PART I

Human security, human rights and human dignity

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Humanising non-citizens: the convergence of human rights and human security

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I. Introduction

Some of the most heated debates on security relate to presuppositions about what security is, what is being secured, the causes of insecurity, and how best to address insecurity.[1] International relations theorists and policy experts have varying perspectives on these questions, which have evolved and have had changing levels of acceptance over time. Realists and neo-realists[2] emphasise the state as the central referent of security, both as the lens through which security is understood, as well as the tool by which security is best maintained or restored. Liberal theorists[3] recognise a wider set of values embedded in the concept of the state and state security, in the methods and means to address insecurity, and the actors involved. More critical constructivist scholars[4] understand that the interests and identities of states are themselves constructed by the distribution of ideas and interests within the state-based system and this shapes a state's security interests and how these are conceived, and in turn impacts upon the actions necessary to ensure security. Feminists argue that traditional security discourse is flawed to the extent

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1 W. McSweeney, *Security, Identity and Interests: A Sociology of International Relations* (Cambridge: Cambridge University Press, 1999), 1.

2 See H. Morgenthau and K. Thompson, *Politics Among Nations*, 6th edn (New York: McGraw-Hill, 1985); K. Waltz, *Theory of International Politics* (New York: McGraw-Hill/Addison Wesley, 1979).

3 See R. Keohane and J. S. Nye, Jr., *Power and Interdependence: World Politics in Transition*, 3rd edn (New York: Little, Brown, 2001).

4 See, e.g., A. Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); T. Hopf, 'The promise of constructivism in IR theory', *International Security*, 41 (1987), 171–200.

that it excludes women and other marginalised groups. Theorists belonging to the school of Critical Security Studies (CSS) have argued, moreover, that people, and not states, must be the referent objects of security and, as such, this school provides the closest theoretical underpinning for the human security paradigm.[5]

Legal theorists have had equally varying perspectives on security, ranging similarly from the more traditionalist views placing the protection of the state and state sovereignty as fundamental goals and determinants of security to a number of broader and diverging conceptions. Legal theorists have an added hurdle of considering the role of law in addressing insecurity. Recurring debates on the relationship of law to politics play in the background, such as whether law is a constraining force on state action or itself a consequence of state interests. In particular, legal scholars grapple with the extent to which law is a tool, or indeed the principal tool, to ensure security. Lawyers are most comfortable within the certainty and predictability of a rules-based system, but are typically frustrated when, at the moments of greatest political tension, the rules appear flawed or lack the requisite force. This underscores law's interconnectedness to politics, and as will be explored later in this chapter and elsewhere in this book, the need for multidisciplinary approaches to multidisciplinary challenges.

As the first chapter in our edited collection on human security and non-citizens, this chapter provides a basic overview of some of the evolving theoretical debates on security, as well as the inter-linkages between citizenship and sovereignty, before turning to consider the emergence and development of the concept of 'human security'. It provides an overview of the origins and varying definitions of human security, and evaluates the myriad critiques of the concept. It then assesses the relevance of this concept to non-citizens, especially in the context of modern security threats and given the gaps in existing legal frameworks.

We argue in this chapter that there are conceptual benefits for non-citizens in a framework that situates the individual human being at the centre of its discourse, irrespective of his or her attachment to or status within the state. Under other security paradigms, in contrast, notions of sovereignty, border control and citizenship are of primary importance, and the non-citizen is usually the first to be excluded, neglected or treated with suspicion as threats to the security of the state surface. By definition,

[5] See McSweeney, *Security, Identity and Interests*. See also K. Booth (ed.), *New Thinking about Strategy and International Security* (London: HarperCollins, 1991).

non-citizens typically fall outside the remit of a state's national interests, except in so far as they represent threats to a state's security or a geo-political pawn to be used to enhance a state's interest in the name of national security.

We conclude that the notion of human security will be at a minimum a rhetorical impetus to joint action. At the same time however, we acknowledge that on a practical level the human security framework will not displace traditional notions of security and these differing policy discourses will operate alongside one another. At best, the human security framework may offer new ways to think about and to conceptualise protection concerns as well as the perceptions of non-citizens, may strengthen strategies of protection and empowerment, and in turn reinforce the foundational principles of international human rights law of dignity, equality and justice for all.

