International Journal of Science and Research (IJSR)
ISSN: 2319-7064
SJIF (2019): 7.583

Human Right to Security in the English Legal Tradition 0 Myth or Reality? Legal Perspectives

Andre Felix Martial TCHOFFO

PhD, Assistant Lecturer, Faculty of Laws and Political Science, University of Yaounde II, Cameroon
Email: *afmtchoffo[at]ymail.com*

Abstract: ***Security, or the right to it, is found today in many international Huma Rights Treaties and Constitutions; it is often articulated alongside peace and the right to liberty from the state. Liberty, for instance, and security may sometimes bring forth duties that are diametrically opposed: one may beg for state protection – security, while the other may focus on protection from the state – liberty [Lazarous L: 'The Right to Security' In: Cruft R, Liao MS and Renzo M (2015): 'The Philosophical Foundations of Human Rights: An Overview', In: Cruft R, Liao MS and Renzo M (ed.): The Philosophical Foundations of Human Rights. Philosophical Foundations of Law, Oxford, Oxford University Press, p.1]. It is by dint of these opposing dimensions, for instance, that different philosophical perspectives emerge, as to whether security is a right or not.The question that this paper seeks to resolve is: what is the legal certainty and enforceability of the human right to security under the English Legal tradition? To unravel this question, we carefully kempt and analysed the contents of some relevant legal instruments and some literature around the subject. The analysis led to the conclusion that legally speaking (in terms of texts), security is couched, in principle, as a human right, but it remains technically and substantively challenging to capture the essence of such a right for enforceability. It is on the basis of this conclusion that we submit, inter alia, that in furtherance of the security conversation, at present, security may be considered as a human right only to the extent of formal consecration as a matter of principle, but whose substantive contents and components still remain wanting.***

Keywords: Human rights, security, legal tradition, legal perspective, right to security

1. Introduction

The protection, violation and enforcement of human rights is one of those subject matters that hardly get weary of scholarly discussion. The importance of human rights[1] cannot be overemphasised but their violation continues to take different forms across different societies. Of course there are legal dispositions, safeguards and for the protection/enforcement of these rights through the different legal systems around the world, but it is important to highlight the fact that one can only protect or enforce what can be determined with certainty, and demonstrate with clarity in a court of law. On the other hand, if the violation of human rights is not met with an effective and reliable protection and enforcement mechanism, citizens may find themselves in what may commonly be referred to as a general state of insecurity. From the above preceding statement, one can begin to ask the question of knowing whether security is a right (*grossomodo*), or a human right *strictosensu*or a state of affairs *in globo*.

We will certainly have the opportunity to address the above question later in this paper, but for now, one may state without much fear of contradiction that the existence of the concept of security is hardly questionable, but when one turns to the direction of the human right to security in particular, the corridors may become quite tricky and slippery. It is in this state of affairs and stream of reflection that this paper ponders around the question as to whether the human right to security is an actual legal reality on the one hand, or has security become such an unquestionable social value to which everyone professes their loyalty and unfortunately taken to be a human right which is honoured more in its breach than in its observance?

These questions and reflections are quite pertinent in contemporary societies because the determination of what security actually is will possibly help in understanding the nature of the relationship between the state and its citizens. That is to say, this involves an understanding of what type of action can be tolerated from the state for the sake of security; what limits and checks can be put on the actions of state authorities to guarantee the enjoyment of the *human right to security* and what extent the courts can go in the establishment of precedents in the security conversation.

It may be good to indicate at this juncture that the preoccupations of this paper on the subject of the human right to security are not predicated only on the questions and considerations raised above; they are equally premised on some theories and concepts. On the one hand, we have the concept of *existentiality* – the being – which will be discussed in the light of Rene Descartes' *Cogito Ergo Sum*, and on the other hand, we have the social contract theory with focus on the contract from Rousseau's standpoint for reasons that will be explained here below.

1.1 The *Human Right to Security* Conversation premised on the concept of *Existentiality*.

There is a strong connection between the question of our existence and the rights that we enjoy as existing beings. One of the most celebrated philosophers to prove the

[1]Human rights refer to the rights that are generally recognized in every human being irrespective of age, race, sex, colour, religion, language, origins, or any other form of social segregation. It should be said that this definition is not a one-size-fits all definition but seems to refer more to natural rights that are universal, interdependent and indivisible, inherent and inalienable. It is also true that human rights cannot be couched exclusively in universal terms because the various cultures from which these rights inhere may not be the same everywhere, which makes the cultural relativism argument a very important one in human rights discourse.

existence of man is Rene Descartes through the concept of *Cogito Ergo Sum* (I think, therefore I am), in his book entitled: *Discourse on the Method of Rightly Conducting Reasoning and Seeking Truth in the Science* (1637). Thought, according to the philosopher is the first step in determining the attainability of certain knowledge. The statement made by the Descartes is one that aims at helping man survive the test of methodic doubt. He strengthens this argument by illustrating that even if an all-powerful demon were to try to deceive him into thinking that he exists when he does not, he would have to exist in order to believe the demon. *Sum* (I am) is not, Descartes argues, the conclusion of a piece of reasoning, but an intuition; rather, it is *cogito* which is the conclusion of a syllogism whose premises include the propositions that he is thinking and that whatever thinks must exist. This being just a snapshot at the philosopher's concept, it will be good to establish the connection with the line of discussion in this paper.

In the logic of *existentiality*, the state of being implies the presence of certain rights that one enjoys as an existing being, some values that are shared among these beings and some concepts that are fundamental to human existence. If *thought* is a substantial determinant (not the only one anyway) of human existence, would it be logical to surmise that freedom of thought, conscience, speech and expression, to name but these, are ingrained into our very existence? Would this explain the inherent nature of these rights, just like the right to life whose existence guarantees the existence of the others? If the answer sways to the affirmative, then one may, without much difficulty, understand the inclusion of liberty (as a human right) into the human rights conversation. The question that one may not clearly understand, or do so with much difficulty, is: how do we position the spectrum so as to capture *security* in the human rights picture frame from this philosophical standpoint, at least? The temptation that one may have to battle to resist is that of *justification by association*, considering that liberty and security have, in legal texts, forged a union of almost absolute no asunder. This battel of resistance will be reflected through the arguments formulated in this paper.Already, it should be clarified that we avoid saying *absolute no asunder* by including the word *almost* because although some philosophers (like Hobbes and Locke, as will be seen later), through their works seem to religiously bless the union between liberty and security, just like most of the legal instruments do, others (like John Stuart Mill) have been able to write *On Liberty* only.

1.2 The *Social Contract* Theory and the *Human Right to Security* Argument.

It must be said at once that majority of the philosophical foundations of the social contract theory seem to espouse liberty with security as well shall see through the works of Hobbes and Aristotle in the second section of this work. The two philosophers mentioned above proposed the first two versions of the theory while Jean Jacque Rousseau proposed the third. This paper investigates the human right to security in English Legal Tradition and on this basis, we prefer not to include the third version in our analysis in section 2 here below. Considering that this first section is introductory (not to mean least important), we prefer to focus on Rousseau's version in the light of the subject matter at hand, and then discuss the first two versions later. The aim behind the invocation of this theory is to find out whether security can be considered as one of the rights involved in the social contract.

