroy democracy are not entitled to its benefits (which is explored in more detail later, when discussing, say, Article 17 of the ECHR, the prohibition of abuse of rights), he states that ‘the very posing of the rhetorical question already assumes guilt’.⁸⁶

Another contributor to the collection, Fernando Teson, is seemingly less liberal in his approach than Luban.⁸⁷ Teson describes the Hobbesian approach as a ‘conservative conception of security’ and maintains that this level of public safety can only be achieved in a ‘police state’.⁸⁸ He distinguishes ‘liberalism 1’, where liberties are curtailed to protect security, from ‘liberalism 2’.⁸⁹ Those that subscribe to the latter branch of liberalism are ‘human rights absolutists’ who consider that a life with no rights is not worth living.⁹⁰ But

Goold and Liora Lazarus have sought to reconcile the two ideals in a collection of academic essays, too: Liora Lazarus and Benjamin J Goold, ‘Introduction: Security and Human Rights: The Search for a Language of Reconciliation’ in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights*, Hart Publishing, 2007, 1-24.

⁸³ David Luban, ‘Eight Fallacies About Liberty and Security’ in Richard Ashby Wilson (ed), *op.cit.*, 242-257.

⁸⁴ *Ibid.*, at pp.243-245.

⁸⁵ *Ibid.*, at p.249.

⁸⁶ *Ibid.*, at p.252.

⁸⁷ Fernando Teson, ‘Liberal Security’ in Richard Ashby Wilson (ed), *op.cit.*, 57-77, at pp.61-62.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* Historically, is this a Lockean approach to individual freedom? Contemporary perspectives on this strand of liberalism, ‘libertarianism’, include those of Milton Friedman,

Teson believes these liberals overlook threats that are directed against the very freedoms they wish to preserve.⁹¹ He argues that the current 'impasse' between security and liberty is between the Hobbesian approach and 'liberalism 2'.⁹² He therefore advocates 'liberalism 1': 'I question the view that liberal values can *never* justify temporary justifications to the current level of enjoyment of freedoms.'⁹³ But he argues that liberal security measures are only justified by security threats perpetrated by 'principled evildoers' – those who seek to destroy liberal-democratic society and its institutions and are prepared to die in the process.⁹⁴ The majority of other kinds of threats to security are orchestrated by 'opportunistic evildoers', such as the former leader of Iraq, Saddam Hussein, who seek an advantage from what they do and can be reasoned with to a greater or lesser extent.⁹⁵ According to Teson, the latter 'do not usually meet the threshold for curtailments of liberty'.⁹⁶ So whilst his aim of reconciling liberty and security is maybe laudable, Teson still expresses a too extreme liberal view for this author: Saddam Hussein, for example, committed horrendous abuses against the Kurdish people in the late 1990s. Is Teson saying that significant infringements of individual human rights to protect, say, the Kurds would not have been justified because of the chance that Saddam could have been dissuaded from committing his terrible crimes?

Capitalism and Freedom (1962); Friedrich von Hayek, *The Constitution of Liberty* (1960); and Robert Nozick, *Anarchy, State and Utopia* (1974). These authors support a minimal role for the state such as enforcing contracts, protecting private property from theft and keeping the peace. That is, in the name of human freedom, they oppose government regulation and favour unfettered markets. People should do whatever they want with their things as long as they respect other peoples' rights to do so – see, for example: Michael J Sandel, 'Chapter 2: 'Do We Own Ourselves?/Libertarianism' *op.cit.*, 58-74.

⁹¹ *Ibid.*, at p.62.

⁹² *Ibid.*, at p.61.

⁹³ *Ibid.*, at p.62.

⁹⁴ *Ibid.*, at p.71.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, at p.72.

Lucia Zedner is also cautious about embracing security (though like Waldron, for example, is not unopposed to its virtues). She suggests that if security were an unqualified good, logically there could not be too much of it but there are several 'paradoxes' associated with it.⁹⁷ One of these is the claim that security promises reassurance but in fact increases anxiety: 'Whilst security promises to enhance subjective feelings of security its pursuit often entails increased insecurity...It is a deep irony that, by alerting citizens to risk and scattering the world with visible reminders of the threat of crime, it tends to increase subjective insecurity.'⁹⁸

In a separate piece, Zedner specifically discusses the liberty/security trade-off,⁹⁹ which she describes as 'perilous'.¹⁰⁰ In a section titled 'What tips the balance?', she believes that all talk of rebalancing presupposes a prior imbalance, so those proposing reform must 'either identify a disequilibrium or external factors that can be said to tip the balance out of kilter'.¹⁰¹ And she questions 'what lies in the scales?' In seemingly echoing previous concerns expressed by Sandel about the utilitarianism of Bentham, Zedner says that balancing presumes that the goods ostensibly placed in the scales are amenable to being weighed against one another. Yet it may be that they are, in practice, 'incommensurable'.¹⁰² That said, she is not averse to the liberty/security balance but believes a 'principled approach' to the exercise provides greater prospects of protecting rights against

⁹⁷ Lucia Zedner, 'Too Much Security?' (2003) 31 *International Journal of Sociology of Law* 155-184, at p.157.

⁹⁸ *Ibid.*, at p.163.

⁹⁹ Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32(4) *Journal of Law and Society*, 507-533.

¹⁰⁰ *Ibid.*, at p.509.

¹⁰¹ *Ibid.*, at p.511.

¹⁰² *Ibid.*, at p.516.

unwarranted erosion.¹⁰³ What would such a principled approach involve? Structural and procedural safeguards through ‘the twin engines of judicial oversight and unremitting defence of due-process’.¹⁰⁴ Thus, it may be possible to enhance collective security against terrorism without diminishing individual security against the state.¹⁰⁵

Other contemporary liberals such as Paul Berman,¹⁰⁶ Bruce Ackerman¹⁰⁷ and Michael Ignatieff have seemingly been much more forthcoming in their support for security at the expense of liberty. Ignatieff, for example, a former Leader of the Liberal Party of Canada, has become much less liberal post ‘9/11’.¹⁰⁸ He says that a democracy can allow its leaders one fatal mistake – ‘and that’s what ‘9/11’ looks like to many observers’ – but Americans will not forgive a second one:¹⁰⁹ ‘We need to change the way we think, to step outside the confines of our cosy conservative and liberal boxes.’¹¹⁰ He seeks to do this in terms of ‘lesser evils’ – ‘to defeat evil, we may have to traffic in evils’ – indefinite detention of suspects,

¹⁰³ *Ibid.*, at p.532. In this regard she cites torture as a good that is inappropriate for balancing, in her opinion (at p.520).

¹⁰⁴ *Ibid.*, at p.533.

¹⁰⁵ *Ibid.*

¹⁰⁶ Paul Berman, *Terror and Liberalism*. WW Norton, 2003.

¹⁰⁷ Bruce Ackerman, ‘The Emergency Constitution’ (2004) 113(7) *Yale Law Journal* 1029-1091.

¹⁰⁸ That is, he was very much in support of key liberal approaches to human rights – ‘natural’, ‘freedoms from’ etc – pre ‘9/11’. For example, he has said that ‘the best way to face the cultural challenges to human rights coming from Asia, Islam, and Western postmodernism was to admit their truth’: rights discourse was ‘individualistic’. But that was precisely why it had proven an effective remedy against tyranny, and why it had proven attractive to people from very different cultures – Michael Ignatieff, ‘The Attack on Human Rights’ (2001) 80(6) *Foreign Affairs*, 102-116, at p.113.

¹⁰⁹ Michael Ignatieff, ‘Lesser Evils’ *New York Times*. 2nd May 2004 <http://www.nytimes.com/2004/05/02/magazine/02TERROR.html> (accessed 23rd October 2014).