II. Citizenship and sovereignty

Legal citizenship refers to the formal status of membership in a state, or nationality as it is understood under international law. The rights common to legal citizenship in virtually all countries include the unconditional right to enter and reside permanently in the territory and to return to it from abroad, the right to receive protection from the state of nationality within and outside of the territory, including access to consular assistance and diplomatic protection, the variety of political rights pertaining to active and full membership of the state, and rights to economic, social and cultural protection.[6] As a citizen, the individual is recognised as a full member of the state, with the overriding right to enjoy membership in the state with all its attendant rights and obligations in full equality and without discrimination. It not only gives rise to protection *by* the state, but also protection *from* the state. Nationality or citizenship has been classified as the ultimate right, or 'the right to have rights'.[7]

By non-citizens, in contrast, we refer to 'anyone who is not a citizen of the country in which he or she presently resides'.[8] The term is used interchangeably with 'non-nationals', 'aliens' and 'exiles'. The term 'non-citizen' carries

[6] A. Macklin, 'Who is the citizen's other? Considering the heft of citizenship', *Theoretical Inquiries in Law*, 8 (2007), 333, 334. See also D. Weissbrodt, *The Human Rights of Non-Citizens* (Oxford: Oxford University Press, 2008).
[7] H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace & Co., 1st edn, 1951; 1979), as referred to in Macklin, 'Who is the citizen's other?, 335.
[8] Weissbrodt, *The Human Rights of Non-Citizens*, 2.

no meaning under international law and is an artificial construct. It is defined not by what it is but rather by what it is not. That is, non-citizens are *not* citizens or nationals of the countries in which they live, work and reside; they may, however, be citizens of other countries. It thus feeds into the 'insiders' and 'outsiders' dialogue and this non-status label renders individuals who are so classified vulnerable to abuse, exploitation and political manipulation, often not being able to exercise an individual or collective voice. By being labelled as *non-citizens*, they are often treated as *non-persons*, outside the interests and concerns of the state and outside the scope of human rights.[9] Some groups of non-citizens have, however, been defined and had their status and rights regulated by specific legal provisions or treaties under international law, such as refugees,[10] stateless persons[11] and migrant workers.[12] These specific legal regimes operate as brakes on the discretion of states in this field.

The decision regarding who is recognised as a national (or consequently who is considered a non-national) of a particular country rests on national, rather than international, standards. Despite a sizeable number of provisions in international human rights law that 'everyone

[9] An analogy is drawn here between discussions of non-state actors under international law, describing them in opposition to state actors. Likewise, the terminology of non-citizens is simply the opposite of being a citizen: P. Alston, 'The "not-a-cat" syndrome: can the International Human Rights Regime accommodate non-state actors?', in P. Alston (ed.), *Non-State Actors and Human Rights System* (Oxford: Oxford University Press, 2005), 3.

[10] Defined as any person 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country . . .', per Art. 1A(2) of the Convention relating to the Status of Refugees 1951 (28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954) (1951 Refugee Convention), as amended by 1967 Protocol (GA res. 2198 (XXI), 16 Dec. 1966, adopted 31 Jan. 1967, 606 UNTS 267; entered into force 4 Oct. 1967). See, also, regional instruments relating to refugees that contain broader definitions: e.g., Organisation of African Unity (now African Union) Convention governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), 1000 UNTS 45; entered into force 20 Jun. 1974.

[11] Defined as 'any person who is not considered as a national by any State under the operation of its law', per Art. 1, Convention relating to the Status of Stateless Persons 1954 (28 Sept. 1954, 360 UNTS 1171; entered into force 6 Jun. 1960) (1954 Statelessness Convention).

[12] Defined as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national', per Art. 2, International Convention on the Protection of the Rights of Migrant Workers and Members of their Families 1990 (GA res. 45/148, 18 Dec. 1990, 2220 UNTS 93; entered into force 1 Jul. 2003).

has the right to a nationality' and that 'no one shall be arbitrarily deprived of his [or her] nationality',[13] as well as two statelessness conventions,[14] the modalities for determining who is to be granted nationality and who is not is determined by domestic laws and policy. Similarly, even though there is a specific legal regime relating to 'the right to seek and enjoy asylum from persecution in other countries',[15] which provides for the status and rights of refugees, there is no right to be granted asylum.[16]

The right to grant citizenship is one of the closely guarded attributes of state sovereignty and territoriality. State sovereignty is traditionally conceived of as the right to defend territory and territorial boundaries, including by exercising rights over the admission and exclusion of aliens.[17] It is increasingly accepted that this notion of state sovereignty is, however, subject to a number of limitations under international law, including, *inter alia*, the human right of everyone to leave any territory, including one's own,[18] and the prohibition on *refoulement* or return to where an individual faces a real risk of being persecuted, tortured or subjected to inhuman or degrading treatment, the latter prohibition having attained the status of customary international law.[19]

Furthermore, states parties to international human rights law instruments are obligated to afford human rights protections to all persons within their jurisdiction, citizens and non-citizens alike. That is, human rights are intended to transcend distinctions, including nationality-based

[13] See, e.g., Art. 16, Universal Declaration of Human Rights 1948, GA res. 217A (III), 10 Dec. 1948 (UDHR); Art. 24, International Covenant on Civil and Political Rights 1966, GA res. 2200A (XXI), 16 Dec. 1966; entered into force 23 Mar. 1976 (ICCPR); Arts. 7 and 8, UN Convention on the Rights of the Child 1989, GA res. 44/25, 20 Nov. 1989, 1577 UNTS 3; entered into force 2 Sept. 1990 (CRC).