The social contract theory is known to have passed through the hands of at least two British philosophers before getting a third revision in the hands of Jean Jacques Rousseau (1712-1778). The latter has been considered to be one of the fathers of the natural law school and the natural rights doctrine in particular. Rousseau argued that in the original contract the individuals did not surrender their right to any single sovereign, but to society as a whole, and this is their guarantee of freedom (or liberty, in isolation from security) and equality. For Rousseau, natural law did not create imprescriptible natural rights in favour of individuals. It conferred absolute and inalienable authority on the people as a whole. For this purpose the people, taken together, constituted an entity known as the "*general will*" which differed from the mere sum of the individual wills of the citizen.

This *general will* was, by natural law, the sole and unfettered legal authority in the State. Any actual ruler was a ruler only by delegation and could be removed whenever rejected by the *general will*. Rousseau's doctrine implied that the people were the real rulers and could overthrow at their discretion any reigning monarch. In this sense Rousseau's doctrine was more revolutionary than that of his predecessors. Indeed, it was in the light of Rousseau's philosophy that the spear headers of the French Revolution in 1789 ultimately overthrew the ancient regime and sought to impose the natural law of reason in its place. Rousseau's approach, however, really implied the tyranny of the majority. The recalcitrant minority, in Rousseau's ominous phrase, must be 'forced to be free'. Thus, ironically enough, the social contract according to Rousseau which arose out of a faith in democracy and liberty, became an instrument of totalitarianism.

It is remarkable that in this version of the social contract theory, liberty/freedom is considered in terms of a human rights and not really associated with security, but equality among men. It may be argued that totalitarianism and tyranny give rise to a state of insecurity, notably when most, if not all, the other rights are trampled upon. On the contrary, nothing seems to suggest that in Rousseau's theory, there exists a *human right to security*, either by association with, or independent from liberty. From the discussions in the next section (2), we will be able to say whether the same conclusion can be drawn from the Hobbesian and Aristotelian philosophies.

Already, it is important that certain considerations should animate and guide our reflections as we probe into the philosophical underpinnings of security as a right. For example, we should be able to draw the line between the 'good' of security and recognizing whether specific actions taken in its pursuit constitute a social good. In same vein, we must be able to draw the line between *the social good of security* and the *individual right to security*. Finally, what is

the difference between the *right to security in people* and the *scope of the correlative obligations it places on states*[2]?

It should be pointed out that although the philosophers to whom we are about to pay a courtesy visit are British philosophers, their ideologies are quite transcendental and have served as inspiration for other philosophers[3] and *human rights revolutions* in the 18th Century[4].

2. The Human Right to Security? Probing the Philosophical Conceptions

Considering that we are interested in the human right to security in the English Legal tradition, and considering that in the human (natural) rights discourse, English philosophers were among the spear headers, our hosts will be two outstanding British (political) philosophers – Thomas Hobbes and John Locke.

2.1 Hobbes'take on Security in his Authoritarian Ideal Political Community

According to Hobbes[5], security is the primary good of every political community and the good against which we trade off our natural liberty. The foundation and legitimacy of the Hobbesian state is the guarantee of security for citizens. The transition from the brutish, solitary and 'warlike' state of nature to a political community is, according to Hobbes, motivated by the simple desire for peace and security. Transition from the state of nature to a political community is thus motivated by the promise of security[6]. Little wonder therefore why in his *social contract* human beings cede their right to do everything (to a 'mortal god' who has unlimited power) to the extent necessary to avoid war. It is irrelevant that the sovereign is a monarch or a democratically elected leader; all that matters is his capacity to eliminate war or the threat of it[7], thus guaranteeing peace and security for his subjects.

It may be good to comment already here that when security is considered as the *promise* which motivates transition from a state of nature to a political community, it may be inferred that security is not perceived, or at least conceived, as a fundamental – basic or again, a natural human right. Some scholars have indicated to this effect that according to Hobbes, freedom (liberty), equality and even security are not pre-political and natural human rights *insua*[8].

Hobbes sees the good of security to be too vulnerable to be threatened even by civil disputes. So to him, individual grievances against the actions of the sovereign can never be compared with the miseries, and horrible calamities that accompany a civil war and that dissolute condition of *masterless* men, without subjects of law or a coercive power to tie their hands from rapine and revenge.

However, we concede to Hobbes that the fear of war and an immediate sense of insecurity can forge an inextricable logic towards a security state. Put differently, the immediacy of insecurity and the strength of our fear of harm can lead us to prioritise security at a cost of corroding other social goods. Today, liberals agree that security must be balanced with other goods and its attainment at the expense of all liberty and all capacity to challenge political power is a step too far[9].

Hobbes' account may be considered to be instructive in so far as it highlights the value of security and its intimate connection to political power.

But the primacy he give to security as well as the absolute powers he gives the sovereign who has to guarantee security is less persuasive as he fails to see that the state itself can be a threat to individual security. Hobbes' ideal state has gained for him the unfriendly qualification of being a proponent of an authoritarian philosophy that places *order* above justice as he sets out to undermine the legitimacy of revolutions against (even malevolent) governments[10]. Little wonder therefore why the Oxford University Press burnt his book as a seditious tract[11]!

2.2 The Lockean Conception: Unison between Liberty and Security

According to John Locke[12] who is a firm proponent of equality, Hobbes' society threatens the security of citizens

[2] *Ibid.*

[3] The example of the French philosophers who were inspired by British thinkers is quite illustrative here. We have philosophers like François-Marie Arouet (known by his *nom de plume* as Voltaire – 1694-1778), Rene Descartes (1596 – 1650), Jean-Jacques Rousseau (1712 – 1778), Baron Charles-Luis de Secondat – Montesquieu (1689 – 1755) who, with many others, literally became the preachers of the gospels of freedom and equality among men in France. Montesquieu was actually a disciple of Locke as he studied in England (politics and power) on scholarship. J.J. Rousseau drew inspiration from the social contract theory propounded by Hobbes and Locke to come out with a third axis of the social contract.

[4] Examples of these Revolutions include the American War of Independence (1775-1783)and the Declaration according to which every man is born free and equal to his contemporary; that they are endowed with certain inalienable rights among which we have life, liberty and the pursuit of happiness. We equally have the French Revolution (1789) and the consequent Declaration of Human Rights and Fundamental Freedoms of citizens.

[5] Thomas Hobbes is one of the earliest British Political Philosophers and proponents of the Natural Law and Natural Rights doctrine. He was born in 1588 in the English County of Wiltshire. He studied Classics in the University of Oxford. He fled, for his life, to Paris in 1640 and only returned to England in 1651, the year in which he published his most celebrated book: *Leviathan*, alongside *De Cive* – On Political Philosophy. See Penner J.E and Melissaris E (2012): Textbook on Jurisprudence, (5thedn.) ISBN: 978-0-190-958434-5, Oxford University Press, Great Clarendon Street, Oxford, pp. 155-167

[6] Lazarous L, *op cit*, p.2

[7] *Ibid.*

[8] See for instance Penner J.E and Melissaris E (2012), *op cit*, pp. 156-157.

