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DISCUSSION

# Security mindsets and international law: thinking differently about security and adjudication

JENS KREMER — 22 September, 2014



Security is a curious term and it comes in many different forms and shapes, and each field of research, every security institution and even more, every security professional has an own very specific understanding of security. Let me give three examples: For military leaders, security is a matter of military strength, tactics and capabilities. If state A has more tanks than state B, state B may want to balance this disadvantage somehow. Here, security is threatened by an external, military enemy to which military power and

military strength are a necessary answer. An airport security officer, as a second example, has a different security perception. For her, security means managing safety and undisrupted functioning of the airport as a functional system. Here, the threat isn't that much focused on tanks, but on individuals trying to circumvent security systems, on technical failure or on other possible disruptions such as accidents. Thirdly, a human-rights NGO has again a completely different understanding of security. For them, the focus is on the protection of individuals e.g. from harm and fear. Here, the subject of security is the individual rather than an entity such as a state or an airport.

**The many securities and legal adjudication**

Those are only three examples of many more and yet, it has to be concluded that there are many different kinds of 'securities'. What they are depends on many things, such as the perceived threat or risk, the institutional setting or simply a certain function. Hence, the way we conceptualize security strongly determines the way we approach, perceive and solve security problems.

Yet, one might ask, what this has to do with international law and adjudication? Security tends to meet law at its very edges, often connected to exceptionality. In fact, security arguments meet law either as an exception within the law – in form of inherent limitations and derogations, or as exceptions above the law –in form of amendments or law-making. In human rights law, for example, there is a right but there are usually limitations which can serve as grounds to justify interferences such as e.g. the common limitations to article 8-11 in the European Convention on Human Rights. In constitutional law, provisions on the state of emergency can

allow temporary suspension of existing rules and norms and as a response to terrorism, many laws today have been changed or amended –often not only temporarily. In many those cases, however, it is ultimately courts that make decisions on security: e.g. on the justification of the interference or the state of exception.

One might argue, though, that security isn't only about exceptionality. In fact, isn't it the mere core of a liberal democratic state to provide security, maybe to even grant security as a right? While this is true, this is as such a very specific perspective on security: one that calls for the balancing of interests – or court decisions between 'egoism and altruism' – as Jarna Petman has put it. Consequently, one very specific perspective on security will be more successful than the other.

Often in jurisprudence, it is hence the security argument which is decisive in the decision about justification and legitimation of the exception or in amending and creating laws. The success of a security argument can justify e.g. derogation from the right to liberty as in *A and others v. UK* or can lead to the adoption of a EU Commission Regulation limiting the amount of liquids that can be carried onto airplanes by passengers, as an example of security-law making. Consequently, from the justification of exceptions, to the balancing of interests and to regulation-making, the actual perspective and essence of security in question strongly influences legal adjudication.

**Decisions on Security**

This is a problem. Often, legal systems are simply not prepared to make decisions on actual security questions.

This is because the assessment of the real threat, the real urgency and pressing need to act is presented as absolutely necessary, often with reference to an existential threat or the survival of an entity. As a side note, this is also the way in which the so called 'Copenhagen School' in International Relations understands security: as a move by actors to claim and justify exceptional policies due to an imminent existential threat, as outlined in *Security: A New Framework for Analysis*, however, with a focus on policies and a tendency towards fading out the legal component. Ultimately, it is Courts that make decisions on security claims, and it is often those security-necessity arguments that are difficult to process within the established legal practices and norms.

One example for this difficulty to handle security discourse in legal could be the shifting of courts from public to secret oversight bodies where security arguments come in a veil of secrecy: The Guantanamo Bay 'war-crimes court' or the secret surveillance oversight by the US Foreign Intelligence Surveillance Court are examples of this phenomenon. As a consequence, lawyers often have no other choice but to either accept the security claim or somehow manoeuvre around it.

Legal systems also have developed systematic strategies and jurisprudence to deal with security questions. The 'margin of appreciation' – doctrine of the European Court of Human Rights, developed in the famous *Handyside* Judgment is such an example. It grants the state a certain leeway as it is regarded to be in a better position to decide on certain questions, unsurprisingly often related to security, such as the justification of emergency derogation.

But does law always have to take security-claims for granted? Certainly not. Firstly, there is of course the option to reject security arguments. Security cannot justify everything and as mentioned before, courts can balance certain rights, interests or harms. This balancing then can very well find that e.g. national security wasn't threatened enough to justify the emergency derogation, however, it still takes the security claims as such for granted.

Yet, there is another way of addressing the security question in courts and that is doing precisely what law generally tends to avoid: looking at security *per se*. However, to do this requires new tools and new ways of thinking about security. In fact, disciplines such as political science, sociology and information technology have developed and discussed many different ways of addressing and thinking about security. Here, security can be perceived *inter alia* as a strategic aim, freedom from fear and want, as emancipation or as the Copenhagen School's securitization, briefly mentioned above. An alternative for law, though, could be to think of security in terms of mindsets.

**Security Mindsets: thinking differently about security claims in Courts**

Security mindsets are distinct perceptions of 'securities' in relation to their individual and institutional backgrounds. The security mindset, as coined by Bruce Schneier, is first of all a professional attitude. This is certainly useful for a security professional working in a very specific field. However, the term becomes even more useful once we think of security as driven by many different security mindsets. Then, a military security mindset, which is based on external threats and a clear distinction between friend and enemy,

necessarily pushes towards a justification of a state of emergency in law. Or, a highway police officer would have a security mindset which focusses on speeding and other traffic related issues to protect individuals on the road and the functioning of traffic as such.

This is not to say that a police officer as a person cannot have many different understandings of security as well, however, it is her professional attitude and institutional background that strongly determines her security actions as a police officer –and consequently also the arguments used for justifying them. In that sense, the professional identity of a police officer depends on a specific perception of security, hence, on a specific security mindset. Perceiving security in terms of mindsets therefore allows locating the actual subject of security in its individual and institutional background. Security is neither a fixed, nor a self-evident concept and if treated like this, many security-related questions popping up in courtrooms could be understood differently. Moreover, identifying security mindsets can serve to debunk false-necessity arguments and false-urgency arguments.

To illustrate this, let's look at the US National Security Agency/Central Security Service as an institution. It exists according to its own understanding 'to protect the Nation' and its mission is to collect information useful to fight enemies such as 'foreign adversaries' and 'terrorists and their organizations'. The NSA/CSS hence come with a strongly militarized security mindset: it is the large entity of the Nation that needs protection from external enemies, or enemies that are labelled as threatening this entity. Necessarily, this comes with a strong demand for legal exceptionality and the expansion of powers. In addition, the

NSA/CSS is an organization heavily relying on secrecy. If one hence adopts such a security mindset, it is very easy to end up in the legal justification of a permanent state of emergency in which all kinds of enemies are constantly threatening the mere basics of existence. If one doesn't adopt such a security mindset, one can as well call for restraint, control and limiting its powers. Legally, this is a matter of choice, not a necessity. And identifying the security mindset at stake helps making those choices.

As a consequence, it is also up to judges and lawyers to decide on security. And it should be legal arguments and legal principles such as rule of law, public oversight, or well established procedural standards that assess security questions in courtrooms, not politically motivated necessity-claims driven by very specific security mindsets. For lawyers, understanding security in terms of security mindsets might already make a difference.

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