¹¹⁰ *Ibid.*

coercive interrogations, targeted assassinations, even pre-emptive war. They can be justified only because they prevent the greater evil.¹¹¹

Ignatieff's liberal leanings are still evident, however. He says that abridgements of the rights of a few are easy to justify politically when the threat of terrorism appears to endanger the majority. Rights exist, however, precisely to set limits to what fearful majorities can do: 'Rights will not have much value to us if they are easily taken away from others. So we all have an interest in making as few exceptions as possible.'¹¹² He then asks: how can democracies resort to 'lesser evils' without destroying the values for which they stand? How can they resort to these means without succumbing to the greater?¹¹³ To police the 'lesser evil', detainees, for example, should not be permanently deprived of access to counsel and judicial process.¹¹⁴ And the liberal institutions of the state need to work effectively: it is the function of a legislature, a free press, a well-organized civil society and an independent judiciary to keep the executive under scrutiny.¹¹⁵ Finally, for Ignatieff, there are some fundamental rights that can never be curtailed, such as freedom from torture: 'If you want to create terrorists, torture is a pretty sure way to do so.'¹¹⁶

¹¹¹ *Ibid.*

¹¹² Michael Ignatieff, 'Human Rights, the Laws of War, and Terrorism' (2002) 69(4) *Social Research*, 1143-1164, at p.1145.

¹¹³ Michael Ignatieff, *op.cit.* (2004).

¹¹⁴ *Ibid.*

¹¹⁵ Michael Ignatieff, *op.cit.* (2002), at p.1148.

¹¹⁶ Michael Ignatieff, *op.cit.* (2004). But whilst rejecting 'torture-heavy', such as physical coercion or abuse, any involuntary use of drugs or serums, any withholding of necessary medicines or basic food, water, medicine, and rest necessary for survival, Ignatieff does question whether lesser forms of harm such as hooding and sleep deprivation that do not result in harm to mental or physical health might be permissible for reasons of security: 'Here we are deep into lesser-evil territory.' – Michael Ignatieff, *The Lesser Evil: Politics*

In conceiving a group right to security, utilising 'positive' duties imposed on the state, the author here is not entirely convinced by Hobbesian 'absolutism' on the one hand and the excesses of liberalism, such as Teson's 'liberalism 2', on the other. So – thus far, at least – he is attracted to the more 'pragmatic' (my words) theories of liberalism post '9/11' echoed by, say, Ignatieff, which seem to draw the balance of security and rights much closer to the approach adopted by the author. Continuing to look at, say, liberal approaches to security, the author in the next section refers to commentators such as Liora Lazarus, who have written about a right to security, in law, in particular.

A 'positive' right to security in law

Liora Lazarus is anxious about the ambiguity of security: on the one hand it signifies a commitment to rights, which she claims we commonly associate with absence from coercion, and a commitment to coercion in the name of individual and collective security on the other.¹¹⁷ But unlike her fellow Oxford academic, Zedner, who maybe approaches security from more of a criminal justice perspective, Lazarus does so from more of a legal one. First, Lazarus believes that the right to security is simply too broad to be legally

Ethics in an Age of Terror. Edinburgh University Press, 2005, at p.141. He justifies the position thus: 'Those who think this allows too much probably underestimate just how important accurate and timely information can be in a war on terror, and just how resistant terror suspects can be.' (at p.141)

¹¹⁷ Liora Lazarus, 'The Right to Security – Securing Rights or Securitising Rights' in Robert Dickinson *et al* (eds), *Examining Critical Perspectives on Human Rights*. Cambridge University Press, 2012, 87-106, at p.89.

workable.¹¹⁸ Its apparent lack of sufficient certainty blurs the rights that flow from it, or even the correlative duties imposed on the state that might allow for such rights to be fulfilled.¹¹⁹ And since the right is connected to perceptions of future risk, she believes that there is no end to the kinds of risks that would have to be averted.¹²⁰ Equally, it says nothing about how foreseeable the risks have to be in order to establish a breach of the right.¹²¹

Lazarus's objections do not end there: she is also concerned about 'duplication', in that the right to security does not seem to add anything to the other rights that are meant to be secured.¹²² Such a right, she claims, should only protect that which other self-standing and established rights cannot, on their face, protect. Consequently, the 'right to security' should not encompass long established and self-standing rights such as the rights to life, liberty, freedom from torture and so on.¹²³ She continues: if the law is unclear about the contours of the right to security, she believes that politics has shed even less light: 'What we do know is that politicians deploy the right to security with enthusiasm, and the right is becoming an increasingly important rhetorical tool in security politics globally.'¹²⁴ Importantly, politicians claim that the 'right to security' is a 'basic' or meta-right' on which all other rights are based.¹²⁵ But this risks slipping from a right to security merely existing to affirm other rights, that is, a 'right to secure rights', to a belief which actively 'securitises' those rights. And in

¹¹⁸ Liora Lazarus, 'The Right to Security' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *The Philosophical Foundations of Human Rights*. Oxford University Press, 2014, 1-21, at p.10.

¹¹⁹ Liora Lazarus, *op.cit.* (2012), at pp.100-101.

¹²⁰ Liora Lazarus, *op.cit.* (2014), at p.10.

¹²¹ *Ibid.*

¹²² Liora Lazarus, *op.cit.* (2012), at pp.100-101.

¹²³ Liora Lazarus, *op.cit.* (2007), at p.327.

¹²⁴ Liora Lazarus, *op.cit.* (2012), at p.95.

¹²⁵ *Ibid.*, at p.98.

invoking security as a means to extend the 'state's coercive reach', we may end up 'righting security'.¹²⁶ Lazarus therefore calls for the courts to stem the 'rhetoric of security' in a global environment of insecurity and ensure that the right does not become the catch-all justificatory foundation for a range of self-standing fundamental rights.¹²⁷

However, if there is to be a right, Lazarus believes that it should be legally workable; there must be far more clarification of the freedom.¹²⁸ In so doing, she offers some advice: it must be specific, that is, it should correlate to clear and meaningful obligations and duties 'rather than empty rhetorical statements'.¹²⁹ And it must be rigorously and narrowly construed,¹³⁰ otherwise there is a real danger that the right to security might not result just in the erosion of rights which protect liberty 'but could displace a hard-won, carefully reasoned, yet fragile, consensus around the foundation of fundamental rights.'¹³¹

Hein van Kempen, who like Zedner, comes to security from a criminal justice perspective, also expresses concern about the concept. But he is seemingly original in that he bases his fears on an expansive interpretation of 'positive' obligations. There is a contradiction, he argues, in that with these duties, human rights no longer serve to control and restrain the power of the state, but that they also legitimise and even require the use of that power.¹³²

¹²⁶ *Ibid.*, at p.103.

¹²⁷ Liora Lazarus, *op.cit.* (2007), at p.344.

¹²⁸ Liora Lazarus, *op.cit.* (2014), at p.19.

¹²⁹ *Ibid.*

¹³⁰ Liora Lazarus, *op.cit.* (2007), at p.329.

¹³¹ Liora Lazarus, *op.cit.* (2012), at p.106.

¹³² Piet Hein van Kempen, *op.cit.*, at pp.18-19.

And since 'positive' obligations entail the use of criminal law against private parties, these obligations even require the state to infringe their human rights.¹³³ He concludes:

'The human rights concept of 'positive' security offers the authorities the possibility—which they are actually utilising—to adduce human rights in defence of all kinds of measures that limit liberty and it makes it easier for them to politicise or even exploit the human rights argument. Human rights can thus be turned in on themselves, neutralising their principles.'¹³⁴

Xenos seemingly agrees: he believes that the open ended scope of 'positive' obligations creates problems;¹³⁵ they are often used as a buzzword for every measure of compliance with human rights standards, a fact that leads gradually to their dilution.¹³⁶ Thus, the 'challenge' is to bring 'positive' obligations 'under a manageable level'¹³⁷ through, say, predictability and certainty.¹³⁸ Bearing these concerns in mind, the author in the next section discusses another philosophy relevant to security, 'communitarianism'. This theory lends greater support to the author's conceptual foundation for a group right to security than, say, Hobbesian 'absolutism', because, whilst it arguably draws on a model of security with, say, 'statist' traditions, at least since '9/11', it does offer concessions to strands of liberalism, such as Teson's 'liberalism 1'.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ Dimitros Xenos, *op.cit.*, at p.4.

¹³⁶ *Ibid.*, at p.204.

¹³⁷ *Ibid.*, at p.5.