[9] Lazarous L, *op cit*, p.2

[10] Wacks R (2012): *Understanding Jurisprudence: An Introduction to Legal Theory*, (3rdedn.), ISBN: 978-0-19-960826-3, Oxford University Press, Great Clarendon Street, Oxford. p.17

[11] *Ibid*, p.18

[12] John Locke was born on the 29th August 1632 in Wrington, United Kingdom. He was an English philosopher and physician (medical researcher at Oxford); regarded as one of the most

themselves. The transition from the state of nature into society is motivated by the desire to enjoy more security and liberty, rather than becoming worse than we were before such transition[13]. Therefore, absolute power is both a declaration of war in itself and an affront to security altogether. This is why Locke was quite clear and emphatic on the idea that where sovereigns fail and rather 'endeavour to grasp themselves or put into the hands of any other an absolute power over the lives, liberties and estates of the people, by this breach of trust, they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have the right to resume their original liberty'[14]. From this rather firm position, one perceives that it was always clear to Locke that if arbitrary power constituted the greatest threat to security and preservation of individuals, then its antithesis constituted the greatest source of security. Therefore, our entry into the social contract is motivated by the desire to forfeit some of the flaws of the state of nature and give up some freedom, while maintaining the right to resist tyranny[15].

Locke's ideal of security, it may be inferred, was a rich conception embedded in the enjoyment of basic rights of liberty, life and property. It was the law's capacity to protect these rights and the law's limit on sovereign power that kept individuals 'safe and secure within the limits of the law'[16].

Both philosophers seem to agree on the fact that safety and security is the *sumumbonum* (ultimate good) for which individuals find themselves in society. Again it would appear that both of them did not expressly articulate on a right to security but their theories constitute, to a remarkable extent,foundations for a liberal conception of the right to security grounded on the protection of liberty, life and property. The impacts or influence of these philosophies on the right to security in the English Legal tradition will be seen through the doctrinal controversies among legal scholars on the subject as well as in international, regional and national textual consecrations.

3. The *Human Right to Security*? Some Doctrinal and Legal Reflections

3.1 Doctrinal Reflections around the *Human Right to Security*

It has been stated already that neither of the two philosophers mentioned above expressly declares the existence of a human right to security. This does not mean that they shy away from the concept of security; basically, after reading these philosophers, the question that arises is: should security be considered as the rationale for a political community and a valuable social good or should we establish that there is a human right to security? It will be good to investigate what legal scholars think about the above question.

3.1.1Sir William Blackstone'stake on Security

Like Hobbes and Locke, Blackstone sees security as the price for entering into the social contract and political community because 'no man that considers a moment, would wish to retain the absolute and uncontrollable power of doing whatever he pleases: the consequence of which is that every other man would also have the same power; and there would be no security for individuals in any of the enjoyments of life'[17]. In effect, he sees *the right to personal security* as the first of the three absolute and natural rights of man (the other two being liberty and the right to property); and the primary good of law is to balance and enforce all three[18]. It is good at this point to highlight the fact that the scholar apparently considers security to be a right – a personal right, but most of all, a fundamental or basic right. Again, what proponents of the natural law and natural rights doctrine mean by basic or fundamental rights is, those rights that are inherent and inalienable, and so Blackstone seems to place the *human right to (personal) security* in that category.

Furthermore, Blackstone perceives the right to personal security as a whole package/bundle made up of, *inter alia*, protection from the state, the right to resources necessary to sustain life, the right to physical integrity, health and life. Couched in these terms, one may begin to wonder whether according to Blackstone, the *human right to (personal) security* would be a meta-right – a right of rights. This preoccupation will be addressed subsequently, for now, we gather that at least there is, according to this scholar, a human right to (personal) security and that it is not just any type of right but a bundle which consists of several other rights, most of which are categorised in the first generation[19].

influential thinkers in the Age of Enlightenment. His monumental *An Essay Concerning Human Understanding* (1689) is one of the first defences of modern empiricism and concerns itself with determining the limits of human understanding in respect of a wide spectrum of topics – it attempts to tell us some details about what one can legitimately claim to know and what one cannot. As a revolutionary, his cause ultimately triumphed in the Glorious Revolution of 1688. His most famous political work is *The Second Treatise of Government* in which he argues that sovereignty in the people and explains the nature of legitimate government in terms of natural rights and the social contract. He is also famous for calling for the separation of the Church and the State in his *Letter Concerning Toleration.* Much of his work is characterised by his opposition to authoritarianism.

[13]Lazarous L, *op cit*, p.5

[14]*Ibid*, p.4

[15]Wacks R (2012) *op cit*, p.19.

[16]Lazarous L, *op cit*, p.5

[17] Blackstone W (1765) *Commentaries on the Laws of England*: A Biographical Approach, Oxford Journal of Legal Studies, Vol. 3, No.1, p. 125.

[18]*Ibid*, p.129

[19]Human rights are generally considered to be classified into different generations. Classically, we had just two generations: the first and second, reflected in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights respectively. Today, we have a third generation of rights on which some writers are beginning to think a fourth generation should be added. The common understanding today however is that human rights are classified into three generations. The first generation rights refer to those that are

3.1.2Shue and the Basic Right to Security

What does the scholar mean by *basic right toSecurity*[20]? According to him, rights are basic if and when enjoyment of them is essential to the enjoyment of all other rights[21]. Therefore Henry Shue aligns with Blackstone's perception of security as one of the three basic human rights (the others, according to the former are liberty and subsistence). If we consider security to be a precondition for the enjoyment of other rights, then we may not have taken any step away from the province of a sort of meta-right. But does this entirely translate the scholar's view point?

According to Shue, security is not entirely basic, due to its intrinsic or moral nature; it is only instrumental in that it is simply a precondition – a constituent part of the enjoyment of all other rights. Although the scholar seems to have relativized security, it still remains very much a bundle, which will be violated by murder, torture, rape, assault,etc. which the author refers to as *basic rights to physical security*[22]. We notice that the author, in venturing into the substantive content of the right to security does exactly not tell what security is, but what will amount to violation of the same. However, we acknowledge that he tailors the right to security much more in terms of physical security – integrity which raises the question: would the human right to security mean protection of one's physical integrity? An outright response in the affirmative may be ambitious and sweeping.

3.1.3Fredman and Powell'sApproach to Security

Sandra Fredman considers security to be an essential prerogative to the existence of liberty, rather than seeing it as a precondition for the existence of other human rights as seen previously. Liberty to her refers to the freedom of choice and not freedom from interference. In this way, any socio-economic constraints on an individual's choice becomes the focus of the *right to security* from want[23]. According to her, freedom from economic deprivation is as essential to *security* as freedom from state repression.

