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**Security in the
Baltic Sea Region from
a Legal Perspective with
a Focus on Border Security**



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Åsa Gustafsson, 'The Baltic Sea Region Border Control Cooperation (BSRBCC) and border management in the Baltic Sea region: A case study' (2018) 98 *Marine Policy* 309, available at <<https://www.sciencedirect.com/science/article/abs/pii/S0308597X18307000>>

Åsa Gustafsson, 'Maritime Security and the Role of Coast Guards: The Case of Finland and the Åland Islands' Demilitarisation' (2019) 12 *Baltic Journal of Law & Politics* 1, available at <<https://www.vdu.lt/cris/handle/20.500.12259/101984>>

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Abstract

First, inter-state threats and deterrence in a Baltic Sea region context are explored from a legal perspective, for the purpose of examining whether the concept of border security is used in connection with the use of force and threats between states. The conclusion is drawn that as a rule the term border security is not used in these contexts. Inter-state threats can be seen as inherent in deterrence. It is more probable that military exercises, which are commonly used as deterrence, could be seen as an illegal threat in a conflict situation, than as standalone exercises.

Second, the main objective of the thesis is an exploration of the concept of border security from a legal perspective, with a focus on national border actors in the Baltic Sea region. 'Border security' is now found in legal documents in the EU, and in UN Security Council resolutions. The objectives of EU border control or border security rules and the UN Security Council application of border control or border security are examined. *Inter alia* the security contexts are different, but border control and the goal of border security at both EU and global levels in the end entail processes of similar character, concerning individuals crossing borders. It is argued that the use of 'border security' in the practice of the UN Security Council has changed over the years. It now concerns individuals (and goods) crossing international borders. It is assessed that factors of both an objective and subjective character are part of developments towards the use of the term border security at both EU and global levels.

The EU is an example of an advanced border control or border security system, based on supranational rules. The overall functioning of member states' continued influence on the EU border system is assessed from a security perspective. A number of circumstances can be seen as alleviating EU member states' concerns over having relinquished sovereignty in this regard to the EU. Member states have certain – but as a main rule narrow – possibilities to derogate from legal obligations for security reasons in the context of border rules. The characteristics and nature of the national authority applying the EU border rules are in the hands of EU member states.

The security of the external border is inextricably linked to upholding the internal security, and in the end economic factors. On a general note, the 'taking-back' of powers over the borders by EU member states during the 2015 migration crisis and the 2020 pandemic crisis shows the sensitivity concerning borders. It is highlighted that a lasting definition of security, or of security dimensions, is not achievable, since the political and scientific concepts of security changes when the political contexts change.

Abstrakt/Sammanfattning

För det första utforskas mellanstatliga hot och avskräckning i Östersjöregionen från ett rättsligt perspektiv, med syfte att undersöka om konceptet gränssäkerhet (*border security*) används i samband med våldsanvändning och hot mellan stater. Slutsatsen är att termen gränssäkerhet som regel inte används i dessa sammanhang. Mellanstatliga hot kan betraktas som en del av avskräckning. Det är mer troligt att militärövningar, som ofta används som avskräckning, skulle kunna ses som ett olagligt hot i en konfliktsituation än som en ensamstående övning.

För det andra är det huvudsakliga målet en undersökning av konceptet gränssäkerhet från ett rättsligt perspektiv med fokus på nationella gränsaktörer i Östersjöregionen. Termen gränssäkerhet finns nu i rättsliga dokument i EU och Förenta Nationernas (FN) säkerhetsrådsresolutioner. Målen med EU:s regler om gränskontroll eller gränssäkerhet och FN:s säkerhetsråds tillämpning av gränskontroll och gränssäkerhet undersöks. Bland annat säkerhetssammanhangen är inte desamma, men gränskontroll och målet med gränssäkerhet både på EU-nivå och globalt innebär i slutändan processer av liknande karaktär, rörande individer som korsar gränser. Det görs gällande att FN:s säkerhetsråds tillämpning av begreppet gränssäkerhet har ändrats med åren. Begreppet avser nu som regel individer (och varor) som korsar internationella gränser. Bedömningen görs att faktorer av både objektiv och subjektiv karaktär har påverkat utvecklingen av begreppet gränssäkerhet både på EU-nivå och globalt.

EU är ett exempel på ett avancerat gränskontrollsystem eller gränssäkerhetssystem, baserat på överstatliga regler. Medlemsstaternas fortsatta inflytande på EU:s system undersöks från ett säkerhetsperspektiv. Ett antal faktorer kan ses som lätnader vad gäller EU:s medlemsstaters oro över att ha överlåtit suveränitet på området till EU. EU:s medlemsstater har vissa – men som regel inte omfattande – möjligheter att av säkerhetsskäl avvika från rättsliga skyldigheter i ett gränskontrollsammanhang. Egenskaper hos och karaktären på den nationella institutionen som tillämpar EU:s gränsregler avgörs av EU-medlemsstaten ifråga.

Den yttre gränsens säkerhet är ouppslösligt förbunden med upprätthållande av den inre säkerheten och i slutändan ekonomiska faktorer. Från ett allmänt perspektiv visar återtagandet av makten över gränser av EU:s medlemsstater under migrationskrisen 2015 och pandemikrisen 2020 känsligheten rörande gränser. Det framhålls att en hållbar definition av säkerhet, eller säkerhetsdimensioner, inte kan uppnås, eftersom politiska och vetenskapliga säkerhetskoncept ändras när den politiska kontexten ändras.

Abbreviations

AFSJ	Area of Freedom, Security and Justice
API	Advance Passenger Information
AU	African Union
BSRBCC	Baltic Sea Region Border Control Cooperation
CJEU	Court of Justice of the European Union
CTC	Counter-Terrorism Committee
CTED	Counter-Terrorism Committee Executive Directorate
ESBG	European System of Border Guards
EAEC	European Atomic Energy Community
EEC	European Economic Community
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
EU	European Union
Euratom	European Atomic Energy Community
FAO	Food and Agriculture Organization
Frontex	European Border and Coast Guard Agency
FTF	Foreign Terrorist Fighter
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IOM	International Organization for Migration
JBC	Joint Border Commission
JHA	Justice and Home Affairs
NATO	North Atlantic Treaty Organization
OCHA	Office for the Coordination of Humanitarian Affairs
OECD	Organisation for Economic Cooperation and Development
OSCE	Organization for Security and Co-operation in Europe
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PNR	Passenger Name Records
PRST	Presidential Statement

SALW	Small arms and light weapons
SBC	Schengen Borders Code
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNEP	United Nations Environment Program
UNISFA	United Nations Interim Security Force for Abyei
UNDP	United Nations Development Program
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WHO	World Health Organization
WMD	Weapons of Mass Destruction
WCO	World Customs Organization

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1. Introduction

1.1 *Rationale* and aim

The reason for initialising the work on this thesis was the evolving security situation in the Baltic Sea region. Security is high on the agenda of states and events in Georgia 2008, and Ukraine in 2014 and 2022, have propelled states' security concerns in the Baltic Sea region to the forefront.

The security structure in the Baltic Sea region is multifaceted. The nine states – Finland, Russia, Estonia, Latvia, Lithuania, Poland, Germany, Denmark and Sweden – in the region by no means form a homogenous group. Eight of them are EU members – thus, there is an external EU border in the Baltic Sea region. Estonia, Latvia, Lithuania, Poland, Germany and Denmark are also members of the North Atlantic Treaty Organization (hereinafter NATO). Finland and Sweden have been non-aligned and stayed out of military alliances. However, following the Russian aggression against Ukraine in 2022 they handed in their formal requests to join NATO in May the same year. On 5 July 2022 NATO members signed the Accession Protocols for Sweden and Finland. The Protocols will have to be ratified by all NATO states according to their national procedures. At the time of writing (July 2022) the outcome of this process is not clear. The changing security situation in the Baltic Sea region is a reason to examine, or even re-examine, issues, and legal preconditions for them.

In the Baltic Sea region politicians and media highlight inter-state threats and make reference to a changed security situation. Deterrence is viewed as critical. In this thesis deterrence and inter-state threats are examined from a legal perspective, with a focus on the Baltic Sea region.¹ The question is posed whether military exercises could be seen as illegal threats to international security against the background of the provision on the prohibition of threats of force in Article 2(4) in the UN Charter.

However, the main focus of the thesis is 'border security' from a legal perspective. In the EU, border security – which relates to individuals crossing international borders, not individuals using armed force against a state – has become a central concept for EU border management of the external borders, and for relevant border management actors, not least Frontex, and thus for the whole Schengen system that builds on the security of the external borders. The hypothesis in this thesis is that at a global level 'border security' earlier envisaged inter-state relations, but now targets individuals crossing international borders (not with armed force). This will

¹ Åsa Gustafsson, 'Aspects légaux et conceptuels de la dissuasion: les exercices militaires russes', ('Legal and conceptual aspects of threats and deterrence: Russian military exercises') (Matthieu Chillaud trs), 2019 *Stratégie* 293

be elaborated on further below in the section on border security and the United Nations Security Council (hereinafter the UN Security Council),

Many scholars refer to EU border security, above all in a human rights context, and the term is commonplace in a UN Security Council context, but the concept is not that explored theoretically in a security – and sovereignty – context. Clearly, there is a need to get a more complete picture of the term border security, so that current and future developments can be understood better. Consequently, the aim in this thesis is to examine how the term is used both at the EU level and the UN Security Council level, since exploration of both these levels demonstrated a need for a deeper understanding of it. There is an added value to analysing both the EU level and the global level for the purpose of juxtaposing at least the objectives of border security in these two contexts, although no outright comparison of the two fundamentally different systems can be made. One difficulty in an endeavor to explore border security from a legal perspective is that the term is not so clearly established legally. There is for instance no case-law from international courts to guide an analysis, which led me to partly make use of other methods than a strictly traditional legal method, as a complement, which I will elaborate on below.