¹³⁸ *Ibid.*

Communitarianism

The author's theoretical justification for a right to security is a compromise between the social contract theories of 'state absolutism' on the one hand and liberalism on the other. Some liberals are maybe right to be concerned about an overly expansive interpretation of security, especially through the use of 'positive' obligations, in that there is then much less emphasis on rights restraining the power of the state. And other liberal approaches to human rights and security, such as those presented by, say, Ignatieff, are much closer to the author's conception of a right to security. However, liberals arguably pay too much attention to individualism and too little attention to community. The author's right to security is borne out of 'positive' obligations imposed on a state by virtue of, say, Article 2 of the ECHR, the right to life, which would attach greater weight to the right of a 'group' or 'community' to security than the liberties of individuals. For the greater good of public protection, the author wishes to import notions of a 'collective' or 'human' security down to a much lower level. Thus, this 'overarching' thesis aims to ground the foundations for a 'semi-collective' right to security in, say, 'communitarian' criticisms of liberalism. That is, whilst the preservation of some rights such as freedom from torture are still very important, rights in general need to be balanced much less in favour of the individual and balanced much more in favour of the community.

Modern-day communitarianism, such as that proposed by Alasdair MacIntyre,¹³⁹ Michael J Sandel,¹⁴⁰ and Michael Walzer,¹⁴¹ began in the form of a critical reaction to John Rawls' *A Theory of Justice*. Sandel states, for example:

'At issue is...whether the principles of justice that govern the basic structure of society can be neutral with respect to the competing moral and religious convictions its citizens espouse...One way of linking justice with the conceptions of the good holds that principles of justice derive their moral force from values commonly espoused or widely shared in a particular community or tradition. This way of linking justice and the good is communitarian in the sense that the values of the community define what counts as just or unjust.'¹⁴²

Thus, the main theme of communitarianism is that there are common formulations of the public good rather than leaving it to be determined by each individual; the state cannot remain neutral on the issue. And in further rejecting, say, Rawls's 'veil of ignorance' hypothetical exercise, communitarians do not believe that individuals are born free and unencumbered, wholly autonomous agents:¹⁴³ they are 'bundles of particularistic

¹³⁹ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*. University of Notre Dame Press, 1981.

¹⁴⁰ Michael J Sandel, *Liberalism and the Limits of Justice*. Cambridge University Press, 1982.

¹⁴¹ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*. Basic Books, 1983.

¹⁴² Michael J Sandel, *op.cit.* (1982), preface, ix-x.

¹⁴³ Michael Walzer, 'The Communitarian Critique of Liberalism' in Amitai Etzioni (ed), *New Communitarian Thinking: Persons, Virtues, Institutions and Communities*. University of Virginia Press, 1995, 52-70, at pp.53-54.

attributes'.¹⁴⁴ We are bearers of a particular social identity; we are someone's son or daughter, someone's cousin or uncle; we are citizens of this or that city, members of this or that guild or profession; we belong to this clan, that tribe, this nation. We inherit from the past of our family, our city, our tribe, our nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of our lives, our starting point.¹⁴⁵ More recent theories of communitarianism are those advanced by, say, Amitai Etzioni¹⁴⁶ and Mary Ann Glendon.¹⁴⁷ For them, an important communitarian principle, which is particularly relevant to this thesis, is redressing the balance between liberalism's emphasis on the rights of the individual and social responsibilities.¹⁴⁸

1. Redressing the balance between rights and responsibilities

Communitarians such as Etzioni and Glendon believe in less individualism and more social responsibility; less autonomy and more community. Unless society begins to redress the

¹⁴⁴ Amitai Etzioni, 'Communitarianism Revisited' (2014) 19(3) *Journal of Political Ideologies*, 241-260, at p.242.

¹⁴⁵ Alasdair MacIntyre, *op.cit.*, at pp.204-205. For example, Walzer notes that the best predictor of a person's voting behaviour is how their parents voted – Michael Walzer, 'The Communitarian Critique of Liberalism' in Amitai Etzioni (ed), *op.cit.* (1995), at p.60.

¹⁴⁶ Amitai Etzioni, *The Spirit of Community: The Reinvention of American Society*. Touchstone, 1994; Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society*, Basic Books, 1996; Amitai Etzioni (ed), *The Essential Communitarian Reader*. Rowman and Littlefield Publishers, 1998.

¹⁴⁷ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*. Free Press, 1991; Mary Ann Glendon, 'Rights in Twentieth Century Constitutions' in Amitai Etzioni (ed), *Rights and the Common Good: The Communitarian Perspective*. St Martin's Press, 1995, 27-36.

¹⁴⁸ Amitai Etzioni, 'Preface: We, the Communitarians' in Amitai Etzioni (ed), *op.cit.* (1995b), at iii.

balance between rights of the individual and a person's obligations to the community, these communitarians believe society is, and will continue to be, self-centred and driven by self-interests.¹⁴⁹ No society can survive if people only want rights and are unwilling to assume responsibilities:¹⁵⁰ 'To take and not to give, to draw on the commonwealth, but to refuse to contribute, people demanding that the government, and above all taxes, be curtailed, while still seeking more government services from education to public health, from housing to protection from crime.'¹⁵¹

The liberal emphasis on rights of the individual – and neglect of responsibilities – inherits much from Locke, but the latter inherits much from the American tradition of human rights and the US Declaration of Independence of the United States in particular. *Rights Talk: The Impoverishment of Political Discourse* by Mary Ann Glendon is especially important in this regard. Glendon titles the first chapter of her book 'The Land of Rights' in reference to America.¹⁵² She says that, even in 1789, which was the date of the French Declaration of the Rights of Man and the Citizen, 'the parting of ways' was already evident: the French Declaration, in contrast to the Declaration of Independence, emphasised that individuals have duties as well as rights: 'American rights talk is set apart by the way the rights...tend to be presented as absolute, individual, and independent of any necessary relation to

¹⁴⁹ Amitai Etzioni, 'Old Chestnuts and New Spurs' in Amitai Etzioni (ed), *op.cit.* (1995a), at p.22.

¹⁵⁰ Amitai Etzioni, 'Introduction' in Amitai Etzioni (ed), *op.cit.* (1995b), at p.1.

¹⁵¹ Amitai Etzioni, 'Introduction: a Matter of Balance, Rights and Responsibilities' in Amitai Etzioni (ed), *op.cit.* (1998).

¹⁵² Mary Ann Glendon, *op.cit.* (1991), 1-17.

responsibilities.’¹⁵³ Glendon refers to Article 29(1) of the UDHR, for example, which states: ‘Everyone has duties to the community in which alone the free and full development of his personality is possible.’¹⁵⁴

In chapter two of her book, which is titled, ‘The Illusion of Absoluteness’, Glendon critiques the seeming absolute nature of American rights talk.¹⁵⁵ In part she blames this on the US Constitution and especially the First and Second Amendments: free speech and the right to bear arms respectively.¹⁵⁶ Echoing a classic criticism of liberalism by, say, Bentham, Glendon says that no one can be an absolutist for all constitutionally guaranteed rights, because taking any one of them as far as it can go soon brings it into conflict with others.¹⁵⁷ And she believes that this ‘rhetoric of absoluteness’ has the ill effect that it tends to downgrade rights into the mere expression of unbounded desires and wants: ‘Excessively strong formulations express our most infantile instincts rather than our potential to be reasonable men and women. A country where we can do ‘anything we want’ is not a republic of free people attempting to order their lives together.’¹⁵⁸

¹⁵³ *Ibid.*, at p.12. Chapter four of Glendon’s book, ‘The Missing Language of Responsibility’ (at pp.76-108), addresses this issue in more detail. References to a neglect of responsibility can also be found in chapter six: ‘Rights Insularity’ (at pp.145-170).

¹⁵⁴ *Ibid.*, at p.13. One could also include, say, the ACHPR, such as Article 27(1): ‘Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.’

¹⁵⁵ *Ibid.*, 18-46.

¹⁵⁶ *Ibid.*, at pp.42-43.