Powell on the other hand perceives *security* as a relational concept which cannot be understood without establishing a link between the following questions: security for whom; security of what (what is protected); security against what (risk or threat); who or what will provide protection[24]? It may be important to underline the fact that through all these interconnected questions, man is the principal subject; one who should enjoy security, although it takes another twist, from Powell's standpoint.

3.1.4 Peter Ramsay on the Right to Security

Among the authors whom we have discussed, Ramsey presents the most recent formulation of the *right to security*. He formulates an approach to security based on what he refers to as *vulnerable autonomy*[25]. According to him, the enjoyment of autonomy is contingent on the existence of certain autonomous requirements such as self-respect, self-esteem and self-trust. These fragile conditions require protection as a matter of social justice. Ontological security is achieved, he thinks, through a reflexive process of mutual reassurance and trust between individuals. The preventive provisions of Criminal Law are a guarantee of that assurance – the right to be free from fear of crime, which translates into the *right to security*.

The scholar however ends with a controversial submission according to which an individual should not complain if his human rights are interfered with in a bid to uphold another's *right to security*[26]. Two things to point out very quickly from the author's take: the first is that there actually exists a *human right to security* and second is that security seems to be couched in terms of the ultimate right. Paradoxically, albeit being the most recent formulation of the right to security conversation, the scholar seems to take us back to square one altogether - the Hobbesian ideal society (the regime of the 'mortal god' and security at all costs).

From the above, the philosophers seem to be settled on the necessity of security and its role and place in a social and political community, but fail to clearly spell out the (natural) *human right to security* (considering that both of them are pioneers of the natural rights doctrine). The legal scholars who build on the philosophical foundations seem to be in unison generally as to the existence of a *human right to security*, but fail to carve out its clear contents, scope and interests which it protects or that are protected under it.

3.2 The *Human Right to Security* and the Law

3.2.1Questioning the Human Right to Security in Legal Normativity

Certain consequences do follow when certain moral claims are transferred to legal institutions and in effect, institutional action sets in with far-reaching effects. It is such action that gives the right in question a different character in social life. Human rights may not always meet the standard of formal specificity that some lawyers would like, but they must be capable of giving rise to plausible legal arguments in terms of their scope, relation with other rights, the duties they carry and the interests which they protect. From the developments this far, we notice that the core legal meaning of the *right to security* is unsettled[27], although the *right* in question is closely associated with others such as liberty, freedom, life and even peace. Our next task therefore is to find out whether the Law (legislator and the judge) has addressed the question, be it at the global, regional or national levels.

variously referred to as substantive, fundamental, basic or simply natural rights. These are the rights that are said to be inherent and inalienable, as a matter of principle though, and universal in nature. These rights include life, liberty, equality and in general, all the rights contained in the ICCPR (1966).

[20]Lazarous L, *op cit*, p.7

[21]Shue H (1996): *Basic Rights: Subsistence, Affluence and U.S Foreign Policy*, (2nd edn.) Princeton University Press, ISBN: 9780691200835, p.18. The first edition of the book was published in 1980 and the most recent edition is published in 2020.

[22]*Ibid*, pp 20-21

[23]Lazarous L, *op cit*, p.10

[24]*Ibid*, p.11

[25] Ramsay P (2012): *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law*, Oxford University Press, Oxford.

[26]Lazarous L, *op cit*, p.12

[27]Lazarous L, *op cit*, p.14

3.2.1.1 Human Right to Security in International Human Rights Law

In the context of this paper, it may be ambitious to make a steady excurses through all the international human rights instruments just to see and comment on where and how the right to security is consecrated. Rather, it would suffice to pick out provisions relevant to the subject from the two most prominent of those instruments from among the International Bill of Rights and make some commentaries and remarks there upon.

On the one hand, we have the United Nations Universal Declaration of Human Rights (1945) that serves, to some considerable extent as the *instrument umlaboris* for any post World War II human rights regime. Article 3 of the Declaration states that:'*everyone has the right to life, liberty and security of person*'. Disappointingly, nothing more is mentioned about security in the articles that follow, but rather an elaboration of the various elements of liberty. We see the association of security with life and liberty which only lends credence to the argument according to which security can hardly stand as a right within its own walls. However, through this provision, some experts have considered liberty and security as fundamental human rights and essential components of any Rule of Law System[28]. What is of interest to us in the above provision is *security of persons*. Is this supposed to mean personal security and if so should personal security be interpreted to mean the human right to security? On the contrary, should *personal security* be understood to mean an ultimate stage of satisfaction, of human wellbeing that a person attains once the enjoyment of the other rights is guaranteed, so that we say the person is in security? Whatever interpretation we adopt, the baseline is that the text still fails to bring clarity on the question of security; one may argue that the instrument is a human rights instrument and so security is couched in human rights terms, *but we must be quick to indicate as well that personal or human security is not exactly the same as saying that human beings have the right to security*[29]. Does the text treat security as a cluster? Some commentators interpret the provisions of article 9 of the UDHR which prohibits arbitrary arrest, detention or exile as constituents of the right to security[30]. We beg to differ with that point of view; especially as issues as these relate more to liberty and not exactly security.

On the other hand, the International Covenant on Civil and Political Rights (ICCPR 1966) provides in its article 9 (1) that: '*everyone has the right to liberty and security of person*…' The rest of the provision only elaborates on aspects of liberty and nothing more is said about security[31]; yet again, we are disappointed by the legislator's monumental failure or timidity on the subject, and we are left with the option of interpretation in the face of a leeway. We also remark that the ICCPR uses the same language – word verbatim – as the UDHR on this subject. So the same comments we made for the UDHR equally hold for the ICCPR.

3.2.1.2. Human Right to Security under Regional Human Rights Law Systems

There are many human rights systems in the world and each one reflects the human rights specificities of a particular region of the world. We will like to comment on the relevant provisions of only two of these systems, to wit, the European human rights system (because it is the most advanced, by many standards) and the African Charter system which concerns us particularly.

Article 5 of the European Convention on Human Rights is entitled: Right to liberty and security. Subsection (1) picks up the same formula found in the UDHR and ICCPR above: '*everyone has the right to liberty and security of person*'. Our disappointment is again not unexpected, but even more profound; as expected, the legislator does not define or mention anything more about the *right to security*, or at least security of person. Article 5 (1) (a)-(f) focuses entirely on detention which, in our view, seems more to be an element of liberty than security. Worse still, article 5 (2) continues with rights guaranteed in situations of arrest and detention from sub-paragraph (a)-(e) without anything being mentioned about security. One can hardly resist the temptation of thinking therefore that either the legislator takes liberty and security to be one thing (by entitling the article as Right Liberty and Security and then elaborating on detention and arrest – elements of liberty), or the legislator adopts the view that liberty preceded security so that once one is guaranteed, the other becomes evident. We do not share any of such interpretations and humbly submit that at best, the legislator, like his predecessors, simply misses the

[28] See for instance Edward A (2011): 'Back to Basics: The Right to Liberty and Security of Persons and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, PPLA/2011/01. Rev.1, p. 17.