As concerns the EU border security concept, the developments in the Mediterranean Sea region have been at the centre of attention of border security due to the migration pressure in that region. However, it seemed clear that it is of interest to examine also the situation in other regions, such as the Baltic Sea region, *inter alia* on account of the multilevel system of actors – Frontex and the member states' authorities. There exists a vast fragmentation regarding authorities with responsibilities in border management in the EU. This makes it necessary to look closer also at other actors than those in the Mediterranean Sea region when one is interested in how the EU control of the external borders is performed.²

Border security in the EU can be seen as encompassing a range of measures related to borders, such as return of illegal migrants and EU international agreements with third countries.³ Within the framework of this thesis, however, the focus is on rules related to the entry of individuals crossing international borders into another state's territory, both at the EU level and the global level. Since that often could be termed simply 'border control' or perhaps 'effective border management' including 'border

² Sergio Carrera and others, *The European Border and Coast Guard: Addressing Migration and Asylum Challenges in the Mediterranean?* (Centre for European Policy Studies 2017) 26, 29, 30. In 2017 it was assessed that more than 50 national authorities were involved in the border control functions that are included in the Schengen Borders Code, and that more than 300 national authorities were engaging in coast guard functions in the EU.

³ eg Valsamis Mitsilegas, 'Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance' in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing 2007) 392

surveillance', one could pose the question whether it would not be more appropriate to choose one of those terms as the topic. However, border security denotes something 'more' than that, since the term security is used.

When the empirical research regarding the border security concept at the global level was initiated for this thesis, it quite quickly transpired that border security has to do with border control of individual persons crossing international borders, much as border security is seen in the EU. (As clarified below under the headings Materials, the empirical research in this dissertation covers the materials in question up to and including 2020.) In this thesis it is argued that this is a main rule when the UN Security Council currently uses the concept border security. The concept border security is not related to the *jus ad bellum* regime in the UN Charter and customary rules in that field, which are in focus if dealing with the use of armed force and threats between states. The modern *jus ad bellum* can be described as a constraint on cross-border force. Here it should be highlighted that, as is well known, legal scholarship has extensively debated whether non-state actors can perform armed attacks, to which the targeted state can respond with self-defence, and state practice on this issue does not seem conclusive.⁴ However, these considerations are not – at least not directly – relevant when dealing with the concept of border security. Nevertheless, as mentioned, deterrence and inter-state threats within the *jus ad bellum* field, connected to the Baltic Sea region, has been analysed 'in parallel' in this thesis.⁵ That analysis contributed to gaining an understanding of international security rules relevant for the Baltic Sea region, as well as an understanding of the limits of the concept of border security – which concerns individuals crossing international borders.

A crucial concept in the endeavour in this thesis is obviously borders. The subject of the research is borders between states, termed inter-state borders or international borders. The history of international borders will be looked into below in section 3. Borders between sovereign states are the subject of a vast amount of research, from different perspectives and in a variation of scholarly fields.⁶ How international borders function and how they are perceived, by different actors are issues that have received a lot of

⁴ Tom Ruys, 'Quo Vadit Jus ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq' (2008) 9 Melbourne Journal of International Law 334

⁵ Gustafsson (n 1)

⁶ eg Sarolta Németh, Ágnes Németh and Virpi Kaisto, 'Research design for studying development in border areas: case studies towards the big picture?' (2013) 1 Belgeo <<http://belgeo.revues.org/10582>> accessed 15 February 2021; Jussi P Laine, 'A historical view on the study of borders' in Sergei V Sevastianov, Jussi P Laine and Anton A Kireev (eds) *Introduction to Border Studies* (Dalnauka Vladivostok 2015) 7; Vladimir A Kolosov, 'Theoretical approaches in the study of borders' in Sergei V Sevastianov, Jussi P Laine and Anton A. Kireev (eds) *Introduction to Border Studies* (Dalnauka 2015) 53

attention.⁷ The border environment is complex and comprises a variety of issues and actors. Mobility and security interests intersect. Movement of persons are seen as necessary to promote economic growth and social development. At the same time, states strive to secure their borders and make use of a varying degree of control for that purpose. Territorial integrity is a norm of international law and is an essential foundation of the sovereignty of states. Borders can be seen as the ultimate symbols of sovereignty. What it means to 'secure the border' or what the concept 'border security' denotes is not clear, although the term border security has been included in EU legislation⁸ and UN Security Council resolutions, including binding resolutions adopted under Chapter VII.⁹ Often border security is linked to national security and said to be strived towards for the same reasons.¹⁰

In the sections on research questions and methods the focus of the research will be detailed, but already here it is appropriate to clarify that a main aim has been, first, to find out what the objectives of the 'border security rules' are, at the EU as well as the global level, and, second, to analyse the functioning of the EU border control or border security system from a security perspective. In the EU context I focus on both border control and border security, since my point of departure is that border control constitutes the core of border security. For an overview of the terms border management, border control and border surveillance in the EU, see section 6.1.

The dissertation is an article-based thesis. The first article deals with issues related to national security, collective security, and international security in the Baltic Sea region.¹¹ It discusses threats and deterrence from a legal perspective in relation to the Baltic Sea region. It concerns inter-state relations and the international rules on threats and use of force, *jus ad bellum*. Three further articles discuss 'EU border rules' from different perspective and the practical application of the rules by EU member states and border actors in the Baltic Sea region.¹² The articles analyse how EU

⁷ eg Bigo Didier, 'The (in)securitization practices of the three universes of EU border control: Military/Navy – border guards/police – database analysts' (2014) 45 Security Dialogue 209; Elspeth Guild, *Security and Migration in the 21st Century* (London Polity 2009)

⁸ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir) [2013] OJ L295/11 (hereinafter Eurosir Regulation); Regulation (EU) 2019/1896 of 13 November 2019 of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1 (hereinafter 2019 Frontex Regulation)

⁹ eg UNSC 2396 (20 July 2017) UN Doc S/RES/2396

¹⁰ eg Kolosov (n 6) 46

¹¹ Gustafsson (n 1)

¹² Åsa Gustafsson, 'The Baltic Sea Region Border Control Cooperation (BSRBCC) and border management in the Baltic Sea region: A case study' (2018) 98 Marine Policy 309; Åsa Gustafsson, 'Maritime Security and the Role of Coast Guards: The Case of Finland and the

supranational rules on border management and control have evolved over time, and the objectives and development of the Schengen system. The nature and activities of border actors, such as the Finnish Border Guard and the Swedish Coast Guard, are examined.

It should be mentioned already here that theoretical perspectives on security will be elaborated on in section 4. Theoretical perspectives on security that have their origin in International Relations will be included for the purpose of clarifying security concepts. Security concepts will be referred to, and used, in the analysis of the research questions. This is part of an interdisciplinary approach in this thesis. Also when it comes to methods, an interdisciplinary approach is used, as clarified further in section 2.2 on materials and methods in relation to the research on UN Security Council action. The question can be posed whether it is necessary to use theoretical perspectives from International Relations when attempting to analyse the issue from a legal perspective. However, this is both necessary and helpful, in line with views of prominent international law scholars who have specialised in security, who have often used International Relations or political science perspectives for the purpose of clarifying or understanding security.¹³ For instance, Nasu refers to an analytical framework for security; (1) the focus (referent object) of security; (2) the scope of security issues; and (3) the means by which security threats are addressed.¹⁴ International law is indeed linked to International Relations, as for instance Grimal puts it: 'International law is intrinsically linked to international relations, in that there is a relationship between power and the normative structure, (..)'.¹⁵

The main traits are the following: First, the research questions will be posed. Second, methods and materials are presented. Third, a historic overview of borders and security is given. Fourth, theoretical perspectives on security concepts will be explored for the purpose of building on them and using them as tools in this analysis. Fifth, the first research question, as presented below, is analysed. Sixth, objectives of border security are analysed regarding the EU and, seventh, in relation to the UN Security Council. Eighth, EU member states' continued influence over border security from a security perspective is analysed. Ninth, EU member states' application of the EU rules are elaborated on. Finally, concluding comments are made.

Åland Islands' Demilitarisation' (2019) 12 *Baltic Journal of Law & Politics* 1; Åsa Gustafsson, 'Multilevel Governance of Maritime Border Surveillance in the EU and Accountability: The Coast Guard in Sweden' (2020) 3 *Nordic Journal of European Law* 60

¹³ Hitoshi Nasu 'Law and Policy for Antarctic Security' in Alan D Hemmings, Donald R Rothwell, Karen N Scott (eds) *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives* (Routledge 2012) 19, 26; Nigel D White, *Advanced Introduction to International Conflict and Security Law* (Edward Elgar 2014) 5

¹⁴ Hitoshi Nasu, 'Human Security and International Law' in Mary E Footer and others (eds) *Security in International Law* (Hart Publishing 2016) 27

¹⁵ Francis Grimal, *Threats of Force International Law and Strategy* (Routledge Oxon 2013) 5

1.2 Research questions

1.2.1 General

First, since the concept of border security is examined in this thesis, it is necessary to clarify how 'concepts' are seen. Concepts are distinguishable from words in a number of ways. The approach in this thesis is based on *inter alia* the conclusions of Koselleck, as well as d'Aspremont and Singh. As Koselleck state a 'concept may be attached to a word, but it is simultaneously more than that word'.¹⁶ d'Aspremont and Singh point to the following as reasons for the choice of concepts in the analyses in 'Concepts for International Law': (1) designations of important and dominant actors; (2) core concepts used in legal argument and judicial reasoning; (3) terms used to designate influential and dominant projects; (4) core temporalized concepts in international law.¹⁷ A concept's internal ambiguity arises in part because it is 'the point of coincidence, condensation or accumulation of its own components'.¹⁸ But a concept's ambiguity also arises out of its external relativity, or rather its ever shifting relations to other concepts and its corresponding vocabulary.¹⁹ d'Aspremont and Singh wished to put a series of questions to the concepts they chose for their analysis, *inter alia*: How have the concepts been affected and changed? Has the porosity of our disciplinary boundaries introduced new concepts or altered existing 'legal' ones?²⁰ d'Aspremont and Singh state that their task, and that of their authors, was to pose questions of our concepts and their possibilities.²¹ This has also been a task in this thesis, to pose questions to the concept of border security, as formulated in the research questions.