[14] 1954 Statelessness Convention; Convention on the Reduction of Statelessness 1961, 30 Aug. 1961, 989 UNTS 175; entered into force 13 Dec. For more on statelessness and human security, see ch. 2 by M. Manly and L. van Waas in this book.

[15] Art. 14(1), UDHR.

[16] See A. Edwards, 'Human rights, refugees and the right to "enjoy" asylum', *International Journal of Refugee Law,* 17 (2005), 297–330.

[17] On the background to state sovereignty and the right to exclude aliens, and a counter-position, see J. A. R. Nafziger, 'The general admission of aliens under international law', *American Journal of International Law,* 77 (1983), 804.

[18] See, too, C. Harvey and R. P. Barnidge, Jr., 'Human rights, free movement, and the right to leave in international law', *International Journal of Refugee Law,* 19 (2007), 1–21.

[19] See E. Lauterpacht and D. Bethlehem, 'The scope and content of the principle of non-refoulement: opinion', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 149–64.

ones. The Universal Declaration of Human Rights 1948 (UDHR), for example, '[recognises] the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world'.[20] The protection of non-citizens by international human rights law, and its shortcomings, is dealt with in more detail later in this chapter.

III. Theoretical background to security studies

There are a number of security theories that have emerged and evolved with shifting international and national priorities and as a result of key events.[21] These theories are not static; each has its variations and permutations. Likewise, each theory is to some extent reductive and essentialist, relying upon assumptions about the nature of the world we live in. While there has been an evolution in security discourse, it is not strictly linear or time-specific but one in which some theories have had greater prevalence at certain times and with particular actors. Equally, there are differing perspectives as to where we are along this evolving continuum. Below we outline some of the central theories that have shaped security discourse by way of background to the emergence of the 'human security' concept.

Realism and neo-realism

The concept of 'security' is traditionally associated with the protection of the territorial integrity and political sovereignty of the state.[22] The origins of this conception of security lie in the Treaty of Westphalia,[23] according to which the sovereign state was understood as the sole protector of its citizens. This view emphasises security of the nation-state from external military threats. Under this traditional Westphalian paradigm, such threats are to be abated by the amassing by states of military capability.[24]

[20] Preambular para. 1, UDHR.
[21] It is acknowledged that there are additional theories of international relations and of security, as well as sub-categories, than those described here.
[22] Art. 2(4), UN Charter 1945, GA res. 26 Jun. 1945, 993 UNTS 3; entered into force 24 Oct. 1945.
[23] Peace treaty between the Holy Roman Emperor and the King of France and their respective allies, 24 Oct. 1648, Munster.
[24] H. J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf, 1973).

The establishment of the United Nations in 1945 provided impetus to reshape the traditional Westphalian conception of security; however, the onset of the Cold War ensured that the emphasis of any collective action to be taken by this new body in the name of peace and security was to protect states from external military threats.[25] In reality, international security under this system is achieved by the regulation and distribution of power between states and is maintained by the careful preservation of power balances. The UN Charter of 1948 is built upon principles of the sovereign equality of states, mutual coexistence, the maintenance of international peace and security through collective action, and non-interference in the internal affairs of other states.[26] Realist discourse plays down other central features of the UN Charter, such as human rights, including economic and social rights, non-discrimination and international cooperation.[27]

[25] Ch. VII, UN Charter 1945. It is concerned with the maintenance or restoration of *international* peace and security, and traditionally focused on external threats. For an analysis of the early approach of the Security Council, see J. Schott, 'Chapter VII as exception: Security Council action and the regulative ideal of emergency', *Northwestern Journal of International Human Rights*, 6 (Fall 2007), 24–80. Contrast this with its increasing characterisation of mainly internal conflicts as threats to international peace and security (often owing to the consequences for regional stability and peace), see, *inter alia*: SC Res. 417 (1977) (South Africa); SC Res. 733, UN Doc. S/RES/733 (1992) (Somalia). The Security Council has even more broadly recognised that '[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security' (President of the Security Council, *Note by the President of the Security Council,* at 3, *delivered to the Security Council,* UN Doc. S/23500 (31 Jan. 1992)). It has further recognised 'with concern the incidents of humanitarian crises, including mass displacements of population becoming or aggravating threats to international peace and security', expressing the understanding 'that humanitarian assistance should help establish the basis for enhanced stability through rehabilitation and development' (Note by the President of the Security Council, S/25344, 26 Feb. 1993), referred to in numerous subsequent Security Council resolutions.