[29] Personal security is not the *human right to security*, same as human security. Personal security may either be subjective or objective. It can be the comfort and assurance that one feels as an individual which is associated with the absence of fear of harm or danger. The United Nations Development Programme – UNDP – considered *human security* to be both "*safety from chronic threats like hunger, disease and depression*" and "*protection from sudden and hurtful disruptions in the patterns of daily life".* This was in its Human Development Report of 1994. For details, see Howard-Harssmann, E.R (2012): 'Human Security, Undermining Human Rights?', John Hopkins University Press, H.R Quarterly Vol. 34, pp 88-112 *So* human security may be more objective in which case we may be referring to a general state of human wellbeing, an ultimate state of satisfaction which enables human beings to live in harmony in the world. Some scholars therefore, in this connection, talk of humanity's right to security. In any case, the human right to security may also be understood in a subjective and objective sense, but even then, its components or substantive elements will not be limited to freedom from fear and a state of wellbeing.

[30] Edward A (2011), *op cit.*

[31] Article 9(1) of the International Covenant on Civil and Political Rights provides that: 'everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' Clearly, the article only states/mentions *security* and that is as far as it goes; the rest of its provision is centred around liberty. The other subsections (2) – (5) continue with elements of liberty such as arrest and detention. If we interpret these issues to be elements of both liberty and security, then the danger is that it may, in this context, drastically limit the scope of the supposed human right to security to freedom of movement and physical integrity.

point with security, and shies away fromor ignores*the right to security*. Whatever the situation, the *human right to security* remains, in our view, as ambiguous as it has been through all the instruments mentioned and cited this far.

In the context of Africa, the African Charter on Human and Peoples' Rights seems to have made a slight demarcation – knowingly or unknowingly – from the language contained in the UDHR, ICCPR and ECHR. In effect, article 6 provides that: '*every individual shall have the right to liberty and to the security of his person*.' The rest of the provision clearly focuses on freedom and arbitrary detention, without anything being mentioned about security[32]. This is disappointmentwith which we are familiar already, so no need to belabour it. From the reading of that article, one seems to capture the desire of the legislator, in his spirit at least, to clearly dissociate liberty from equality – '*.... right to liberty and to the security….*' Unfortunately, that is only as far as security is mentioned and the right is unavoidably doomed to interpretation and even misinterpretation. The inevitability of its doom now appears to us more as the consequence of a philosophical, doctrinal and now legislative ambiguity in the consecration of the *humanright to security*. However, another thing that catches our attention in that provision is that the previous provisions talk of '*…the right to liberty and security of person*' while the ACHPR talks of '*…the right to liberty and to the security of his person*.' This may be a blurry dissimilarity and an insignificant one altogether, but technically, *security of person* is not the same as *security of his person*. The former may either refer to a state of wellbeing that one attains or a consequence of liberty, as the case may be, depending on contexts and purpose, but the latter, viewed from a legal spectrum, relates more to integrity – physical and moral integrity of the (his) person. So *security of person* is quite broader in scope and effect that *security of his person* because one's property for instance, if protected, may not fall within the security of his person/personality. Arguments in support or against cannot be sufficiently tendered within the limited purview of this paper, and that may therefore constitute the subject of yet another debate, but for now, we only wish to indicate the probable disparity, at least in spirit, in legal provisions that seem to consecrate the same thing in a way that means/reads differently.

The provision of article 23(1)[33] of the ACHPR is sometimes interpreted to mean the consecration of the *human right to security*. We do not share such an interpretation because in our understanding, the provision of that article seems to touch on *peoples* and their right to *national and international peace and security*, which reveals, as we shall see below with the example of the Cameroonian Constitution, the existence of a state's right to internal and external security. So we should be able to make the difference in some of the very subtle and easily confusing expressions used in the conversations around the concept of security, for instance, the line must be drawn between the *human right to security* and the *right to security*[34]. This is why we think that the mention of security in this provision does not square perfectly with our discussion in this paper, just as it is the case with *collective security* mentioned in article 27(2) of the same ACHPR[35].

3.2.1.3. Human Right to Security in the Internal Legal Order

The South African Constitution is one of the multitudes of Constitutions around the world[36] that consecrate the *right to security*. The drafters of the said Constitution, just like many of their counterparts (such as in Cameroon) seem to have

[32] Article 6 of the African Charter on Human and Peoples' Rights provides that: '*every individual shall have the right to liberty and to the security of his person. No one shall be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one shall be arbitrarily arrested or detained*.' We see that this is similar language used in the provisions of article 5(1) of the European Convention on Human Rights. Again, it is worthy to reiterate our position that freedom, arrest and detention are not exactly the kind of elements that are constitutive of a *human right to security*, but fundamental liberty.

[33] Article 23(1) of the ACHPR provides that: 'All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by the Organisation of African Unity shall govern relations between states.' Subsection (2) goes ahead to discuss how to strengthen peace, solidarity and friendly relations in its subparagraphs (a) and (b).

[34] From an easy interpretation, the human right to security clearly touches and focuses on the individual, whether as a person or as a part of a peoples. The right to security on the other hand may be understood in some contexts to refer to and include human beings, but also other sorts of beings, not necessarily human, such as the state or other public entities. In this way, the right to security is much broader in scope that the human right to security. So we can talk of the right to security for human beings or for state entities when we mention the *right to security*, but we cannot talk of the state's human right to security when we mention the *human right to security*.

[35] Article 27(2) of the ACHPR establishes that: 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest. Again we see the complexity and slippery nature of the concept of security and it will, in our opinion, be wrong to understand collective security in the context of this subject as a *human right to security*.

[36] We mention South Africa because our focus is to determine whether there is a human right to security in the English Legal tradition and the country constitutes part of the Common Law Family. The *right to liberty and security* are consecrated in article 5(1) of the United Kingdom Human Rights Act (1998). In effect, article 5(1) (a)-(f) of the UK Human Rights Act is exactly the same as article 5(1) (a)-(f) of the European Convention on Human Rights. It may be important to recall that the Act is an instrument that domesticates the provisions of the ECHR, considering that in matters of domestication of international instruments, the UK is generally considered to be a *dualist* system; international instruments do not apply directly upon ratification or accession, a separate Act needs to be taken to domesticate the provisions of the said instrument for it to become part of national law. This is not the case with countries like France and Cameroon in which ratification, publication and entry into force of an international instrument are the mechanisms by which the instrument automatically becomes part of national law, so no need for a separate legislation for their domestication. We see this in the provision of article 45 of the Constitution of Cameroon which provides that duly ratified international treaties and conventions shall override existing national law on a given subject from the date of their publication and entry into force. Such countries, in the domestication conversation, are said to be *monist* systems.

had a hard time dissociating security from liberty for it to stand on its own as a right, and so a now fashionable nexus (although hardly justified) is established between the two. This is done in article 12 (1) (c) which makes an overwhelming cluster of rights around liberty and security[37] in the form of prohibition against torture, cruel, inhumane and degrading treatment, protection of physical as well as psychological integrity). The South African Constitution therefore adopts a holistic approach to the *human right to security*.