For the sake of clarity the four research questions are addressed in separate parts below, *inter alia* since different methods are used, as explained in section 2 on Methods and materials.

¹⁶ Reinhart Koselleck, 'Introduction and Prefaces to the "Geschichtliche Grundbegriffe" ' (Michaela Richter trs) (2011) 6 Contributions to the History of Concepts 1

¹⁷ Jean d'Aspremont and Sahib Singh, 'The Life of International Law and its Concepts' in Jean d'Aspremont and Sahib Singh (eds) *Concepts for International Law. Contributions to Disciplinary Thought* (Edward Elgar 2019) 22

¹⁸ Gilles Deleuze and Félix Guattari, *What Is Philosophy?* (Hugh Tomlinson and Graham Burchell III trs, Columbia University Press 1996) 20

¹⁹ d'Aspremont and Singh (n 17) 22

²⁰ *ibid*

²¹ *ibid*

1.2.2 Military exercises as deterrence or threats in the Baltic Sea region

The first research question is the following:

- 1) Under what circumstances could military exercises in the Baltic Sea region be seen as illegal threats to international security against the background of requirements in Article 2(4) in the UN Charter?

The inclusion of this research question is based on the assessment that it seemed highly relevant to examine such a topical issue as deterrence in the Baltic Sea region – and this from a legal perspective, within the *jus ad bellum* field. However, the research for the purpose of arriving at conclusions regarding the research question was above all a part of a process to gain an understanding of the concept of border security. As will be seen, in these inter-state contexts the concept of border security is usually not used, as argued in this dissertation.

The research question has been analysed in a published article on military exercises as deterrence or threats in the Baltic Sea region,²² and the article has been summarised in section 5 under the heading ‘Military exercises as deterrence or threats in the Baltic Sea region’.

1.2.3 Objectives of border security

The second research question is the following:

- 2) What are the main objectives of the EU border control or border security rules and the UN Security Council application of border control provisions or the concept of border security?

The second research question about the objectives of border security covers EU legal rules in the field, as well as the UN Security Council application of border control provisions or the concept of border security. However, the intention is not to make outright comparisons, since two completely different systems are involved. Furthermore, the research regarding the two levels – the EU level and the UN Security Council action – has been conducted with two different methods, as explained in section 2. Nevertheless, it is enlightening to examine both levels for the purpose of juxtaposing them regarding the chosen aspect, that is, the objectives of the EU rules in question and of the UN Security Council use of border security. The reason for focusing on the objective and purpose of the rules is that this is a debated topic in relation to border security. If one uses a security term

²² Gustafsson (n 1)

such as border security, the implication is that there is a threat, and a follow-up question to that is what kind of threat.

This second research question is dealt with below under the heading 'Objectives of border security'.

1.2.4 EU member states' continued influence over border control or border security

The third research question is the following:

- 3) How does the EU 'border control system' or 'border security system' function from a security perspective – above all, to what extent can member states' continue to influence border control in the EU?

Since the EU 'border control system' or 'border security system' often is referred to as the most advanced regional border system in the world, it is highly relevant to examine how this system functions, above all from a security perspective, and regarding how much influence member states retain in the continuing application of the supranational rules in question. It is of interest how much influence member states 'have given up' when agreeing to these supranational rules, since member states' sovereignty has been a sensitive issue *inter alia* when negotiating the Frontex regulations.²³ Some member states' reluctance to renounce sovereignty is not surprising, taking into consideration that it is common to see the control over borders as part of a core of national security or sovereignty of a state. However, one 'safety valve' that can be mentioned is that within the Schengen system there are possibilities for member states to refer to their own security as a reason for derogating from the main rule. This will be analysed and elaborated on in section 8.

This third research question is dealt with below under the heading 'EU member states' continued influence over border control or border security'.

1.2.5 EU member states' application of EU border rules in the Baltic Sea region

The fourth research question is the following:

- 4) How are the EU 'border rules' applied by EU member states' in the Baltic Sea region and what are the characteristics of 'border authorities' in that region?

²³ 2019 Frontex Regulation (n 8)

As is the case with the third research question above, also this research question concerns EU member states continued influence over 'EU border rules'. Conclusions from the published articles examining EU member states' application of the EU rules in the Baltic Sea region are found in section 9 under the heading 'EU member states' application of EU border rules in the Baltic Sea region'.²⁴

²⁴ Gustafsson (n 12)

2. Methods and materials

2.1. Public international law and EU law

2.1.1 Method

Both public international law and EU law have been researched for the purpose of this thesis.

Research of public international law has been conducted to analyse and arrive at conclusions regarding research question 1).²⁵ Research of EU law, and to a certain extent national law, has been conducted to analyse and arrive at conclusions regarding research questions 2) to 4).²⁶

The approach taken when researching both public international law and EU law is legal positivism, sometimes referred to as doctrinal or legal-dogmatic research.²⁷ The term legal-dogmatic research is used for the purposes of this thesis, entailing that law is explored and described as it is, *lex lata*. The research has focused on law as laid down in written and unwritten rules, principles, concepts, doctrines, case law and literature.²⁸

Having clarified the approach concerning methods above, further considerations need to be explained that have guided the research and influenced which sources that have been examined in the field of the objectives of border control, or border security, in EU law. Those considerations are related to the interpretative methods that the Court of Justice of the European Union (hereinafter CJEU) uses.²⁹ The interpretative methods of the CJEU have been analysed extensively by scholars.³⁰ It is clear that the teleological method of interpretation plays an important role in the

²⁵ This thesis includes four published articles. EU law has been researched in three of the published articles, which all deal with the application by EU member states border control authorities in the Baltic Sea region, as well as in the theoretical part of this thesis, see Gustafsson (n 12). The fourth published article on deterrence and threats in the Baltic Sea region focuses on public international law, see Gustafsson (n 1)

²⁶ *ibid*

²⁷ Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 38, 39; Jan M Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research in Rob van Gestel, Hans W Micklitz and Edward L Rubin (eds) *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 5; Jan Vranken, 'Exciting Times for Legal Scholarship' (2012) 2 *Law and Method* 42

²⁸ Vranken (n 27) 42; cf Cryer and others (n 27)

²⁹ The post-Lisbon term 'CJEU' is used as a generic term for the Court of Justice of the EU (CJEU) and European Court of Justice (ECJ).

³⁰ eg Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20 *Fordham International Law Journal* 656; Koen Lenaerts, 'Interpretation and the Court of Justice: A Basis for Comparative Reflection' (2007) 41 *The International Lawyer* 1011, 1017; Koen Lenaerts and José A Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice* (European University Institute Working Paper, Academy of European Law 2013/9)

CJEU's legal reasoning.³¹ Not only the object and purpose of single norms, but also of the telos of the instruments in which they appear, are taken into account.³² However, when an EU law provision is ambiguous or incomplete, several methods of interpretation employed by the CJEU may be used in a mutually reinforcing relationship.³³

One such interpretative method is contextual interpretation. It encompasses both a systematic interpretation focused on the normative context in which the EU law provision in question is placed, and an examination of the decision-making process that led to the adoption of the EU law provision in question.³⁴ The latter makes use, in particular, of preparatory work or *travaux préparatoires*. Preparatory work is increasingly used as an interpretative aid in cases concerning the interpretation of secondary legislation.³⁵ Regarding primary law that has not been the case, *inter alia* since access to the preparatory work has been limited.³⁶ Writing extrajudicially, former Advocate General Fennelly stated that the Court 'frequently relies on legislative history in the form of, for example, an earlier legislative proposal from the Commission .. including cases where that proposal has been rejected'.³⁷ There are arguments both for and against the use of preparatory work as an aid to interpret secondary legislation. The preparatory work for a complex or technical secondary act can assist in the interpretation of possibly ambiguous provisions in the act in question. On the other hand, interpreting an EU act in light of its preparatory work might have an ossifying effect.

Teleological and systematic interpretation are often interlinked.³⁸ According to a teleological interpretation *stricto sensu*, an ambiguous or not complete EU provision can be interpreted in light of the objectives it pursues.

Furthermore, it is of interest to mention also the principle of consistent interpretation. Initially the consistent interpretation doctrine was developed in case law as a way of giving effect to EU law before national courts.³⁹ Later, the Court extended the doctrine to international law, to the effect that EU

³¹ Lenaerts and Gutiérrez-Fons (n 30) 47; Fennelly (n 30) 664

³² Salvatore Fabio Nicolosi, 'Disconnecting Humanitarian Law from EU Subsidiary Protection: A Hypothesis of Defragmentation of International Law' (2016) 29 Leiden Journal of International Law 463, 476; Case C-84/12, Koushkaki, Judgment of 19 December 2013, para 21

³³ Lenaerts and Gutiérrez-Fons (n 30) 48

³⁴ *ibid* 13

³⁵ *ibid* 22; Lenaerts (n 30) 1016, 1017

³⁶ Lenaerts and Gutiérrez-Fons (n 30) 19

³⁷ eg Case C-468/93 *Gemeente Emmen* (C-468/93) [1996] EU:C:1996:139, cited by Fennelly (n 30) 666

³⁸ Lenaerts and Gutiérrez-Fons (n 30) 25

³⁹ Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] EU:C:1984:153

secondary law shall be interpreted in the light of the wording and the purpose of EU international obligations.⁴⁰ Instead of accepting that international obligations may produce direct effects within the EU legal order, the CJEU, through a conforming interpretation achieves a general indirect effect of such rules.⁴¹ Casolari asserts that that the judicial attitude seems to permit recourse to the consistent interpretation also with regard to international rules that are not binding on the EU and do not form an integral part of the EU legal order.⁴² van Rossem states that the duty of consistent interpretation ‘does not really distinguish a binding norm from a non-binding one’.⁴³ Casolari points out that despite the importance of the principle of consistent interpretation, there is little literature on it addressing international law.⁴⁴ Already in earlier case law of the CJEU the necessity to take into account the text of UN resolutions in order to interpret the implementing EU secondary law was evident.⁴⁵ The CJEU’s approach relating to international law is mainly based on the primacy of international law over EU secondary law, and the Courts’ settled case-law considers that the primacy of international law at the EU level cannot extend to primary law.⁴⁶