[26] See, UN Charter Arts. 2(1) (sovereign equality); 1(2) and (4) (international cooperation and harmonisation); 1(1) and 2(6) (maintenance of international peace and security, and see further Chs. VI and VII); 2(4) (prohibition on use of force, subject to individual or collective self-defence (Art. 51) or Security Council action (Chs. VI and VII). On traditional security discourse, see A. Wolfers, 'National security as an ambiguous symbol', in A. Wolfers, *Discord and Collaboration: Essays in International Politics* (Baltimore: Johns Hopkins Press, 1962).

[27] UN Charter, Arts. 1(3), 13 and 55 (human rights) and 1(1) and Chs. VI and VII (collective measures and cooperation).

The Cold War further provides some explanation for the authority vested in the UN Security Council and the privileged position of its permanent members, expressed in the right of veto. Although the rule of law is also an important characteristic of the collective security system espoused by the UN Charter, as evidenced by the legal regulation of the Security Council's enforcement powers under Chapter VII, the linkage between these powers and the veto power of the permanent members is a reminder of the pre-eminence of the interests of the most powerful states. This realist outlook dominated international relations at least until the end of the Cold War, whereby the primary function of the UN and its subsidiary bodies was to help to maintain or restore the balance of power between states and ensure that any attempts to solve problems of international peace and security did not impinge on another's sovereignty.

Liberalism

Liberal conceptions of security likewise understand the preservation of the nation-state as important to the achievement of security; however, they consider multilateralism as a way of promoting state interests. Liberalism recognises the role of a plurality of actors, including the state, governmental and non-governmental organisations, and individual actors in contributing to security. Liberal theorists also believe that international relations is not limited only to the 'high politics' of security but also to economic, social and cultural exchanges and interdependence.[28] They further believe in the legitimating force of law and the strength of international institutions. Recognising the interdependence of states on many levels, cooperation through international institutions and multilateralism provide opportunities to achieve and maintain security.

Constructivism

Constructivist and other critical analyses of security[29] challenge the essentialist anarchic state of affairs of realism and neo-realism, which is used by realists and neo-realists to explain how states behave and how

[28] See Keohane and Nye, Jr., *Power and Interdependence*.

[29] A. Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); T. Hopf. 'The promise of constructivism in IR theory'; E. Newman, 'Human security and constructivism', *International Studies Perspectives*, 2 (2001), 239–51.

they are confined to certain pre-determined behaviours. The realist and neo-realist premise that an essentially anarchical system forces states into recurrent competition over security. The constructivist perspective is less concerned with the relative distribution of power and is more interested in the way ideas, interests and international relations are socially constructed and arise from social processes and interactions. This frees up constructivists to theorise international relations and security from a fresh perspective, incorporating importantly the ideas and interests of a range of actors. Consequently, society's diverse beliefs about the relative merit of objectives will help shape each state's actual interests. Like realists and some liberals, certain constructivists also see states as the primary actors. However, this constructivist position understands the state as a more diffuse entity with a range of diverging interests.[30]

Feminism

A fourth school of thought worth setting out here for its importance in representing marginalised groups is feminism. Feminist scholars are generally critical of theories of international relations that focus solely or predominantly on the state. They argue that this is problematic on a number of grounds. First, like the constructivist perspective, the idea that a state represents a unified community is questionable, especially for women and other marginalised groups (for our purposes, refugees and other non-citizens) who have generally been excluded from full citizenship within borders. Second, it assumes that protecting state security results in more secure conditions for citizens in general and this fails to take account of the many people living in conditions of insecurity within sovereign state borders.[31] Feminist theorists are specifically concerned with the ways in which women are affected by conflict and other security threats. It has been asserted, however, that feminist theory, whether of law or international relations, may have significance for all disempowered persons.[32] It has also been asserted that the approach may benefit men as well as women.[33]

[30] Wendt, *Social Theory of International Politics*, 113–35.
[31] See A. Orford, 'The politics of collective security', *Michigan Journal of International Law*, 17 (1995–1996), 373–411.
[32] G. Binion, 'Human rights: a feminist perspective', *Human Rights Quarterly*, 17 (1995), 509–26, 512.
[33] *Ibid.*, 514.