The Constitution of the Republic of Cameroon adopts a very similar approach in paragraph 3 of the preamble; it is therein provided that liberty and security shall be guaranteed to everyone with respect to the rights of others and the superior interests of the state[38]. A quick comment: the drafters of the Constitutionseem not to consider liberty and security in absolute terms which must be obtain at all costs, even at the expense of other human rights (unlike what Hobbes and Ramsey apparently suggest). In the case of Cameroon therefore, the Constitution seems to establish, even if with some disappointing timidity, the existence of a *right to security*, when it says liberty and security shall be guaranteed to all, but within the limits of the respect of the rights of others. When interpreted,this may imply that in as much as individuals enjoy the *right to security*, such enjoyment should not compromise or jeopardise the rights of other people and the superior interests of the state. We like to indicate that although, not unexpectedly, the Constitution is clearly silent regarding the substantive contents of the *human right to security*, the document however acknowledges, in its article 8[39], that the state equally has the right to security. It may be interesting to submit at this point that we are dealing with two separate issues: the *human right to security* in juxtaposition with the state's right to security with the latter that takes primacy over the former as clarified by paragraph 3 of the preamble of the Constitution already.

The Cameroonian Constitution highlights the same cluster found in the South African Constitution, although in different paragraphsin the preamble which protects life, physical and moral integrity; prohibiting inhuman and degrading treatment and torture. Nothing seems to suggest from these provisions that the right to security has a clear and determinable content in the Constitution of Cameroon.

It may be worthwhile indicating at this juncture that the so-called *human right to security* is not a fact accepted and consecrated in all common law countries. In some systems, no mention is made of security and the law sometimes states the right to liberty without even mentioning *security* whether as a right or as a concept. A good example is the Constitution of the Federal Republic of Nigeria (1999). Chapter IV of that text is entitled: 'Fundamental Rights' which comprises 13 articles (from article 33 – 46). This Constitution sets a remarkable departure from what could be understood as some universal or fashionable and unavoidable practice of espousing liberty and security, for whatever reason. Article 35(1) for instance provides that: 'every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with the procedure permitted by law.' The subparagraphs[40] of that subsection provide for the exceptions – the deprivation of liberty – meanwhile the rest of the subsections of article 35[41] follow through with the issue of arrest and nothing about security. So knowingly or not, the Nigerian Constitution clearly avoids the rather ambiguous or unclear association between the right to liberty and security, may be because the components of each right are provided in the respective subsections and subparagraphs of each article, so it is needless stating something, the substantive contents of which are not clearly decipherable.

[37] The Constitution of the Republic if South Africa (1996) entitles its article 12 as *Freedom and Security of the person*. It is interesting to highlight the choice of freedom over liberty and reiteration of *security of the person* as the ACHPR seems to have heralded. Subparagraph (1) provides that: 'everyone has the right to freedom and security of the person, which includes the following: (a) not to be deprived of freedom arbitrarily or without justice; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.' This subsection seems to elaborate on aspects of freedom and physical integrity. Subsection (2) however expresses clear interest in the integrity of the person (physical or mental) as it provides that: 'everyone has the right to bodily and psychological integrity, which includes the right – (a) to make decision over reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.' With the mention of freedom in subsection (1) and security in subsection (2), one picks up the understanding that the drafters seem to deliberately distinguish the only two subsections of that article with two distinct rights – freedom and security. In this way, the drafters attempt to give elements of the *human right to security* in article 12(2) and following which is a remarkable step in our survey of legal instruments from global to regional and national levels. Substantively therefore, if one could give the legal basis for the existence of a *human right to security,* it would be the Constitution of the Republic of SA and none of the other instruments. However, and almost understandably, this Constitution seems to treat the *right to security* in the light of physical and moral integrity – a formula impliedly designed in article 6 of the ACHPR which talks of *security of his person* and retaken almost exactly here as *security of the person*. Although this would be a very limited perspective or breadth given to a certain *human right to security*, this constitutes a very laudable progress and effort in the demarcation of the *right to security* as an autonomous right in its own feel. We say autonomous because all human rights are interdependent and indivisible.

[38] This sort of caution and guarding of the *human right to security* we find in paragraph 3 of the preamble of the Cameroonian Constitution is similar to what we find in article 27(2) of the ACHPR.

[39] Article 8(3) of the Constitution of Cameroon provides that the President of the Republic shall be the guarantor of the internal and external security of the state. It is this provision that may empower the sovereign, if not well curtailed and harnessed, to take any measures he deems fit, in the name of preserving the internal and external security of the state and this becomes dangerous for the *human right to security* itself which still faces a lot of difficulties in its acknowledgement.

[40] See to this effect article 35 (1) (a)-(f) of the Constitution of the Federal Republic of Nigeria.

[41] For details on the provisions, see article 35(2)-(7) of the Constitution of the Federal Republic of Nigeria.

2.2.3Judicial activism on the *human right to security* and Political Rhetoric on the Subject

3.2.3.1 Judicial activism on the *human right to security*

Many scholars have attempted to trace the history or development of judicial precedent on the question of (*the right to*) security in England. One of such authors isAileen Kavanagh who paints a fairly decent picture of the attitude of the courts in England on the question of security and the (human) right to security from the mid-20th and early 21st Centuries[42].The history of judicial decision making in the 20th Century on matters concerning security does not seem to cover the British judiciary in glory. Rather than take a firm stand against draconian counterterrorist legislation and oppose powerful governments bent on violating the rule of law, judges tended to withdraw from the fray tending that national security was none of their business.[43] Issues of national security were often considered to be non-justiciable; see for instance the case of *Liversidge v. Anderson*[44]in which the House of Lords did nothing to oppose or even question a system of executive detention without trial.Although Lord Atkin's dissent seems to have been against such a stance, it is very much the same stance that was upheld throughout the 20th Centuries[45].

Security has since then been referred to by the courts entirely within the context of national security and not in the light of the *human right to security*. In effect, Lord Diplock in the case of *CCSU v. Minister of Civil Service*[46]was crystal clear when he reiterated the point that national security is the responsibility of the executive government; what action is needed to protect its interest is, as cases establish and as common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is, according to the learned law Lord, a non-justiciable question*par excellence* because he felt that the judicial process is totally inept to deal with the sort of problem which it involves.

Ten years later, Simon Brown L.J in 1995 opined that the words 'national security' have acquired over the years an almost mystical significance; that the incantation of the phrase in itself instantly discourages the court from satisfactorily fulfilling its role of deciding where the balance of public interest lies[47].

However, since 1998 with the coming of the UK Human Rights Act, courts have gradually become less repulsive to the question of national security on grounds of the doctrine of non-justiciability. The Act therefore seems to have provided the courts sufficient grounds on which to venture in the question as well as reaffirm the place and role of the legislator. It may be relevant to point out, even if just in passing, that article 5 of the Act is equally entitled '*Right to Liberty and Security'* and systematically retakes the same provisions as article 5 (1) (a) – (f) of the ECHR[48].