The considerations described regarding interpretation methods above are taken into account when examining the objectives of border control or border security in the secondary legislation that are in focus in this thesis, namely the Schengen Borders Code⁴⁷ and the Frontex Regulation.⁴⁸

Finally, it is also of interest in the context of this thesis to note that the question of the relationship between international law and EU law is not confined to legal rules and their enforcement. The EU contributes also in other ways to the shaping of international law, for instance, it has international legal capacity and concludes treaties and is a member of some

⁴⁰ Case 92/71 *Interfood GmbH v Hauptzollamt Hamburg* [1972] ECR 231; Federico Casolari, Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation in Enzo Cannizzaro, Paolo Palchetti, and Ramses A Wessel (eds) *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012) 396

⁴¹ *ibid*

⁴² Case C-181/73 *Haegeman v Belgium* [1974] EU:C:1974:41, para 5; Casolari (n 40) 396

⁴³ Jan Willem van Rossem, ‘Interaction Between EU Law and International Law in the Light of Intertanko and Kadi: The Dilemma of Norms Binding the Member States but not the Community’ in Ige F Dekker and Ellen Hey (eds) *Netherlands Yearbook of International Law* (Asser Press 2009) 208

⁴⁴ Casolari (n 40) 397

⁴⁵ eg Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and Others* [1996] EU:C:1996:312, paras 13–14

⁴⁶ Casolari (n 40) 407; eg Joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat* [2008] EU:C:2008:461, para 308

⁴⁷ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1

⁴⁸ 2019 Frontex Regulation (n 8)

international organisations. The EU discourse is therefore in general of interest. Although a legal-dogmatic method is used in the 'EU part' of the thesis, examples of the language used by for instance EU actors in relation to border security will be pointed to.

2.1.2 Materials

Regarding public international law, traditional sources have been used. Such sources are listed in article 38 of the Statute of the International Court of Justice (hereinafter ICJ), namely primary sources such as international conventions, international custom and general principles of law, and subsidiary sources, such as decisions of courts and the opinions of legal scholars.

As concerns EU law the materials analysed include EU primary and secondary legislation, CJEU case law, relevant European Commission (hereinafter the Commission) documents, such as legislative proposals, and opinions of legal scholars, up to and including 2020.

2.2 UN Security Council discourse

2.2.1 Method

As concerns the research method of UN Security Council action in the field of border security, a complementary interdisciplinary approach is used in this thesis, as indicated above. In the exploration of UN Security Council action in the field of border security, with a focus on the objectives of border security, a suitable method is an analysis of the discourse used in a Security Council context. The reason for the choice of a discourse approach is that legal sources are scarce, and that such an approach in this part is sufficient for the purpose of this thesis. There is not any known case law to be analysed and there are only a few provisions at the global level dealing with border control or border security, namely a few provisions in Security Council resolutions and in international treaties. The treaty provisions in question – on human trafficking and migration – that contain border control requirements regarding individuals crossing international borders will be referred to, but only as part of the discourse analysis.

There is no consensus on a definition of discourse, nor on how it should be analysed. In this thesis, discourse is seen as 'a structure in which meaning is constantly negotiated and constructed'.⁴⁹ Furthermore, discourse can be seen as a process of producing 'meaning-systems' that make the complexity

⁴⁹ Ernesto Laclau, 'Metaphor and social antagonism' in Carey Nelson and Lawrence Grossberg (eds) *Marxism and the interpretation and culture* (Macmillan Education 1988), cited by Paul J. Kohlenberg and others in *Introducing UNSCdeb8 (beta) A Database for Corpus-Driven Research on the United Nations Security Council* (German Institute for International and Security Affairs WP 1 2019) 10

of the world more understandable.⁵⁰ All utterances in and by the UN Security Council can be seen as playing a part in the constitution of meaning-systems, as argued by Kohlenberg and others.⁵¹

The analysis is made through a simple qualitative method. UN Security Council decisions and documents that are assessed as relevant have been included in the analysis. For a more detailed description of which documents have been included, see subsection 2.2.2 below. The aim has been to map the UN Security Council use of the concept of border security through empirical explorations of the UN Security Council discourse. Concretely, the term border security, references to secure border/borders or border controls, have been identified. Thereafter, the context in question has been analysed. The main question of interest to pose when analysing references to border security or secure borders in the context of this thesis is 'security from whom/what' – see further section 4 for an elaboration on this 'tool' and other analytical 'tools'. When a reference to border control has been found, the aim has been to identify the objective of it.

Also the following words have been noted in the examination of the documents in question: border, territorial integrity, demarcation, war, non-state actor, terrorism, migration, crime, smuggling, trafficking. In section 7 examples of the identification of some of these terms are given.

Here, it is relevant to refer also to the approach by for instance Bothe, who points out that where a practice by the Security Council is well established, it is hard to contest that this is the actual law at a given time.⁵² An example of an analysis of binding Security Council resolutions in a concrete case are the patterns of obligation found in resolutions on Non-International Armed Conflicts, which according to Fox, Boon and Jenkins should serve as important evidence of customary international law.⁵³

The practice of international organs can be seen as evidence of state practice – or of existence of *opinio juris*.⁵⁴ However, in the case at hand it does not seem possible to arrive at such definite conclusions, but examining the discourse can at least, lacking more solid evidence of state practice, give some indications as to the content of the concept in question. Thus, a limitation in the research for this thesis is that the legal status of the different activities, above all resolutions, by the Security Council will not be

⁵⁰ *ibid*

⁵¹ Paul J Kohlenberg and others, *Introducing UNSCdeb8 (beta) A Database for Corpus-Driven Research on the United Nations Security Council* (German Institute for International and Security Affairs WP 1 2019) 10

⁵² Michael Bothe, 'Security in International Law Since 1990' in Hans Günter Brauch and others (eds) *Globalization and Environmental Challenges Reconceptualizing Security in the 21st Century* (Springer 2008) 475, 484, 485

⁵³ Gregory H Fox, Kristen E Boon and Isaac Jenkins, 'The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law' (2018) 67 AM. U. L. REV. 649

⁵⁴ Ian Brownlie, *Principles of Public International Law* (Oxford University Press 2008) 6

examined. Nor will the legislator role of the Security Council be assessed. Such issues have been explored extensively by international law scholars.⁵⁵ The Council is a political organ and Article 38(1) of the Statute of the International Court of Justice that name the sources of public international law does not include United Nations Security Council resolutions. However, the Security Council does produce resolutions which have legal consequences. In recent decades the Security Council has also gone further than earlier: the Council has adopted resolutions that have created general obligations, which are binding under Chapter VII of the UN Charter. Prime first examples are the much discussed and analysed UN Security Council Resolutions 1373(2001) and 1540 (2004).⁵⁶ For the purpose of this text it is noted below that there are border control provisions included in these resolutions.

In the analysis of UN Security Council resolutions in section 7 I have chosen to specifically refer to the UN Charter's Chapter VII resolutions that mention border control or border security, since this is of interest in general, taking into account that the Security Council can make decisions that are binding on member states under Chapter VII. However, the status of the analysed resolutions is not decisive for the outcome of the discourse analysis in which all relevant references are taken into account on an equal basis.

As mentioned in the introduction, the hypothesis is that border security as a main rule has been reconceptualised – changed – as applied by the UN Security Council after the end of the Cold War, and, in particular, the 9/11 attacks. It is asserted in this thesis that earlier it envisaged inter-state relations, as is elaborated on further below in section 7, but now it targets individuals crossing international borders (not with armed force).

2.2.2 Materials

For a coverage of the early period until after the end of the Cold War the Annual Reports from the Security Council to the UN General Assembly during the period 1947-1995/96 were used as research material. For the purposes of this thesis it was not useful to go through the later reports after 1995/96 since after that point in time the Annual Reports in principle

⁵⁵ Eric Rosand, "The Security Council As "Global Legislator": Ultra Vires or Ultra Innovative?" (2004) 28 Fordham Int'l L.J. 542

⁵⁶ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 requires states to refrain from providing support to non-state actors attempting to manufacture, possess, transport, or use WMD and their means of delivery, and requires the states to prohibit in domestic law any such activities by non-state actors, particularly for terrorist purposes. UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540 imposes binding obligations on all states to adopt legislation to prevent the proliferation of nuclear, chemical and biological weapons, and their means of delivery, and establish appropriate domestic controls over related materials to prevent their illicit trafficking.

contain only summaries of resolutions and decisions. Instead, for the period 1997-2020, relevant resolutions were examined. The focus has been on resolutions, but also other sources have been examined, such as presidential statements and debates if they seemed to be of interest for the topic of border security.

In this context, it is necessary to briefly explain the traits and status of the Annual Reports. The UN Security Council Annual Report to the UN General Assembly is one of the few document types that have existed since 1947 until today. The reporting requirement is included in article 24(3) of the UN Charter, according to which the Security Council must submit an annual report to the General Assembly for its consideration. The submission of the annual report is the only clear obligation the Council has vis-à-vis the General Assembly under the Charter.⁵⁷ The content and format have been discussed and criticised in debates in the UN General Assembly and developed over the years. Initially such documents as resolutions and presidential statements were included in full text, but around the late 1990s, when the reports had grown very long, resolutions and decisions started to be summarised. In the early period explored, as will be seen, the term border security is as a rule not included in resolutions, and there are only rare references to it by state representatives.

The research for this thesis included materials up to and including 2020.