¹⁵⁷ *Ibid.*, at p.44. In this respect, therefore, do we have an ultimate responsibility to respect the rights of others? Note: freedom of speech/expression is guaranteed by, say, Article 19(2) of the ICCPR and Article 10(1) of the ECHR but, unlike the First Amendment in the US, it is qualified for several reasons by Article 19(3) and Article 10(2). One of these is – ‘in the exercise of the right...carries with it...responsibilities’ [my italics].

¹⁵⁸ *Ibid.*

It is important to note, however, that the communitarian philosophy of, say, Etzioni is not anti-rights. He says that because 'no society is ever perfectly balanced', communitarians seek to discern the direction a society is leaning at any one point in history and cast their weight on the other side. Thus, in China and the former Soviet Union, a communitarian would fight for expanding and enshrining individual rights. In the United States communitarians feel that social responsibilities particularly need shoring up.¹⁵⁹ So responsibilities do not replace rights or vice versa; they require one another.¹⁶⁰ What then would be a communitarian response to the restrictions on individual freedoms presented in the author's published works?

2. Communitarianism and human rights

In *After Virtue*, for example, MacIntyre articulated a strong anti-liberal approach to communitarianism. Whilst he conceded that there may be practices which simply are evil such as torture, he claimed natural or human rights were 'fictions'. Rights presuppose 'the existence of a socially established set of rules...[in] particular historical periods under particular social circumstances' (articulating similar criticisms of, say, Lockean liberalism by Bentham?).¹⁶¹ Interestingly, MacIntyre in a later edition of *After Virtue*, the third edition, expressed unease with the labelling of him as 'communitarian'. He saw no value in community as such – 'many types of community are nastily oppressive' – and the values of

¹⁵⁹ Amitai Etzioni, 'Introduction' in Amitai Etzioni (ed), *op.cit.* (1995b), at p.1.

¹⁶⁰ *Ibid.*

¹⁶¹ Amitai Etzioni, 'Liberals and Communitarians' (1990) 57(2) *Partisan Review*, 215-227, at p.221.

community, as understood by spokespersons of contemporary communitarianism, such as Amitai Etzioni, were compatible with and supportive of the values of the liberalism that he had rejected.¹⁶²

As MacIntyre suggests Etzioni arguably proposes a 'liberal' approach to communitarianism. In reference to, say, freedom of speech, which he is loath to infringe, Etzioni states that the First Amendment of the US Constitution is as dear to communitarians as it is to libertarians and many other Americans. Suggestions that it should be curbed to bar verbal expressions of racism, sexism, and other slurs 'seem to us to endanger the essence of the First Amendment'.¹⁶³ (But Etzioni does say that the victims of such abuse should not be ignored. To this end, he suggests education programmes as a way of encouraging 'responsible' speech rather than the coercive nature of the law.¹⁶⁴) In *Spheres of Justice*, Walzer articulated a more moderate communitarian vision, too. He developed his notion of community against a background of rights, asserting that individuals had the right to 'life and liberty,' and other rights 'beyond those'.¹⁶⁵

¹⁶² Alisdair MacIntyre, *After Virtue*. 3rd edition, Bloomsbury, 2013. Preface, iii. Similarly, Michael J Sandel, in the 2nd edition of *Liberalism and the Limits of Justice*. Cambridge University Press, 1982, expressed unease with the label of him as a 'communitarian', too, since for him, this theory was also too much associated with 'majoritarianism' (Preface, ix-x).

¹⁶³ Amitai Etzioni, 'The Responsive Communitarian Platform: Rights and Responsibilities' in Amitai Etzioni (ed), *op.cit.* (1995b), at p.19.

¹⁶⁴ *Ibid.*

¹⁶⁵ Amitai Etzioni, *op.cit.* (1990), at p.219.

In summary, communitarians charge contemporary liberal philosophers such as Rawls with an excessive focus on individual rights and with neglect of obligations to the community and to shared purposes. While contemporary liberal philosophers evince a measure of commitment to a moderate vision of community – Rawls became less individualistic and more sympathetic to communitarianism in his later work *Political Liberalism*,¹⁶⁶ for example – they contend that communitarians provide an insufficient basis for individual rights. Communitarians, in turn indirectly acknowledge the need to ensure these rights in order to avoid ‘collectivism’.¹⁶⁷ On the continuum, therefore, between freedom and community, communitarians – especially the more liberally minded ones such as Etzioni and Walzer – are more inclined to draw the line towards the latter. The theme of the author’s published works, with a greater focus on the community rather than on either the private sector or the government, but not an erosion of every human right of the individual, is therefore suggesting – at least implicitly – a ‘liberal communitarian’, right to security. But what have ‘liberal communitarians’ like Etzioni said about security in particular? This issue will be explored in the next section.

3. Liberal communitarianism and security

Amitai Etzioni seems to have become much less liberal post ‘9/11’, such that he seemingly shares the author’s belief that human rights are predicated on security. For Etzioni the right to security is more fundamental than any others, so much so, ‘it ought to be treated as a

¹⁶⁶ John Rawls, *Political Liberalism*. Columbia University Press, 1993.

¹⁶⁷ Amitai Etzioni, *op.cit.* (1990), at p.215.

class unto itself'.¹⁶⁸ The main reason that the right to security takes precedence over all others is that all the others are contingent on the protection of life – whereas the right to security is not similarly contingent on any other rights.¹⁶⁹ He declares: 'It sounds simplistic to state that dead people cannot exercise their rights, whereas those who are living securely at least have the possibility of exercising more rights in the future. However, it is still an essential truth: when and where the right to security is violated, all other rights are violated as well.'¹⁷⁰

So for liberal communitarians like Etzioni security is a precondition for the enjoyment of rights and freedoms – a 'basic' right from which all others rights flow.¹⁷¹ And in reference to, say, security measures post '9/11', he believes that nations have not lost their liberty as a result of a small accumulation of increased safety measures: they did so when they failed to respond to urgent public needs.¹⁷² He proclaims: 'True patriots...realize that one must protect the nation from all enemies and the essence of what it means to be patriotic is to protect our Constitution and its Bill of Rights with all our might.'¹⁷³

¹⁶⁸ Amitai Etzioni, *Security First: For a Muscular, Moral Foreign Policy*. Yale University Press, 2007, at p.1.

¹⁶⁹ *Ibid.*, at p.6.

¹⁷⁰ *Ibid.*

¹⁷¹ That said, it may be possible to exercise rights in conditions of insecurity – see, for example, Jeremy Waldron, 'Security as a Basic Right (after 9/11)' in *Torture, Terror and Trade-Offs: Philosophy for the White House*. Oxford University Press, 2010, at p.177.

¹⁷² Amitai Etzioni, 'Introduction: Rights and Responsibilities, Post '9/11' in Amitai Etzioni and Jason H. Marsh (eds), *Rights vs. Public Safety After '9/11': America in the Age of Terrorism*. Rowman and Littlefield Publishers, 2003, ix-xviii, at p.xii.

¹⁷³ Amitai Etzioni, *How Patriotic is the Patriot Act? Freedom Versus Security in the Age of Terrorism*. Routledge, 2005, at p.1.

But Etzioni is not a Hobbesian 'absolutist': he believes that 'to seek full-fledged security, to obviate all threats, to end fear, puts us on the slippery slope at the bottom of which is a police state'.¹⁷⁴ To this end, he says that individuals should share the commitment to find a middle course between those who are committed to shore up liberties but who are blind to the needs of public safety, and those who in the name of security never met a right that they were unwilling to curtail to give authorities a free hand.¹⁷⁵ Like many liberals, at least since '9/11', such as Teson who attempts to plot a course between a 'conservative conception of security' and 'liberalism 2', Etzioni has become much less liberal but still does not subscribe to an unfettered global fight against terrorism: to reduce the danger of slipping down the slope, it is important to 'draw additional moral and legal notches along the way'.¹⁷⁶ Drawing parallels with, say, the 'lesser-evils' approach of Ignatieff, Etzioni says that before setting foot on the slope, we must mark how far we are willing to go, in order to avoid slipping to a place one ought not to go.¹⁷⁷

In a separate piece, Etzioni elaborates further on what he thinks is or is not acceptable. Seemingly sharing this author's belief, in his published works, in the significant curtailment of the rights of terror suspects for reasons of security, Etzioni criticises those (such as Dworkin?) who urge that suspected terrorists are to be treated like, say, other criminals; assumed innocent until proven guilty; tried in civil courts according to similar procedures employed in the trying of other criminals; afforded several layers of appeals if found guilty; and incarcerated and released once they have served their terms. Importantly, he suggests

¹⁷⁴ Amitai Etzioni, *op.cit.* (2007), at p.2

¹⁷⁵ Amitai Etzioni, *op.cit.* (2005), at p.8.