The courts, just like the legislator, have therefore taken the habit of associating security and liberty and addressing elements of liberty as though they were impliedly security issues as well. In 2010, the court in *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*[49] had the opportunity to decide on a case relating to security but the judgement tilted in the direction of national security and not human right to security. In an earlier decision in 2006, the UKHL took the view that information obtained through torture, even for national security interest, will not be admissible as evidence in court[50].

3.2.3.2 Human Right to Security and Political Rhetoric

The *right to security* usually echoes in political discourse to justify counter-terrorism action or military invasion in the name of the war against terrorism[51]. Most politicians therefore consider security to be the most basic right on which all the others are hinged and their policies and actions may become meaningless if they are unable to guarantee security for their citizens. It is equally imperative to remark that in a purely political context, security is hardly perceived as security against the power of the state, instead, it is mostly used as a ground on which to extend a state's coercive or military intervention, a situation now commonly referred to as *righting security*[52].

Politicians are equally quick to inject security into the development discourse so as to probe into the needs and interests of a given community. In political discourse therefore, it is mostly the holistic – correlative approach to security that is upheld and not a strict legal right with clear and determined duties and interests.

[42]Kavanagh, A (2011): Constitutionalism, Counter Terrorism and the Courts, Oxford University Press and New York University School of Law.

[43]*Ibid*, p.172

[44] (1941) UKHL 1, (1942) A.C 206. The judges who sat were: Viscount Maugham, Lord Atkin, Lord Macmillan, Lord Wright and Lord Romer.

[45] For further reading on the reaction of the English Courts in relation to the question of security, see Tomkins, A. (2014) Justice and Security in the United Kingdom. Israel Law Review, Cambridge University Press, ISSN 0021-2237.

[46]*Council of Civil Service Unions v. Minister of the Civil Service (1984) UKHL 9*.

[47]Kavangh, A (2011), *op cit*, p.173

[48]The British Human Rights Act is an instrument of domestication of the ECHR because in matters of domestication of international legal instruments, that is their integration in the internal legal order, Britain is said to operate the *dualist system*. This is in opposition to the *monist system* according to which once an international legal instrument has been signed and ratified, it automatically becomes part of national law upon entry into force (see for example the provision of article 45 of the Constitution of Cameroon). so in these systems, there is no need to adopt another national law that will incorporate the provisions of the international legal instrument as it is the case in Britain and most of the English-inspired systems of law.

[49]*R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No.2)*, UKHL 61.

[50] See the case of A and Others v. Secretary of State for the Home Department (2004) UKHL, 56. (2005), 2 A.C. 68.

[51] See generally, Lazarous L, *op cit*, pp. 15 and 16.

[52]*Ibid,* p.16

4. The Security of Human Rights or the Human Right to Security? Commentaries on the Devolution of Responsibilities

From a philosophical, doctrinal, legal and judicial perspective, we have been unable to find convincing elements on which to ground the existence of a *human right to security*, at least in substance and not only in theory/principle. So at this point the question becomes a straightforward one: are we securing rights or are we making them dependent on, and intricately enmeshed with security? In other words, do we secure the rights to life, liberty and equality of individuals, for example, or do we say that an individual is secure only when he can enjoy these rights? On the other hand, can we say with certainty that from the developments this far, there is a *human right to security* in the same rank like the right to life, liberty and equality? Comments on the following considerations may be of help.

4.1. Unravelling the Concept: Human Security or the (Human) Right to Security?

It should be said at once that the existence of a *human right to security* may face some stark legal challenges. A right conceived this way may be very broad to be legally workable. Why? The reasons are manifold: such a right would be wanting in specificity and in same connection, its substance, if at all it really has one, may be connected to the perception of risks that are notoriously opaque[53]. The question is to know how feasible these risks can be in order to establish breach of the right,or again, what risk can we tolerate to enable us exercise the other rights?

Even if we consider the *human right to security* as a meta-right, that may only amount to a rhetorical flush which unnecessarily duplicates other rights, considering that the key elements of such a right already reside in the enjoyment of yet other categories of rights. Therefore its formulation in these terms serves little or no legal purpose because the courts may end up not knowing what rules of protection to adopt.At best, the rhetorical claim may only stress the *human right to security* as a necessary value or good – a *summumbonum*– and not exactly a *conditio sine qua non* for the enjoyment of the other rights

Security may not comfortably be considered as an all-or-nothing matter, but a more-or-less matter. On this basis, it will be difficult to qualify security as a precondition because it is possible to still enjoy rights in a situation of insecurity meanwhile paradoxically, in more developed or *secure* societies, the enjoyment of rights is not guaranteed; one may exercise his freedom of speech today and the next day he loses a child as a consequence. To over focus on the precondition therefore may cause us to lose sight of the other rights and so there is some urgent need, in our estimation, to do some balance up, but a very troubling question is: what are we balancing? Remember that security as yet, has no determinable content, so how do we balance the scope and parameters of a right that is wanting in substance with other established rights? If we are not careful, security may rather break open the door for arbitrary state actions that pose a threat to the other rights that security is meant to '*secure*'[54].

We therefore advocate for some moderation and caution in the deployment or proliferation of the idea of a (human) right to security especially in trying times as these – heightened insecurity from every respect and the possibility for states to abuse or exploit the need to restore security. If at all there is such a right as *human right to security*, then there is strong and imperative need to determine its scope and content and not to let it degenerate to legitimise state coercive interventions and actions in a politics of security.

4.1.2. Would the State be a threat to the *Human Right to Security* or to Human Security?

To a very considerably extent, the negative security of the state is the essence of the present human rights concept of security, which concept curtails and controls infinite power[55]. Human rights imply the legal normative approach and relate to the judicial relationship between individuals and the state, while human security is a much more open and vague concept. This is because security relates to all kinds of issues[56] which Human Rights Law has only limited capacity to capture and resolve[57].

Although some authors[58] address the above point in terms of 'negative individual security against the state', it is good to take the caution however that an absolute perception of security in terms of negative security against state power may shift the balance to mean that the state is not the impartial guardian of individual security, but a subjective party that is part of the problem. Then the question becomes who else but the state can assume the rather slippery role? Again, if seen in absolute negative terms against the state, then security may be abused to neutralise the importance of human rights constraints, that is, if everything is security, then security always triumphs, whatever the state does or does not do[59]. Therefore, it is imperative to make clear the fact that this approach only looks at the concept of security from the relationship between individuals and the state, but it cannot be considered or used as a definite security model.

4.1.3. Security at the Expense of Human Rights or Vice Versa?

The concept of security sometimes constitutes a legitimate ground on which to limit or infringe human rights. Not only may most human rights be derogated from in times of public emergency which threatens the life of a nation, but even in normal times, human rights law offers the authorities the possibility to restrict the exercise of a number of rights on account of national security interests. To operate an

[53] *Ibid.*

[54] *Ibid*, p.17.