2.3 Further delimitations

There are further delimitations to the thesis. A necessary clarification is that in the EU context border security refers, as far as one can detect the content of it, to movement of persons, not movement of goods. In the EU such issues as security aspects related to air cargo are usually termed customs security.⁵⁸ However, in a UN Security Council context border security is – although a definite definition does not exist – interpreted as encompassing both movement of persons across borders and illegal cross-border movement of certain types of goods, according to the expert body the UN Security Council's Counter-Terrorism Committee (CTC) Executive Directorate (hereinafter CTED).⁵⁹ Also, the World Customs Organisation (hereinafter WCO) seemingly includes goods under the heading border

⁵⁷ Security Council Report website <<https://www.securitycouncilreport.org/un-security-council-working-methods/annual-report-to-the-general-assembly.php>> accessed 12 February 2021

⁵⁸ European Commission website <https://ec.europa.eu/taxation_customs/general-information-customs/customs-security/general_en> accessed 14 February 2021

⁵⁹ The CTED was established by UNSC Res 1535 (26 March 2004) UN Doc S/RES/1535 as an expert body.

security.⁶⁰ Goods can constitute security risks, but the focus in this thesis is the movement of individuals across international borders, based on the use of the term border security in the EU.

The thesis will not examine whether 'border security' conflict with human rights and will not examine in depth how 'national security' is regulated in international law and how these rules limit human rights, since that is not the focus of this thesis. Neither is member states' possibilities to invoke superior interest of national security and derogate from EU law in situations of emergency or war a point of focus, and, therefore, no examination of such circumstances is included.

The geographical focus of the dissertation is the Baltic Sea region. Thus, the published articles on border security deal with that region and the EU border rules applied there. Sea borders, and the actors involved in guarding them, have been studied. Although, naturally, a number of characteristics of the control of sea borders differ from the control of land borders, the core concepts are the same, so a principled discussion and generally valid analysis can still be carried out.

In section 4 on theoretical perspectives the term International Relations is used. It is debated whether International Relations is a sub-discipline of political science.⁶¹ Fields or sub-fields related to International Relations is for instance Security Studies. However, debates and different views on these issues will not be referred to in this thesis, since I assess that the approach to use International Relations as an overarching term is sufficient for the purposes of this text.

As concerns the UN Security Council, the issue of non-state actors as 'target' for resolutions should be mentioned. In the cases that have been of interest in the research for this thesis the provisions adopted by the Council require the states to take measures vis-à-vis individuals, i.e. the Council actually requires states to reinforce their administrations. This is a rather new trait of the Council's work, as explained further below. Formally, the setting in which the Council does this is non-military measures under Article 41. This is different to resolution provisions that address individuals directly. There are such provisions in resolutions, for instance UNSC Resolution 2178(2014)⁶² that demands all foreign terrorist fighters to disarm. This has been a debated issue, but since such cases are not relevant for the purpose of this text they are left aside.

Table 1 in subsection 4.5.1 contains a hypothesis of a nation-state perspective on border security, and Table 2 in subsection 7.6.1 a hypothesis of the UN Security Council application of the concept. Two of the terms used

⁶⁰ WCO website <<http://www.wcoomd.org/en/topics/enforcement-and-compliance/activities-and-programmes/security-programme.aspx>> accessed 14 February 2021

⁶¹ eg Cryer and others (n 27) 78

⁶² UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178

in the two Tables are sovereignty and territorial integrity. At a general level sovereignty can be understood as the authority of a polity to govern itself. Territorial integrity is a general principle of international law, codified in Article 2(4) of the UN Charter. The purpose of including the Tables in question in this thesis is to illustrate the two hypotheses in an easily accessible way. The Tables are simplified reflections of reality, and of legal and political concepts. The terms sovereignty and territorial integrity are used in these Tables as characteristics of states. However, no further legal analysis of these two concepts is made in this thesis, with the exception of the elaboration on the term sovereignty with a focus on the EU in section 6.4.

3. Historic overview: borders and security

3.1 Borders

Today the claim is made that the border is not an exact place. It is rather a series of spatial limits incessantly changing, and the physical location of a person is no longer the crucial variable.⁶³ However, the border is still linked to territory and remains one of the essential tools through which states assert their power.

The shift from pure territorial to 'functional' borders is maintained by scholars in both international law and socio-legal studies.⁶⁴ The migration crisis in the Mediterranean Sea clearly shows this shift. Newman points out that border management cannot be understood without recourse to the question of power relations and an analysis of whose interests the management of borders serve,⁶⁵ which leads to a discussion of 'whose security' and the perception of threats. The focus on newly perceived security threats, whose framing as such has been termed 'securitisation', has been discussed extensively by scholars in various fields and there is a vast literature on the topic.⁶⁶ Governments have often justified the measures to make use of increasingly stricter border control measures, even closing down of borders, with perceived security threats. Rulers' attempts to control people's freedom of movement are characteristic of the history of borders.⁶⁷ However, as Dowty points out the most sophisticated civilisations flourished where there was a lot of migration and where migrants brought in new ideas and change, adding to a region's wealth in different ways.⁶⁸

The first large scale attempts to restrict movement were made already in the Roman Empire during the third and fourth centuries AD.⁶⁹ Boundaries

⁶³ Alice Riccardi and Tommaso Natoli 'Borders and International Law: Setting the Stage' in Alice Riccardi and Tommaso Natoli (eds) *Borders, Legal Spaces and Territories in Contemporary International Law* (Springer, Cham. 2019) 8-9

⁶⁴ *ibid*; John Gerard Ruggie 'Territoriality and beyond: Problematizing modernity in international relations' (1993) 47 *International Organization* 1, 165; Andreas L Paulus (2004) 'From territoriality to functionality? Towards a legal methodology of globalization' in Ige F Dekker and Wouter G Werner (eds) *Governance and international legal theory* (Martinus Nijhoff Publishers 2004) 59

⁶⁵ David Newman, 'Borders and Bordering Towards an Interdisciplinary Dialogue' (2006) 9 *European Journal of Social Theory* 171, 176

⁶⁶ *ibid*; Peter Andreas, 'Redrawing the Line: Border Security in the 21st Century' (2003) 28 *International Security* 78; Ole Wæver and others, *Identity, Migration and the New Security Agenda in Europe* (Pinter Publishers Ltd. 1993); Didier Bigo, 'When Two Become One: Internal and External Securitisations in Europe' in Morten Kelstrup and Michael Williams (eds) *International Relations Theory and the Politics of European Integration* (Routledge 2000) 171

⁶⁷ Laine (n 6) 15

⁶⁸ Alan Dowty, *Closed Borders: The Contemporary Assault on the Freedom of Movement* (Yale University Press 1987)

⁶⁹ Laine (n 6) 16

organised the Empire according to a hierarchy of spaces (territories of varied dimensions and functions, which included settlements, cities, provinces and regions) and the outer boundaries of the Empire were seen as a border between civilisation and barbarism.⁷⁰ The outer borders of the Roman Empire were not defensively militarily fortified, enclosing demarcation lines, but more of administrative outposts and permeable borderlands.⁷¹ Concannon asserts that 'Roman border security was historically effective, not because of massive barriers, but because they knew how to manage the flow of migration'.⁷²

From the Renaissance the border per se 'gained an effective dimension'⁷³ and appeared in legal documents.⁷⁴ In the sixteenth and seventeenth centuries, the expressions *fines naturales* and *termini* were respectively used to identify geographical (e.g. rivers or mountains) and artificial borders in the writings of, inter alia, Grotius (1583–1645)⁷⁵. The modern version of international borders stems from the Peace of Westphalia, which can be regarded as the starting point of the modern political order based on boundaries of sovereign and territorially demarcated states – although it has been argued that the Westphalian model has formed part of a continuing process of development originating before 1648 and continuing long after 1648.⁷⁶ The sovereign states whose borders were demarcated through a series of peace treaties constituting the Peace of Westphalia came to form the basis for nation-states, which became the principal way to divide surface around the globe. The border became more and more precise: in the words of Vattel (1714–1767), 'to remove all occasion to strife and dispute, the boundary lines of territories should be clearly and precisely determined'.⁷⁷

In the eighteenth century, the first boundary arrangements among States were agreed upon. The act of borders' delimitation, far from being a customary obligation under international law, soon became a main

⁷⁰ *ibid* 15-16

⁷¹ eg Kimmo Katajala, 'Drawing Borders or Dividing Lands?: the peace treaty of 1323 between Sweden and Novgorod in a European context' (2012) 37 *Scandinavian Journal of History* 23, 26

⁷² Cavan W Concannon, 'Border Security in Ancient Rome' (March 5 2019)

<<https://brewminate.com/border-security-in-ancient-rome/>> accessed 15 January 2021

⁷³ Claude Blumann 'Frontières et Limites' in Pedone (eds) *La Frontière* (Société Française pour le Droit International 1980) 4

⁷⁴ Merio Scattola, 'Die Grenze der Neuzeit' in Markus Bauer and Thomas Rahn (eds) *Die Grenze* (Akademie Verlag 1997) 37, 58-61

⁷⁵ Hugo Grotius (2005) [1625]. *The rights of war and peace* (R. Tuck ed) (Vol. 2). Indianapolis, in *Liberty Fund* 477, cited by Natoli and Riccardi (n 63) 4

⁷⁶ Laine (n 6) 17; Stephane Beaulac, 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004) 8 *Australian Journal of Legal History* 181

⁷⁷ Emer de Vattel (1758). *Le droit des gens, ou Principes de la loi naturelle* (Tome II). London: [s.n.] ch. VII, para 92

preoccupation of states.⁷⁸ By the twentieth century, to have well-defined territory was part of what it meant to be a nation-state. Legal discussions on the border recommenced in the early twentieth century. In 1910, the Permanent Court of Arbitration affirmed that '[o]ne of the essential elements of sovereignty is that it is to be exercised within territorial limits, and, failing proof to the contrary, the territory is coterminous with the Sovereignty.'⁷⁹ Prior to the beginning of World War I, there were no requirements for passports and visas to cross borders,⁸⁰ but the mass movement of persons following the war, facilitated by the development of rail systems, led to the establishment of comprehensive mandatory visas schemes.⁸¹

Early border studies focused, implicitly or explicitly, on questions of legitimate state borders. After the end of the Cold War era, the focus on the demarcation of boundaries has shifted to borders as broader constructions.⁸²

The number of hard core inter-state territorial and border disputes has decreased substantially in the past decades,⁸³ although, according to Thirlway, a number of disputes concerning boundary delimitation have been brought before judicial or arbitral bodies.⁸⁴ According to Owsiak about 90 percent of state borders today are defined by *de jure* international agreements.⁸⁵ It can be noted that in the Baltic Sea the maritime boundary delimitations are almost complete, which is unique in an international comparison.⁸⁶ Owsiak's study of border settlement over the past two centuries indicates that in about two third of the attempts to settle, states generally rely on peaceful negotiations, but about 12% of the time have resorted to the use of force.⁸⁷

The legal and political discussion is not focused on legitimate borders anymore. Rather, such issues as terrorist movements, transnational crime and migration in relation to international borders and globalisation are of interest, and states, whose interests the management of borders serve, are in a powerful position. These circumstances have been crucial in the evolvement of the term border security.