¹⁷⁶ Amitai Etzioni, 'Introduction' in Amitai Etzioni (ed), *op.cit.* (1995b), at p.5.

¹⁷⁷ Amitai Etzioni, *op.cit.* (2005), at p.12.

that such an approach accords ‘terrorists more rights than they are entitled to, and unduly and significantly increases risks to the security of innocent citizens’.¹⁷⁸ That said, Etzioni does believe that there are limits to the state’s infringement of the rights of terrorists: he states that even terrorists ‘should indisputably be guaranteed some basic rights’. For example, they should be captured rather than killed; they should not be tortured or turned over to other states that are likely to kill or torture them. Rather than holding them indefinitely, they should be subject to a defined period of administrative detention, which could be extended through legally established channels if necessary.¹⁷⁹

The author’s liberal communitarian right to security

The theoretical base for the author’s conception of a right to security is ‘liberal communitarianism’. Communitarians are critical of, say, liberalism’s overemphasis on rights but do not wish to qualify every right of the individual such as freedom from torture in the furtherance of security. But ‘liberal communitarians’ like Etzioni are still prepared to ‘trade’

¹⁷⁸ Amitai Etzioni, ‘A Liberal Communitarian Paradigm for Counterterrorism’ (2013) 49(2) *Stanford Journal of International Law*, 330-370, at p.347.

¹⁷⁹ *Ibid.*, at pp.358-359. In the case of transnational terrorism, for example, Etzioni has discussed specifically the responsibility of states. Using the language of ‘R2P’ he believes there is a similar duty on countries, a ‘Responsibility to Counter Terrorism’ (‘R2CT’), by not using terrorists as agents, allowing their territory for training and/or raising funds or failing to suppress terrorists (at pp.344-345). If they fail in this obligation, then it is legitimate for the international community, with or without the consent of the UN Security Council, to violate a state’s sovereignty by, say, using drone strikes, special forces and intensified surveillance. For example, he suggests that a state’s sovereignty is ‘conditional’, that is, its sovereignty is forfeited if they fail in their international responsibilities such as ‘R2P’ (at pp.342-343).

many other rights of the individual for the greater good – an approach pervading many of this author’s published works.

That said, it is important not to ignore the concerns about a right to security, as previously expressed by, say, Lazarus: as the right stands, it is arguably vague, ambiguous and too broad to be legally workable. Indeed, even communitarians possibly have their doubts. It will be recalled that ‘liberal communitarians’ wish to redress liberalism’s neglect of responsibilities, but whilst Etzioni, Glendon etc are not anti-rights, they do propose a moratorium on the manufacture of new rights:

‘Once, rights were very solemn moral/legal claims, ensconced in the Constitution and treated with much reverence...We need to remind one another that *each newly minted right generates a claim on someone* [my italics]. Unless we want to generate a universal backlash against rights, we need to curb rights inflation and protect the currency of rights from being further devalued.’¹⁸⁰

If the author were to conceive his ‘positive’ right to security as one in express terms, then a model for such a right could be Article 23(1) of ACHPR. And there is s.12(1) of the Constitution of the Republic of South Africa, 1996, which is ‘the most extensively defined autonomous, express and justiciable right to security in any constitutional document around

¹⁸⁰ Amitai Etzioni, *op.cit.* (1994), at p.6.

the world'.¹⁸¹ This states that everyone has the right to be free from all forms of violence from either public or *private* sources. But in justifying liberal communitarianism in the conception of his group right to security, ideologically, the author is perhaps constrained from advocating the creation of a new right. To this end, in calling for a more expansive interpretation of the existing 'positive' obligations of the ECHR, he is therefore *developing* a right to security. In the next sub-section the author discusses the 'reach' of his right, as propounded in his published works attached to this thesis.

1. The 'reach' of the author's right to security in his published works

In two of the author's works, he applies the right to life to the shooting of a suspected suicide bomber, Jean Charles de Menezes, at Stockwell train station in London in July 2005. But in the first piece, because of word constraints, the author examines only the 'express' 'positive' duty of the state to protect life, as per Article 2(1) of the ECHR (as well as the 'negative' right not to be unlawfully killed, as per Article 2(2)).¹⁸² The second article in the de Menezes study continues the theme of the first, in that the shooting is assessed on the grounds of its human rights' compatibility, but from the perspective of another element of the 'positive' obligation of Article 2(1): the procedural duty imposed on state authorities to

¹⁸¹ Liora Lazarus, *op.cit.* (2007), at p. 336.

¹⁸² Ian Turner, 'Suicide Terrorism, Article 2 of the ECHR and the Shooting of Jean Charles de Menezes' [2008] 4 *Web Journal of Current Legal Issues* <http://www.bailii.org/uk/other/journals/WebJCLI/2008/issue4/turner4.html> (accessed 30th October 2014).

investigate death.¹⁸³ In a third case study, unrelated to the author's analyses of the de Menezes shooting, an examination of the 'positive' obligation imposed on the state to protect life is also undertaken. However, this time the author employs a 'right to security' to support the then control order scheme, as per the Prevention of Terrorism Act 2005; a scheme designed to disrupt the activities of terror suspects.¹⁸⁴ And in a fourth, separate article the author employs a 'right to security' to question support for a routinely armed police in mainland Britain, which, if the police had been armed, might have saved significant loss of life from, say, the shooting spree of Derrick Bird in Cumbria in 2010.¹⁸⁵

In two other articles, the author examines Article 3 of the ECHR, the freedom from torture and inhuman and degrading treatment and punishment, in supporting the possible torture of terror suspects. To go on and construct a possible argument justifying ill-treatment against a terror detainee on the basis of, say, the state's 'positive' duty to prevent violations of Article 3 by non-state actors, for reasons of security, which the author attempts to do in the second piece,¹⁸⁶ he questions in the first article whether freedom from torture can in fact be categorised as absolute.¹⁸⁷

¹⁸³ Ian Turner, 'Article 2 of the ECHR, the Investigative Obligation and the Shooting of Jean Charles de Menezes' [2009] 5 *Web Journal of Current Legal Issues* <http://www.bailii.org/uk/other/journals/WebJCLI/2009/issue5/turner5.html> (accessed 30th October 2014).

¹⁸⁴ Ian Turner, 'The Prevention of Terrorism: in Support of Control Orders, and Beyond' (2011) 62(3) *Northern Ireland Legal Quarterly*, 335-359.

¹⁸⁵ Ian Turner, 'Is there a Human Right to Armed Police in Britain?' [2015] *Covert Policing, Terrorism and Intelligence Law Review*, 1-18.

¹⁸⁶ Ian Turner, 'Human Rights and Anti-Terrorism: A 'Positive' Legal Duty to Infringe Freedom from Torture' (2012) 35(11) *Studies in Conflict and Terrorism*, 760-778.

¹⁸⁷ Ian Turner, 'Freedom from Torture in the 'War on Terror': is it Absolute?' (2011) 23(3) *Terrorism and Political Violence*, 419-437.