[55] Van Kempen H.P. (2013) Four Concepts of Security – A Human Rights Perspective, Human Rights Law Review, Vol.13:1 Oxford University Press, p.9.

[56] There is a plethora of issues that relate to security which are not necessarily mainstreamed into pure human rights discourse, such as: environmental security, economic security, social security and political security.

[57] Christie (2010) Critical Voices and Human Security: To Endure, To Engage or To Critique. Security Dialogue 169, p.169

[58] Van Kempen H.P. (2013), *op cit*, p.9

[59] *Ibid*, p.10.

adequate criminal law system and implement other security measures, the authority must, it is contemplated, under certain conditions and if necessary, have the possibility to infringe certain, but not all human rights[60].

The problem with the approach however is the difficulty in determining the mechanism of control and place limits to the politicisation or exploitation of security – the situation in which politicians may use the concept of security as an instrument of fear to govern danger. Therefore, there is no watertight or definite answer to the question raised in the subheading above; rather we should be able to balance the equation at all times so that one operates as control mechanism for the other.

4.1.4. Positive State Obligation to offer Security to Individuals

Generally speaking, the responsibility in matters of human rights protection devolves on the state; the concept of security requires that in the protection of human rights, states should take appropriate measures to guard against violations. The positive obligation of the state in this regard therefore resides in the criminalisation, obligation to clearly investigate and prosecute, obligation to sentence and execute punishment[61].

In Cameroon therefore, just as it is the case with many other countries, the responsibility to guarantee security, or any right to it, has to be shouldered by the state. The Constitution for instance provides that the state shall guarantee the right to education for everyone; that basic education shall be mandatory and that it shall be the strict responsibility of the state to organise and control the learning process at all levels[62]. So when children are brutally killed in classrooms, before getting to the determination of the perpetrators of the *actusreus*, the question is that of determining whether the state met her obligations or not. In addition, the last paragraph of the preamble of the Constitution provides that the state (of Cameroon) shall guarantee the enjoyment of all the rights mentioned in the preamble. If we take the example of the troubled regions of the country, the question of determining whether there is a right to security in the North West or South West is only a small pocket of a more general question around the existence of the *human right to security*. With the difficulties in capturing the essence of such a right, one can only rely on, and uphold the existence of the concept of security which sits comfortably well in the security crisis phenomenon for which the state is still the principal guarantor, as her basic Constitutional duty. So it may be difficult for one in the crisis regions to demonstrate how his right to security has been violated, but there is no denying the fact that the regions are chronically infected by insecurity. Would the *human right to security* therefore be a concept which is hardly perceivable and determinable but highly honoured more in its breach – insecurity – than in its observance?

5. What Conclusions on the Question of the Human Right to Security and the Suggested Legal Stance

In fine, is there a human right to security? From the preceding arguments, one can hardly give a comfortable one size-fits-all answer. The concept of security itself is quite complex and sweeping; any answer to the question, in our view, must be measured and tailored to a particular context and purpose. First, there is a right to security, which may be a state's (or any other such entity) right to security, but not necessarily to be understood in the same context as an individual's *human right to security*. It is in this respect that one may understandably talk of state security forces that are generally said to protect not only public order but guarantee security for citizens. The right of a state to security may either be national or external. Secondly, it may be safer to take the view that there is a *human right to security* in principle or in theory, by reason of its consecration in many global, regional and national legal instruments that enshrine the existence of human rights. But substantively speaking, the *human right to security* may still be wanting in precise legal terms, by reason of an appalling lack of a determinable content, clear interests to protect, duties it imposes, or scope. This is why the *human right to security* is said to be of such nature as to fall comfortably under any of the generations of rights. It is the reason why such a right will be both an individual and collective right – subjective and objective. In effect, it is the reason why such a right may mean and touch everything and nothing in particular, which may make it to be an unnecessary duplication of what is already contained and captured by other existing and established rights. These are some of the encumbrancesthat are likely to be encountered if the right under consideration is considered as a meta-right or a blanket right.

We may therefore disagree on the consistency and autonomy of the *human right to security*, but we cannot be complaisant about its formal (and somewhat ambiguous) consecration. Regrettably though, the right is said to still be in the process of development – to determine and clearly capture its scope, substance and essential components. The disappointment is that we are talking about a right which philosophers in the 17th and 18th Centuries had been flirting with, not being able to exactly label it as a human right but as a social value and an ultimate good; curiously after five (05) Centuries, we still refer to it as a right in development, or in its infancy. Unlike scholars who may either be tired of the argument as to the existence or non-existence of the right, or who feel that the argument is tired by now, we think that there is even more impending need to determine the contours and legal nature of the said right and this need becomes even more critical as time goes by and humanity faces new types of security crises in the face of which states continue to legitimise their overreach. Instead of considering the argument as one that is ripe already for abandonment therefore, we humbly submit that the argument still remains very much *en vogue*.

[60]*Ibid*, p. 13.
[61]*Ibid*, p.16.
[62]See to this effect paragraph 18 of the 1996 Constitution of Cameroon, as modified in 2008.

References

[1] Blackstone W (1765) *Commentaries on the Laws of England*: A Biographical Approach, Oxford Journal of Legal Studies, Vol. 3, No.1
[2] Edward, A., (2011): 'Back to Basics: The Right to Liberty and Security of Persons and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, PPLA/2011/01. Rev.1
[3] Howard-Harssmann, E.R., (2012): 'Human Security, Undermining Human Rights?', John Hopkins University Press, H.R Quarterly Vol. 34.
[4] Kavanagh, A., (2011): Constitutionalism, Counter Terrorism and the Courts, Oxford University Press and NewYork University School of Law.
[5] Lazarous, L., 'The Right to Security' In: Cruft R, Liao MS and Renzo M (2015): 'The Philosophical Foundations of Human Rights: An Overview', In: Cruft R, Liao MS and Renzo M (ed.): *The Philosophical Foundations of Human Rights. Philosophical Foundations of Law*, Oxford, Oxford University Press
[6] Penner, J.E. and Melissaris, E., (2012): Textbook on Jurisprudence, (5th edn.) ISBN: 978-0-190-958434-5, Oxford University Press, Great Clarendon Street, Oxford
[7] Ramsay, P., (2012): *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law*, Oxford University Press, Oxford.
[8] Shue, H., (1996): *Basic Rights: Subsistence, Affluence and U.S Foreign Policy*, (2nd edn.) Princeton University Press, ISBN: 9780691200835
[9] Tomkins, A., (2014) Justice and Security in the United Kingdom. Israel Law Review, Cambridge University Press, ISSN 0021-2237.
[10] Van Kempen, H.P., (2013) Four Concepts of Security – A Human Rights Perspective, Human Rights Law Review, Vol.13:1 Oxford University Press
[11] Wacks, R., (2012): *Understanding Jurisprudence: An Introduction to Legal Theory*, (3rd edn.), ISBN: 978-0-19-960826-3, Oxford University Press, Great Clarendon Street, Oxford.