⁷⁸ eg *Monastery of Saint-Naoum* (Advisory Opinion) (1924) PCIJ Series B 9; *North Sea Continental Shelf cases* (*Germany v Denmark/Germany v the Netherlands*) (1969) ICJ Rep 3

⁷⁹ *North Atlantic Coast Fisheries Case* (Great Britain, United States) (1910) RIAA Vol XI, 180

⁸⁰ John Maynard Keynes, *The economic consequences of the peace* (MacMillan 1919) ch 2, cited by Riccardi and Natoli (n 63) 6

⁸¹ Riccardi and Natoli (n 63) 5-6

⁸² Laine (n 6) 29

⁸³ Newman (n 65) 171, 172-3.

⁸⁴ Hugh Thirlway, 'Territorial disputes and their resolution in the recent jurisprudence of the international court of justice' (2018) 31 *Leiden Journal of International Law* 117

⁸⁵ Andrew P Owsiak, Allison K Cuttner and Brent Buck, 'The International Border Agreements Dataset' (2016) 35 *Conflict Management and Peace Science* 559

⁸⁶ Erik Franckx, 'Gaps in Baltic Sea Maritime Boundaries' in Henrik Ringbom (ed) *Regulatory Gaps in Baltic Sea Governance: Selected Issues* (Springer 2018) 7

⁸⁷ Owsiak, Cuttner and Buck (n 85)

3.2 Security

Turning to the evolvement of the term 'security', which also needs to be commented on, today that term is used and heard in multiple contexts, from everyday situations to various scientific and political settings. As indicated in the introduction, security – of various kinds – is high on states' agendas.

It has been argued that the origin and development of the security concept is connected to an intensification of the modern state.⁸⁸ A few examples of how security has been perceived historically can be mentioned. 'Securitas' was closely linked to Pax Romana and Pax Christiana (for instance to the maintenance of peace), while it later also applied to persons and goods as objects of protection.⁸⁹ According to Machiavelli's 16th century vision, internal and external threats to the power of rulers were clearly distinct.⁹⁰ Internal security was stressed by Hobbes as a main task of the sovereign towards its people.⁹¹ Since the mid-17th century internal security was distinguished from external security, and during the 17th century external security became a key concept of foreign and military policy and of international law.⁹² During the French Revolution the declaration of citizens' rights declared security as one of its four basic human rights ('la sûreté').⁹³

Today the term security has different meanings in several social science disciplines. There is a vast literature on the topic of security, in a number of disciplines. In political science and sociology, the term security is used as a tool to better understand and describe political and societal processes. For international law, it is by definition a normative concept. Like any legal concept, it is an element of composite norms which are to induce a certain human behavior, including of legal persons or collectivities.⁹⁴

⁸⁸ Werner Conze, 'Sicherheit, Schutz' in Otto Brunner, Werner Conze and Reinhart Koselleck (eds) *Geschichtliche Grundbegriffe. Historische Lexikon zur politisch-sozialen Sprache in Deutschland*, Vol. 5 (Ernst Klett Verlag 1984) 831

⁸⁹ *ibid*

⁹⁰ Pastore Ferruccio, *Reconciling the Prince's two 'Arms'. Internal-External Security Policy Coordination in the EU* (Occasional Papers no. 30, Institute for Security Studies 2001)

⁹¹ Edward A Kolodziej, 'The Foundations of Security Studies: Hobbes, Clausewitz, and Thucydides' *Security and International Relations* (Cambridge University Press 2005)

⁹² *ibid*

⁹³ Conze (n 88)

⁹⁴ Bothe (n 52) 475

4. Theoretical perspectives on security in International Relations

4.1 Introduction

First of all it should be clarified that in the field of international law guidance is scarce when it comes to definitions of security. However, the term national security is used in provisions in a number of treaties, for instance international human rights (hereinafter IHRL) instruments, which contain clauses in which certain rights can be limited based on national security concerns. Below in section 4.2 this is elaborated on when discussing the term national security.

In this thesis border security is placed in a security context, both at the EU level and the global level. Therefore it is necessary to describe and make use of theoretical perspectives on security in International Relations for the purpose of explaining the debate and changed views on security of concern for states. However, security can be seen as a largely subjective term, which indicates that it is not possible to arrive at definite answers, as will be seen. For the purposes of this thesis the term subjective means 'influenced by or based on personal beliefs or feelings, rather than based on facts' and the term objective means 'based on [...] facts and not influenced by personal beliefs or feelings'.⁹⁵

The overarching aim of this section is to discuss theoretical perspectives on security and arrive at conclusions on factors that will be used in a theoretical-based analysis of border security. This section focuses on border security as such and how it is viewed by nation-states. In section 7 border security as the UN Security Council has applied the concept in recent years, and the empirical analysis of the material, are dealt with.

When exploring the fundamental security concepts below, a number of factors that are useful to keep in mind as starting points are the following, building *inter alia* on Brauch's approach: reference object or security of whom, value at risk or security of what, and perception of source(s) of threat or security from whom/what.⁹⁶ In the case of border security it is highly interesting to examine in particular the perception of source(s) of threat (security from whom/what?), both in relation to the EU and the UN Security Council. As mentioned, as concerns the latter context, my hypothesis is that

⁹⁵ Cambridge English Dictionary website,

<<https://dictionary.cambridge.org/dictionary/english>> accessed 3 June 2021

⁹⁶ Hans Günter Brauch, 'Introduction: Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century' in Hans Günter Brauch and others (eds) *Globalization and Environmental Challenges Reconceptualizing Security in the 21st Century* (Springer 2008) 27, 29

border security has been reconceptualised – changed – from encompassing threats from states to targeting threats from non-state actors.

In section 4.2 it is described how security concepts have evolved and are viewed from theoretical perspectives by scholars from different fields. It is necessary to go through the gradual developments of such fundamental concepts as national security and international security, followed by the later reconceptualisation of security, which includes a widening and deepening of the security concept, as well as the use of dimensions/categories or sectorialisation. A key area of the reconceptualisation of nation-states' security has been the widening of the concept from a narrow military security concept. Security has been seen as reconceptualised in different ways. Commonly such terms as widening and deepening of security, as well as dimensions/categories or sectorialisation, have been used. The overview of developments and standpoints is a basis for arriving at conclusions regarding how border security should be analysed. However, it is also crucial *per se*: it serves the purpose of explaining security concepts that are necessary to understand in the context of this text, since such concepts as international security and national security are used when analysing the EU level as well as the global level.

4.2 Fundamental security concepts

First, it is necessary to describe the debate on such basic concepts as national security, international security, and collective security. A fundamental notion when it comes to nation-states' security is national security. However, no definite or agreed definition of it exists. Over time the term national security has been given a variety of reference points by academics from different disciplines, politicians, policymakers, military leaders, and researchers to mean a policy objective, a field of study, and/or an analytical concept. For the purposes of this text 'national security' is used as an analytical concept in reasonings about the security system in the UN Security Council, in the EU, and on border security. Below a range of the existing views on 'national security' will be described.

The views on national security up until the end of the Cold War were often traditionally realist, later neorealist, entailing that there were objective – and thus possibly predictable – military threats from other states. Traditional realist views can be exemplified by Morgenthau, who did not actually define 'security', but stated that 'National security must be defined as integrity of the national territory and its institutions'.⁹⁷ In another connection, Morgenthau added 'culture' to the list, emphasizing that the 'survival of a political unit in its identity' (i.e. 'security') constitutes 'the irreducible minimum, the necessary element of its interests vis-à-vis other

⁹⁷ Hans J Morgenthau, *Politics Among Nations. The Struggle for Power and Peace*, 3rd edition (Alfred A. Knopf 1960) 562

units'.⁹⁸ The more comprehensive definition proposed by Arnold Wolfers has become a standard in International Relations theory: Security, in an objective sense, measures the absence of threats to acquired values, in a subjective sense, the absence of fear that such values will be attacked.⁹⁹ The view that security encompasses an objective and a subjective element has also been the point of departure for my assessments in this text.