In another of his articles illustrating the utility of ‘positive’ obligations to situations threatening security, but is excluded from this PhD study because of word length, the author examines Article 4 of the ECHR, the freedom from slavery, servitude, forced or compulsory labour. There, he assesses the UK’s statutory compliance with its ‘positive’ obligations in criminalising trafficking in human beings (THB) – a contemporary form of slavery – to prevent violations of rights by third parties such as criminals.¹⁸⁸ Although this PhD study mainly concentrates on threats to public safety from terrorism, THB poses a serious risk to security, too: it is thought to be the world’s fastest growing criminal activity involving a global enterprise worth in the region of US\$32 billion, of which 2.4 million people are thought to be its victims.¹⁸⁹

The author has written a second article on the UK’s ‘positive’ obligations under Article 4, but this time he largely concentrates on the state’s duties to protect victims of human trafficking.¹⁹⁰ The fact that this piece will not be in print at the time of submission of this PhD excludes it from this study, too, but of course it represents a further contribution to the author’s published works on ‘positive’ obligations and a ‘right to security’. Indeed, this second piece assessing Article 4 is particularly informative in respect of a discussion of ‘positive’ obligations, in that it explores the ‘reach’ of these duties imposed on states much more so than the works attached to this study. In 2002, for example, the United Nations High Commissioner for Human Rights published the *Recommended Principles and Guidelines*

¹⁸⁸ Ian Turner, ‘Positive Obligations and Article 4 of the European Convention on Human Rights: a Defence of the UK’s Human Rights Act 1998’ (2014) 18(1) *International Journal of Human Rights*, 94-114.

¹⁸⁹ *Ibid.*, at p.101.

¹⁹⁰ Ian Turner, ‘Human Rights, Positive Obligations and Measures to Prevent Human Trafficking in the UK’ (2015) *Journal of Human Trafficking* (forthcoming).

on Human Rights and Human Trafficking. Its core principles emphasise: ‘preventing trafficking’ (principles 4-6); ‘protection and assistance’ to victims (principles 7-11); and ‘criminalization, punishment and redress’ (principles 12-17). Internationally, therefore, human rights principles informing states’ anti-trafficking measures should ‘prevent’ and ‘protect’, as well as ‘criminalize’, or ‘prosecute’, to give the principles their short-title of the ‘3Ps’. Often ‘positive’ state obligations under human rights law such as those attached to freedom from slavery are couched in terms of ‘prevent’, but fulfilling this duty can be achieved in several ways. In reference to, say, the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (‘UN Protocol’), which the UK ratified in 2006, Article 5 obliges state parties to criminalise human trafficking. A state’s emphasis upon the ‘prosecution’ of those who engage in human trafficking can therefore contribute to ‘preventing’ (or at the very least reducing) future harm against a person because of, say, its deterrent effect. ‘Prevention’ can also be achieved through ‘protection’: the UN Protocol obliges state parties to provide assistance to and protection of victims of trafficking, as per Article 6; and Article 7 encourages states to allow victims of trafficking to remain in their country of transit, temporarily or permanently, if they so wish. Thus, by encouraging victims to come forward by offering assistance, and in some cases permitting them to stay, Articles 6 and 7 can ‘prevent’ the continuance of the harm. Article 9 of the UN Protocol, which is expressly referred to as ‘Prevention of trafficking in persons’, requires state parties to establish comprehensive policies, programmes and other measures: (a) to prevent and combat trafficking in persons; and (b) revictimization.

The author in his published works has illustrated the significant ‘reach’ of a right to security, by reference to the ‘positive’ nature of several human rights: the right to life, freedom from torture and freedom from slavery. But Zedner, Lazarus, Hein van Kempen and others are concerned about an overly wide interpretation of a right to security, such that they wish to restrain its exercise. Many of these concerns are grounded in traditional liberal ideas of the ‘Rule of Law’ such as ‘legal certainty’.¹⁹¹ But even ‘liberal communitarians’ such as Etzioni are concerned about an expansion of rights, in that there is a risk of devaluing existing rights (so the author is *developing* an existing right rather than suggesting the creation of a new one). In the next sub-section the author therefore discusses the limits to his right to security, as propounded in the pieces attached to this thesis.

2. The limits to the author’s right to security in his published works

Before the author discusses the limits to his right to security, as propounded in the attached works, the question of who will be able to enforce such a group right will be addressed, as this issue is largely absent from his existing publications. The author is expanding the interpretation of, say, the right to life beyond its traditional ‘positive’, protection of a specific individual, or individuals, but in so doing, he is relying on communitarian ideals as a theoretical model for doing so. If the author’s right to security is to be justiciable,¹⁹² it is

¹⁹¹ See, for example, Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review*, 195-209.

¹⁹² To be honest, the author has no strong opinions on the issue of enforceability, so is prepared to accept a non-justiciable right to security along the lines of the ‘R2P’ concept, which relies on political and institutional pressure for its enforcement rather than through legal redress. That said, a call in the main text for a more expansive interpretation of

logical, perhaps, to draw on this theory's definition of 'community' to explain the 'standing' of those who can claim such a right. Etzioni, for example, describes 'community' as 'kin, friends, neighbours, and other community members',¹⁹³ so the provenance of the group for the purposes of state protection would be relatively small. Thus, this author is not articulating an all embracing duty imposed on the authorities to protect everyone; there would have to be a 'communitarian' nexus between the individual making the claim and the threat that the state had allegedly failed to avert.

Continuing the limits of his right to security, in an article discussing human rights in general, which is also not included in this study for reasons of word length, but is still a published piece by the author, the author examines the effect on human rights in the UK since the introduction of the Human Rights Act 1998, incorporating the ECHR into domestic law.¹⁹⁴ Traditional principles of judicial review dictate that the courts are concerned with assessing only the lawfulness of administrative decision-making rather than its merits. That said, the author in this piece finds that the orthodox principles of judicial review no longer apply: the courts engage in a legitimate review of merits when assessing suspected breaches of the ECHR. Nevertheless, there is an absolute bar to judicial intervention: the executive reserves the right not to have their judgments substituted by the courts.¹⁹⁵ In terms of enforcement, therefore, the author's right to security should not entail the courts in a substitution of

'positive obligations' through existing human rights that are legally enforceable does signify a commitment to a right to security that is justiciable.

¹⁹³ Amitai Etzioni, 'Preface: We, the Communitarians' in Amitai Etzioni (ed). *Rights and the Common Good: The Communitarian Perspective*. St Martin's Press, 1995, at iv.

¹⁹⁴ Ian Turner, 'Irrationality, the Human Rights Act and the Limits of Merits-Review' (2009) 18(1) *Nottingham Law Journal*, 18-36.

¹⁹⁵ *Ibid.*, at p.35.

judgment. That is, the executive branch of the state should be accorded some measure of discretion in how it chooses to protect human security.

In further 'mapping' the author's right to security, it is important to look at the specific human right of the individual being curtailed for reasons of public protection, in that some rights are more important than others. First, there are those freedoms like Article 3 of the ECHR, the prohibition on torture, which in law, are 'absolute' and can never be infringed. (They are also 'non-derogable' in times of war or public emergency, as per, say, Article 15(2) of the ECHR.) In two of his published works it will be recalled that the author explores a relaxation of the absolute ban on the use of torture against terror suspects. In his first torture article he concludes that the freedom is indeed absolute, thus making an argument justifying the use of ill-treatment much more difficult.¹⁹⁶ Interestingly, there he questions if the right is not to be abrogated by the conduct of terrorists, how is the freedom squared with, for example, Article 17 of the ECHR, the prohibition of abuse of rights?¹⁹⁷ Article 17 states:

'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

¹⁹⁶ Ian Turner, *op.cit.* (2011b), at p.419.

¹⁹⁷ *Ibid.*, at pp.429-430.

In that piece the author finds that the application of Article 17 is limited, as per, say, the ruling of the ECtHR in *Lawless v. Ireland*,¹⁹⁸ in that it is restricted to situations where rights are claimed to destroy the liberties of others. There, the author uses the example of extremists claiming a right to freedom of expression, when calling for the death of those who have offended the Muslim prophet Mohammed (Article 17 can also be used as basis for justifying, say, the censorship, and even criminalisation, of ‘hate speech’ such as the denial of the ‘Holocaust’). But is not the essence of Article 17 ‘responsibility’? – a key criterion of communitarianism. Perhaps, therefore, rather than calling for a more expansive interpretation of ‘positive’ obligations to support a right to security, the author should do so in reference to Article 17, or even as a supplement to this? For reasons of word length such questions will not be explored here but in future works by the author. (That said, it has already been stated earlier in this piece that some liberals believe that the very posing of this question – that is, suspects who seek to destroy democracy should not be able to rely on its values for their own protection – already assumes guilt.¹⁹⁹)

Not to be deterred about his conclusions in the first torture work, the author explores in the second piece another case for a relaxation of the ban for the purposes of security, but from a different perspective: protecting the ‘positive’ rights of, say, terror victims, especially children, from acts of harm?²⁰⁰ However, for several reasons, such arguments are rejected.²⁰¹ Indeed, this overarching thesis can provide a theoretical edge to some of the

¹⁹⁸ (1960) 1 EHRR 1.