Overall, the traditional view of security in International Relations can be summarised as defining it in military terms with the primary focus on nation-state protection from threats to national interests.¹⁰⁰ The concept of national security has traditionally included political independence and territorial integrity as values to be protected.¹⁰¹ Traditional definitions have been narrowly constructed. Threats are treated as external and objective and it is assessed that 'each state must guarantee its own survival since no other will provide its security'.¹⁰² However, in particular the end of the Cold War entailed a change in the views on the security concept, although since around the late 1970's, a broadened security concept had already been referred to by some in scholarly research.¹⁰³ Since around the 1990's, in fields such as International Relations, political science, sociology and law, scholars have increasingly argued that national security has expanded and that the perceived nature and sources of threats have been widened as well as the objects of protection.¹⁰⁴ Questions that can be asked and used as analytical tools are 'security for whom', 'security for which values', 'how much security', 'from what threats', 'by what means', 'at what cost', and 'in what time period'.¹⁰⁵ In more recent years a subjective element has often been stressed by scholars: Security is seen as a subjective term and the perception of the threat which may affect security will determine the

⁹⁸ Hans J Morgenthau, *Politics in the Twentieth Century* (University of Chicago Press 1971) 204, 219

⁹⁹ Arnold Wolfers, 'National Security' as an Ambiguous Symbol', (1952) 67 *Political Science Quarterly* 481

¹⁰⁰ eg Hans J Morgenthau, 'Another 'Great Debate': The National Interest of the United States' (1952) 46 *American Political Science Review* 961, 972; John J Mearsheimer, 'Back to the Future: Instability in Europe After the Cold War' (1990) 15 *International Security* 5

¹⁰¹ David A Baldwin, 'The Concept of Security' (1997) 23 *Review of International Studies* 5

¹⁰² Mearsheimer (n 100) 12

¹⁰³ eg Gert Krell, 'The Development of the Concept of Security' in Egbert Jahn and Yoshikazu Sakamoto (eds) *Elements of World Instability: Armaments, Communication, Food, International Division of Labour* (Campus 1981) 238; Barry Buzan, *People, States & Fear. The National Security Problem in International Relations* (Harvester Books. University of North Carolina Press, 1983; 2nd ed 1991; reprint with new preface 2007)

¹⁰⁴ Brauch and others (n 96); *International Law and Changing Perceptions of Security Liber Amicorum Said Mahmoudi* (eds) Jonas Ebbesson and others (Brill Academic Publishers 2014)

¹⁰⁵ Baldwin (n 101) 12-18

meaning of security and the type of measures designed to maintain security.¹⁰⁶

Here, it is appropriate to mention the (International Relations based) Copenhagen School's views – from a constructivist perspective – as an example of a proposed wider and deeper security concept. The Copenhagen School distinguished between five dimensions of widening of security: military, political, economic, societal and environmental.¹⁰⁷ Furthermore, five referent objects or levels of analysis, termed deepening of security, were referred to: international, regional, national, domestic groups, and individual.¹⁰⁸ With the School's approach security loses its objective character and is perceived as an 'act of speech' or a result of 'securitisation'. An issue becomes a security issue because the issue is depicted as a threat. The Copenhagen School's ideas on securitization have been helpful in understanding how the concept of security has expanded, *inter alia* that also collective concepts such as the environment or regions can be 'referent objects', not only the state.

Finally regarding national security, there is no clear definition of what constitutes such security in international law. There are provisions on national security in a number of treaties,¹⁰⁹ for instance international human rights instruments, which contain clauses in which certain rights can be limited based on national security concerns.¹¹⁰ Such provisions have been adjudicated on by international courts, which is interesting since it gives at least some hints as to the scope of national security. In particular the European Court of Human Rights (hereinafter ECtHR)¹¹¹ has adjudicated a number of cases. National security is mentioned in paragraph 2 of Articles 8, 10 and 11 of the European Convention on Human Rights (hereinafter ECHR) as the first of the 'legitimate aims' making it necessary to restrict these rights. The term national security is not clearly defined in the ECHR, and 'could even be said to be somewhat vague', a 2013 compilation of case law by the ECtHR says.¹¹² The European Commission of Human Rights has

¹⁰⁶ Jill Barrett, 'Securing Polar Regions Through International Law' in Mary E Footer and others (eds) *Security and International Law* (Hart Publishing 2016) 303

¹⁰⁷ eg Barry Buzan, Ole Wæver, 'Slippery? contradictory? sociologically unstable? The Copenhagen school replies' (1997) 23 *Review of International Studies* 143; Ole Wæver, 'Concepts of Security' (dissertation, Department of Political Science, University of Copenhagen, 1997); Barry Buzan, Ole Wæver and Jaap de Wilde, *Security. A New Framework for Analysis* (Lynne Rienner 1997, 1998, 2004)

¹⁰⁸ *ibid*

¹⁰⁹ eg Vienna Convention on the Law of Diplomatic Relation 19 April 1961, Rome Statute of the International Criminal Court 17 July 1998

¹¹⁰ eg art 19(3)(b) International Covenant on Civil and Political Rights (hereinafter ICCPR), which states that the exercise of the right to freedom of expression may be restricted 'for the protection of national security or of public order'.

¹¹¹ European Convention on Human Rights, 4 November 1950

¹¹² *National security and European case-law* (Council of Europe/European Court of Human Rights 2013) 4

considered that 'national security' could not be comprehensively defined, thus giving it a degree of elasticity and flexibility, which is reflected by the margin of appreciation which states have in this sphere according to the ECtHR.¹¹³ Although its limits are difficult to define, according to ECtHR case law the concept of national security includes (at least) the protection of state security and constitutional democracy from espionage, terrorism, support for terrorism, separatism and incitement to breach military discipline.¹¹⁴

Turning to the term international security, it is one of the most widely used concepts in world politics. National security can be said to be supplemented with the concept of international security, through the collective security system.¹¹⁵ The idea of international security, as distinct from nation-state security, emerged with the development of the collective security system.¹¹⁶ The League of Nations was the first attempt to a legal collective security regime, established under a Covenant¹¹⁷ and consisting of a formal structure with certain powers. After the Second World War and the creation of the UN, the UN Security Council became the central organ of an institutionalised collective security system. As Møller points out collective security can be seen as more radical than earlier concepts by envisaging a transfer of powers from the state to international authorities, i.e. a partial relinquishment of sovereignty.¹¹⁸ The academic research of international security began as an independent field after the Second World War, but was absorbed as a sub-field of International Relations. Since it took hold in the 1950s, the research of international security has been at the heart of International Relations studies.¹¹⁹

Some points of departure of the UN and the collective security system should be highlighted. The achievement of peace and security is the *raison d'être* for the establishment of the UN. The UN Charter's Article 1 states that 'international peace and security' is to be maintained through collective measures. It is noteworthy that nowhere in the Charter is 'international' connected directly to 'security'; the expression 'international security' is not used. No semantic

¹¹³ *ibid*

¹¹⁴ eg *McCann and Others v the United Kingdom*, 27 September 1995, Series A no. 324; *Klass and Others v Germany*, 6 September 1978, Series A no. 28; *Leander v Sweden*, 26 March 1987, Series A no. 116; *United Communist Party of Turkey and Others v Turkey*, 30 January 1998, Reports of Judgments and Decisions 1998-I; *Hadjianastassiou v Greece*, 16 December 1992, Series A no. 252; *Engel and Others v the Netherlands*, 8 June 1976, Series A no. 22

¹¹⁵ White (n 13) 6

¹¹⁶ Hitoshi Nasu, 'The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System' (2011) 3 *Amsterdam Law Forum* 15

¹¹⁷ Covenant of the League of Nations 28 April 1919

¹¹⁸ Bjørn Møller, 'National, Societal and human security: General Discussion with a Case Study from the Balkans' in UNESCO (ed) *First International Meeting of Directors of Peace Research and Training Institutions. What Agenda for Human Security in the Twenty-first Century* (UNESCO 2001) 41, 45

¹¹⁹ Barry Buzan and Lene Hansen, *The Evolution of International Security Studies* (Cambridge University Press 2009)

distinction is made between 'peace' and 'security' in the Charter. Instead, they are used conjointly under the label 'international peace and security'. This does not however mean that they are identical concepts.¹²⁰ The principles in Article 2 in the UN Charter include *inter alia* the prohibition of threat or use of force between states. International security can be seen as encompassing the right of every state to take advantage of any relevant security system as well as the legal obligations of every state to support such systems.¹²¹ However, international law remains based on nation-state security, reinforced by a continued state-based monopoly on the means of using force.¹²²

From a theoretical perspective it is of interest to note for instance that Brauch points out that several security concepts imply different approaches on how to achieve the goals of the concept in question, and gives the following examples: 'common'; 'collective', 'comprehensive', 'equal', 'cooperative', 'mutual' and 'universal' security.¹²³ Møller has analysed *inter alia* 'common security' and reaches the conclusion that it does not automatically entail any broader notion of security, but may signify little more than the same type of security, only to be achieved by other, less confrontational means, and the state remains the referent object in this context.¹²⁴

4.3 Reconceptualisation of security

Having given the overview above of, in particular, national security, international security and collective security, it is necessary to approach the changed – reconceptualised – security concepts. If one asks why security has been reconceptualised or why it is necessary to reconceptualise security, a number of factors can be explored. As already touched on, the changing world after the Cold War with decreasing risk of interstate and nuclear conflict was subsequently reflected in the political and scholarly discourse in the North, and the 9/11 attacks affected the security agenda. Other elements are the changing role of the state and emphasis put on market and society, resulting from a broadly defined globalisation, the emerging need for global governance, and regional integration, especially in Europe.¹²⁵ Political, economic and social globalisation have increased virtually every year since

¹²⁰ Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law and Practice* (Cambridge University Press 2013) 22-23

¹²¹ Rüdiger Wolfrum 'Chapter I Purposes and Principles' in Bruno Simma and others (eds) *The Charter of the United Nations: A Commentary vol. I, 3d ed* (Oxford University Press 2012) 107, 111

¹²² White (n 13) 2

¹²³ Hans Günter Brauch, 'Conceptual Quartet: Security and its Linkages with Peace, Development, and Environment' in Hans Günter Brauch and others (eds) *Globalization and Environmental Challenges Reconceptualizing Security in the 21st Century* (Springer 2008) 78

¹²⁴ Møller (n 118)

¹²⁵ *ibid*

the end of the Cold War to the Financial Crisis of 2008-2009, though flattening since 2015.¹²⁶ Transnational crime, terrorist networks and human traffickers have exploited the opportunities created by globalisation processes and capitalised on the societal and economic vulnerability of societies. However, it should be mentioned that in many parts of the world the process of globalisation, de-borderisation and de-territorialisation, has coexisted with a process of partly violent territorial disintegration and a re-borderisation of space along ethnic and religious lines and disputes on territorial control of areas.¹²⁷

A key area of the reconceptualisation of security has been the widening of the concept from a narrow military security concept. However, it is relevant to discuss not only a widening, but also a deepening, as well as dimensions/categories or sectorialisation of security. Security's political constructions have real world effects by guiding action of policy-makers and decisions-makers, including in the UN Security Council.¹²⁸