¹⁹⁹ David Luban, ‘Eight Fallacies About Liberty and Security’ in Richard Ashby Wilson (ed), *op.cit.*, at p.252.

²⁰⁰ Ian Turner, *op.cit.* (2012).

²⁰¹ *Ibid.*, at pp.768-771.

author's findings in these torture pieces that a limit to his right to security should exclude the ill-treatment of a terror suspect. Infringements of Article 3 were justified by utilitarian philosophy, at least implicitly rather than explicitly, because in extreme cases they provide the greatest security for the greatest number. In fact some utilitarians oppose torture on practical grounds.²⁰² They argue it seldom works, since the information gained is often unreliable.²⁰³ Pain is inflicted, but the community is not made safer: there is no increase in the collective utility.²⁰⁴ Or they worry that if states engage in torture, they will become less secure; their soldiers abroad will face harsher treatment if taken prisoner, for example.²⁰⁵ Thus, the author in his published works on torture was maybe not subscribing to the traditional liberal approach that the freedom was non-negotiable, it being a natural right: his rejection of the practice was probably premised more on traditional utilitarian grounds, that is, merely after a cost/benefit analysis, he concluded that the practice does more harm than good.

But in writing this thesis, the author is not so sure now if the limits to his group right to security, which include respecting freedom from torture, are grounded in utilitarian balancing or that some rights are so fundamental that they should be protected from majoritarian laws.²⁰⁶ That said, when discussing 'balance', Etzioni believes that there a small number of 'major moral values' that speak to us directly, that we find compelling. He says that people are born with a moral sense that yields strong judgments about various

²⁰² Michael J Sandel, *op.cit.* (2010), at pp.38-39.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ Or is, say, torture simply wrong, to adopt a Kantian perspective? – see footnote 68.

behaviours.²⁰⁷ Thus, whilst this author is still unsure whether he would balance torture, for example, in the pursuit of security, he has strong beliefs that freedom from the death penalty should always be excluded – whatever the cost. Some may argue that some crimes, such as those of international concern such as genocide, being so heinous, should at least warrant capital punishment being available to a court for consideration, but in the author’s ‘defence’ even the death penalty is excluded from the punishment powers of the ICC, as per Article 77 of the ‘Rome Statute’.

The right to life is ranked with freedom from torture in terms of its importance. In the author’s first article examining the killing of Jean Charles de Menezes by police firearms officers in 2005, it will be recalled that he assesses the ‘positive’ duty to protect life (and the ‘negative’ right not be unlawfully killed).²⁰⁸ In conclusion, accounting for the many features of Article 2, ‘positive’ and ‘negative’, the author finds that the balance falls in favour of the state, that is, de Menezes was not unlawfully killed. Nonetheless, if in the event that the killing is later held to contravene Article 2, he does believe, therefore, that the ‘positive’ obligation is weighted too heavily on the side of the individual whose life has been deprived rather than the community’s right to be protected from terrorism, especially suicide violence where the risks to life are that far greater. But in calling for a standard more beneficial to the public interest, the author neither calls for a unilateral relaxation of existing terror laws in favour of states authorities nor an extension to them.²⁰⁹

²⁰⁷ Amitai Etzioni, *op.cit.* (2014), at p.251.

²⁰⁸ Ian Turner, *op.cit.* (2008).

²⁰⁹ *Ibid.*, at pp.26-27.

Continuing the limits of a group right to security, the author does so again in the second article assessing the shooting of Jean Charles de Menezes, but from the perspective of the state's investigative obligation.²¹⁰ There, he finds that the subsequent inquiries into the shooting were lawful. Nonetheless, for the purposes of protecting life, and the continued accountability of state agents, especially those killings for which the police are directly responsible, he argues that this element of the 'positive' obligation – the procedural duty – should not be relaxed in the fight against terrorism. Otherwise the 'positive' duty to protect life, which is the basis for legitimising a lesser need for lethal force in the author's first article, lacks sufficient safeguards for the person whose life has been deprived; and arguably puts the general public at greater risk.²¹¹

The author sets further limits to a group right to security when he questions support for armed police in mainland Britain.²¹² In this article he concludes that the Cumbria police did not fail in their duty to protect life in granting a firearms license to, say, Derrick Bird. In doing so, however, he limits his right to security by doubting the need for all police officers to be routinely armed (recent firearms operations, for example, such as those involving the killings of Azelle Rodney in 2005, Jean Charles de Menezes in 2005, Mark Saunders in 2006 and Mark Duggan in 2011, do not necessarily inspire public confidence). Nevertheless, for reasons of greater public protection, the author does suggest reform of the firearms licensing scheme and the wider use of 'less-lethal weapons' by the police such as TASERS.

²¹⁰ Ian Turner, *op.cit.* (2009a).

²¹¹ *Ibid.*, at p.19.

²¹² Ian Turner, *op.cit.* (2015a).

Moving away from basic liberties such as freedom from torture and the right to life in the 'hierarchy' of human rights, one 'finds' special rights – that is, those freedoms that can be infringed but only in limited circumstances – such as Article 5 of the ECHR, the right to liberty, and Article 6 of the ECHR, the right to a fair trial. Because these rights are seemingly less important than those discussed above, the author in his published works inevitably adopts a more expansive interpretation of 'positive' obligations justifying their infringement. He does so, for example, in supporting the then control order scheme to disrupt the activities of terror suspects.²¹³ The scheme extended the reach of state interference – orders were imposed on individuals where there was only a reasonable suspicion – and was significantly intrusive of human rights: Article 5 of the ECHR, the right to liberty; Article 6 of the ECHR, the right to a fair trial; and Article 8 of the ECHR, the right to respect for private life, family, home and correspondence. The author makes out a case for supporting control orders on the basis of the existing 'positive' duty imposed on the state to protect life as per Article 2(1) of the ECHR.²¹⁴

²¹³ Ian Turner, *op.cit.* (2011a).

²¹⁴ *Ibid.*, at pp.350-354. Incidentally, control orders were replaced by Terrorism Prevention and Investigation Measures (TPIMs) in s.1 of the Terrorism Prevention and Investigation Measures Act 2011. This statute relaxed the controls on a suspect, as well as raising the standard of proof for their imposition from 'reasonable suspicion' to 'reasonable belief', as per s.3. Nevertheless, a former independent reviewer of anti-terrorism legislation in the UK, Lord Carlille, called for the reintroduction of control orders, to increase security. This was because of, say, the threat to the UK from Britons returning to the country, after having travelled abroad to train and fight with international terror groups such as Islamic State (ISIL) in Syria and Iraq – Matthew Holehouse, 'Isil: Call to Bring back Blair's Control Orders for Terror Suspects' *The Telegraph*. 22nd August 2014 <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/11050330/Isil-call-to-bring-back-Blairs-Control-Orders-for-terror-suspects.html> (Accessed 24th March 2015). Thus, whilst the new Counter-Terrorism and Security Act 2015 has raised the standard of proof of a TPIM still further – to the civil standard of proof, 'a balance of probabilities', as per s.20 – it has placed greater restrictions on the freedoms of the individual, as per ss.16-19 – see, for example: Ian Turner, 'CTSA 2015 and the Risk of Being Drawn Into Terrorism' *Lexis Nexis*

Conclusion

Post 9/11 the threat to the UK and its allies from Islamist terror groups such as Al-Qaeda has continued: there was the 'Ricin case', a plot to spread deadly ricin across London, in 2003; the train bombings in Madrid in 2004 and the 7/7 attacks in London in 2005, as well as the failed suicide bombings a couple of weeks later. There was also the 'Airline Bomb Plot', a plot to detonate homemade explosives on airliners mid-flight over the Atlantic Ocean, in 2006, and the discovery of a bomb in a computer printer on a plane bound for the United States at East Midlands airport in 2007. Whilst the threat to security from Al-Qaeda in Afghanistan and Pakistan has decreased, with, say, the killing of Osama Bin Laden by American Special Forces in May 2011, as well as the threat from Al-Qaeda in the Arabian Peninsula, with, say, the killing of Anwar al-Awlaki by an American drone strike in Yemen in September 2011, acts of 'super-terrorism' by other Islamist groups have not abated. In particular, there has been the spectacular rise of Islamic State in Syria and Iraq (ISIL), over the last few years with, say, its beheadings of Westerners, such as James Foley, videos of which were posted on the internet. (The murder of James Foley caused the UK government to increase its terror threat level from 'substantial' to 'severe' in August 2014.) More recently, ISIL has committed terror atrocities in mainland Europe: the shootings at the Jewish Museum in Brussels in 2014 and the offices of the satirical magazine, Charlie Hebdo,

News. 1st April 2015
<https://www.lexisnexis.com/uk/lexispsl/immigration/document/412012/5FN3-3BP1-DYW7-W54B-00000-00/CTSA-2015-and-the-risk-of-being-drawn-into-terrorism-> (legislative commentary) (last accessed 14th April 2015). So with TPIMs the state could be said to be attaching less weight to the rights of the individual because of public safety, as the author previously supported.

in Paris in January 2015, as well as its massacres in the same city, Paris, primarily at the Bataclan Theatre, where 89 people were killed, in November 2015. These outrages serve only to remind states that they need to remain strong and vigilant if they are to be successful in preventing, or at least reducing, Islamist terrorism. Contributing to the debate about states' need to provide effective protection to their citizens from, say, ISIL, this overarching thesis has advocated a human right to security – but not the furtherance of the traditional liberal, 'negative', right to security of the individual *from the state*: a collective, 'positive' right of security from threats to public safety *from non-state actors* such as suspected terrorists. The foundations for such a human right are the 'positive' obligations imposed on states to, say, protect life, as per Article 2(1) of the ECHR, and prevent injury, as per Article 3 of the ECHR.

The social contract theories of Thomas Hobbes and John Locke emphasise the state's responsibility to provide security so serve – at least initially – as theoretical models for the author's conception of his 'positive' right to security. The author finds the lure of Hobbesian 'absolutism' particularly seductive, especially as his attached published works suggest he is prepared to make substantial in-roads into the rights of the individual for the peace and order that would inevitably follow. However, in acquiring significant powers of security, Locke, for example, believed that the Hobbesian sovereign could itself pose a threat to security. The totalitarian regimes of, say, Stalin and Hitler were 'absolutist' ones seemingly supported by the writings of Hobbes, in that significant curtailments of human rights were justified on the basis of security – but these states were themselves a significant threat to security, especially to Jews, Roma, political opponents, gay and lesbian men and women,

those with disabilities etc. However, this is to do Hobbes an injustice: these states had in fact delegitimised themselves in the eyes of Hobbesian philosophy as the covenant upon which these individuals had qualified their rights in exchange for protection was spectacularly broken. Thus, a right of rebellion to institute a new sovereign was permitted.

That said, Locke believed that to legitimise a right of rebellion only when the state had gone too far – in enslaving its subjects, for example – was too late. Moreover, in conceiving the Hobbesian model as the basis for public protection of democracy, the state seemingly undermines the very ideals it is seeking to preserve; the degree of ‘trade-off’ between rights and security required to fulfil the Hobbesian sovereign can so easily become merely a question of ‘*your* rights for *my* security’; and is there actual evidence that substantial gains in state power in the last 15 years or so, as the terror threat has continued, have actually made nations more safe? So liberal concerns about significant erosions of individual freedoms post 9/11 should not be ignored (perhaps, therefore, to work through this apparent ‘impasse’, the author should be advocating a *freedom from* insecurity, to reflect traditional, liberal sensibilities, rather than a *right to* security, but this would still require intervention by the state for the right to be fulfilled, it being ostensibly a ‘positive’ right in the sense of Article 6 of the ECHR, the right to a fair trial by an independent and impartial court or tribunal). Nevertheless, some liberals do recognise substantial limitations on individual freedoms for the greater good. Teson, for example, attacks those strands of liberalism which are unprepared to accept a balance between rights and security – Dworkin and others? – in that these liberals seemingly overlook threats that undermine the very values that they hold so dear. Indeed, some liberals such as Ignatieff go much further; in

advocating 'a lesser evils' approach, Ignatieff justifies significant curtailments of individual freedom on the basis that terrorism is the 'greater evil'.

Plotting a course through these models of state absolutism and liberalism one 'finds' communitarianism. In this 'overarching' PhD thesis, therefore, the author is advocating a 'positive' right to security grounded in the ideals of 'communitarianism'. In particular, communitarians reject the Rawlsian, liberal 'veil of ignorance' exercise that individuals are born-free and wholly unencumbered agents: they are bearers of a particular social identity; they are someone's son or daughter, someone's cousin or uncle; they are citizens of this or that city, members of this or that guild or profession; they belong to this clan, that tribe, this nation etc.

Of communitarian theory, the author is attracted to its more moderate elements reflected in the writings of, say, Amitai Etzioni and Mary Ann Glendon. Etzioni and Glendon are critical of liberalism's Lockean traditions of absolute freedoms, in that they attach too much emphasis to rights and too little weight to responsibilities (a charge implicit in the critical writings of 'natural' rights by Bentham). Thus, Etzioni and Glendon call for a moratorium on new freedoms. In basing his 'communitarian', right to security on an expansive interpretation of 'positive' duties of the state, the author is therefore not proposing an autonomous human right to security, which would suggest the creation of a new right; he is developing an existing one. Etzioni and Glendon also believe that too many rights devalue the more fundamental and well established ones such as the First Amendment of the US

Constitution, the right to free speech, which they are loathe to infringe. In this respect, therefore, Etzioni and Glendon could be categorised as 'liberal communitarians'.

The author's accompanying published works see his 'positive', 'liberal communitarian' right to security applied to situations which affect public safety; they are a collection of case studies illustrating the reach of the freedom. (Indeed, since 9/11, for example, Etzioni has emphasised the significance of security as a 'basic' right, which very much agrees with this author's published works that human rights are predicated on security, that is, to enjoy human rights requires security but not vice versa.) In many of his pieces the author applies his right to security to protect life from 1) the threat of suicide bombers 2) those who the state suspects are engaged in acts of terrorism but has insufficient evidence to satisfy the criminal standard of proof and 3) individuals licensed to possess firearms and/or shotguns but who no longer exercise proper control over them. In two other pieces the author applies his right to security in assessing a relaxation of the absolute ban on the use of torture against terror suspects, on the premise that they may have information which could prevent an attack.

To make the author's 'positive', 'liberal communitarian' right to security more *legally* workable, however, his published works also suggest limits to its exercise. (Thus, the author still sees his right to security as primarily a justiciable one enforceable before the courts.) He does not advocate an all embracing duty imposed on the state to protect everyone, justifying the broad erosion of individual liberties for the good of preventing terrorism;

there would have to be a 'communitarian' nexus between the individual making the claim and the threat that the state had allegedly failed to avert. And in reviewing the right, the judiciary should not substitute their judgment for that of the executive.

Furthermore, whilst the use of torture against a suspect is rejected – not because it is a 'natural' right that should never be traded, even in the liberty/security balancing exercise, but because the author sees it as causing more harm than good – the use of the death penalty should never be permitted. And the police should not be routinely armed either, though there may be a case for their further weaponisation with less lethal options such as TASERS. But in situations not involving the absolute rights of, say, a terror suspect, the author's published works suggest that his 'communitarian' right to security should be accorded much greater weight in the liberty/security trade-off over, say, the rights to liberty and fair trial of the individual. Thus, initiatives such as the previous control order scheme to prevent terrorism should not engage judicial scrutiny particularly intensively, when examining suspected violations of the rights of the individual.