Security dangers are now more complex and the security risks less calculable and predictable.¹²⁹ During the Cold War a system was built up to deal with international and national security threats, largely predictable, but that system has to a certain extent become obsolete. This process of reconceptualising security since the 1990's can also be observed in statements of international organisations, such as the UN, EU, NATO, the Organization for Security and Co-operation in Europe (hereinafter OSCE), the Organisation for Economic Cooperation and Development (hereinafter OECD), and in the interfaces between security and development.¹³⁰

The discussion of an expanded security concept is not that new amongst scholars. As mentioned, since around the late 1970's, an expanded security concept has been used in the academic debate. Walker pointed to the complexity of a non-state centred redefinition of security towards 'individual' security while Buzan distinguished between the international, state and individual level of analysis and the inherent tension especially among the latter two.¹³¹ Since the early 1990's, both scholars and policy

¹²⁶ Beth A Simmons and Robert Shaffer, 'Globalization and Border Securitization in International Discourse' (Social Science Research Network 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3480613> accessed 14 June 2021; Florian Haelg, 'The KOF Globalisation Index – A Multidimensional Approach to Globalisation' (2020) 240 Journal of Economics and Statistics (Jahrbuecher fuer Nationaloekonomie und Statistik) 691

¹²⁷ Brauch (n 123) 80

¹²⁸ *ibid* 77

¹²⁹ Hans Günter Brauch, 'Concepts of Security Threats, Challenges, Vulnerabilities and Risks', in Hans Günter Brauch and others (eds) *Coping with Global Environmental Change, Disasters and Security* (Springer 2011) 61, 62-63

¹³⁰ Hans Günter Brauch and Úrsula Oswald Spring, 'Introduction: Coping with Global Environmental Change in the Anthropocene' in Hans Günter Brauch and others (eds) *Coping with Global Environmental Change, Disasters and Security* (Springer 2011) 31, 35-46

¹³¹ Møller (n 118) 42; Krell (n 103); Buzan (n 103)

makers in the North have widened the security concept, although some 'traditionalists' kept focusing on the primacy of a narrow military security concept.¹³² New debates have emerged between traditional approaches, critical security studies, and constructivist approaches.¹³³ The realist, and later neorealist, views are that there are objective threats for a state, such as possible military – and possibly predictable – threats from another state, whereas constructivist approaches do not attempt to predict threats in a similar way.

There are various approaches to reconceptualisation, but the above-mentioned proposals by the Copenhagen School¹³⁴ constitute a point of departure when discussing widening and deepening of the security concept. The above-mentioned five widening dimensions of security were military, political, economic, societal and environmental. The above-mentioned five deepening dimensions of security concerned the referent objects ('whose security'), namely international, regional, national, domestic groups, and individual. The Copenhagen School did not review the sectorialisation of security from the perspective of national (international, regional) and human security.¹³⁵

The deepening of the agenda of security studies means moving either down to the level of individual or human security or up to the level of international security, with regional security as a possible intermediate point. This typology seems representative for most writings discussing reconceptualisation of security, with some variations. Møller has discussed an expanding of security, using *inter alia* the concepts of national, societal, human and environmental security.¹³⁶ Brauch has referred to national security, societal security, human security, environmental security and gender security.¹³⁷ In his view national security has a political and a military dimension.

The concept mainly regarded as the widest and deepest is human security, given in the 1994 United Nations Development Program (hereinafter UNDP) Report.¹³⁸ It has two basic aspects: 'freedom from want', encompassing safety from chronic threats as hunger, disease, and repression, and 'freedom from fear', encompassing protection from sudden and harmful disruptions in the patterns of daily life. For national security the

¹³² eg Stephen M Walt, 'The Renaissance of Security Studies' (1991) 35 *International Studies Quarterly* 211; John Chipman, 'The Future of Strategic Studies: Beyond Grand Strategy' (1992) 34 *Survival* 109

¹³³ Brauch (n 129) 61, 62

¹³⁴ Buzan and Wæver (n 107); Wæver (n 107); Buzan, Wæver and de Wilde (n 107)

¹³⁵ Brauch (n 96) 28

¹³⁶ Bjørn Møller, 'National, Societal and Human Security: Discussion - Case Study of the Israel-Palestine Conflict' in Hans Günter Brauch and others (eds) *Security and Environment in the Mediterranean: Conceptualising Security and Environmental Conflicts* (Springer 2002) 277

¹³⁷ Brauch (n 96) 29

¹³⁸ Human Development Report 1994. *New Dimensions of Human Security* 24

state is the major referent, while for human security, human beings and humankind are the referents. However, it has been argued that the although the key 'actor' has been the state, the state has not necessarily been the major 'referent object' of security.¹³⁹ According to this view, the referent object has been 'the people'. The answers to the questions of security for whom, from whom, by whom, of what values, from what threats and by what means differ, in most instances fundamentally, between the two concepts of national security and human security.¹⁴⁰

Within the UN framework there have been further efforts to promote a broadened security concept. The Report of the Secretary-General's High-level Panel on Threats, Challenges and Change reflected a widening of the 'security' concept.¹⁴¹ The High-level Panel mentioned 'human security' several times, but its main focus remained on the 'state' as the cause and as a key actor in dealing primarily with military and societal threats.¹⁴² In the 2005 report 'In larger freedom: towards development, security and human rights for all', Kofi Annan listed *inter alia* the following threats to peace and security: 'international war and conflict ..., civil violence, organized crime, terrorism and weapons of mass destruction',¹⁴³ The threats also include poverty, deadly infectious disease and environmental degradation, since these can have equally catastrophic consequences.¹⁴⁴

Also in legal UN contexts there have been references to the concept of human security. In the Commentary to The Charter of the United Nations, it is stated that the additional more recent concept of human security acknowledges that threats cannot only come from states and non-state actors, but can also exist to the security of both states and the people.¹⁴⁵ The concept has been debated extensively. One example of criticism is Thomas and Tow, who advocated a narrower understanding of human security to enable it to 'accrue greater analytical and policy value'.¹⁴⁶

An issue of importance for this thesis is the earlier functional division between external and internal security, mentioned above in the historical overview. The concepts were seen as distinct, and the traditional point of departure was that the focus of the armed forces was 'external' threats

¹³⁹ Brauch (n 96) 29

¹⁴⁰ Brauch (n 129) 61

¹⁴¹ High-level Panel Report on Threats, Challenges and Change, A more secure world: our shared responsibility 2 December 2004

¹⁴² For an analysis of a 'security/development nexus', see Ole Jacob Sending, 'Security, Development and UN Coordination' in Hans Günter Brauch and others (eds) *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century* (Springer 2008) 637

¹⁴³ In larger freedom: towards development, security and human rights for all 21 March 2005

¹⁴⁴ *ibid*

¹⁴⁵ Wolfrum (n 121); Nigel D White, 'Security Agendas and International Law' in Mary E Footer and others (eds) *Security in International Law* (Hart Publishing 2016) 6

¹⁴⁶ Nicholas Thomas and William T Tow, 'The Utility of Human Security: Sovereignty and Humanitarian Intervention' (2002) 33 *Security Dialogue* 177, 178

directed against the sovereignty of the state and the focus of the police was 'internal' threats. During the Cold War threat perception was divided into two domains: one concerned crime, and law and order inside the state, the other concerned war and deterrence between states.¹⁴⁷ The upholding of law and order was not a question of survival of the state or the identity. The threats from other states were the important ones in that regard. However, today the common approach is that there has been a blurring of the distinction between internal and external security, and that internal and external security are linked and inseparable, of which terrorism is a prime example.¹⁴⁸

The notion of internal security becomes crucial for the purposes of this text when looking closer at the EU, where with the Treaty of Amsterdam internal security became a primary objective of the European Union – but the competence is shared, so member states can continue to legislate in the area.¹⁴⁹ I will elaborate further on this 'constructed' concept of internal security of the EU below in section 6.

4.4 Dimensions of security/sectorialisation

The application of security concepts within specific policy areas have been termed sectorialisation of security,¹⁵⁰ but also dimensions or categories. Sectorialisation can be seen as part of a reconceptualisation of security.

According to the 1994 UNDP Report the following seven categories are relevant when considering threats to human security: economic security, food security, health security, environmental security, personal security, community security, and political security.¹⁵¹ For instance water security was not included as a stand-alone category. Within the UN system and other international organisations, such as the Food and Agriculture Organization (hereinafter FAO), UNDP, the United Nations Environment Program

¹⁴⁷ eg Didier Bigo, 'Internal and External Aspects of Security' (2006) 15 *European Security* 385

¹⁴⁸ *ibid*; Heidi Tiimonen and Maarit Nikander, *Interdependence of Internal and External Security Will the operational culture change with the operational environment?* (Ministry of the Interior publication 2016); Malcolm Anderson and Joanna Apap, *Changing Conceptions of Security and their Implications for EU Justice and Home Affairs Cooperation* (Centre for European Policy Studies, Policy Brief 1, 2002) <<https://www.ceps.eu/ceps-publications/changing-conceptions-security-and-their-implications-eu-justice-and-home-affairs/>> accessed 10 March 2021

¹⁴⁹ TEU art 3.2; Valsamis Mitsilegas, Jörg Monar and Wyn Rees, *The European Union and Internal Security: Guardian of the People?* (Palgrave MacMillan 2003) 36

¹⁵⁰ Hans Günter Brauch, 'Introduction: Facing Global Environmental Change and Sectorialization of Security' in Hans Günter Brauch and others (eds) *Facing Global Environmental Change Environmental, Human, Energy, Food, Health and Water Security Concepts* (Springer 2009) 21

¹⁵¹ Human Development Report 1994 (n 138) 24-25

(hereinafter UNEP) and OECD, sector-specific security concepts are now widely used.¹⁵²

It is warranted to look closer at a few of the dimensions for understanding what types of concepts that are in play. Collomb has described food security in the following way: Individual food adequacy/security refers to 'access to adequate, safe and nutritious food to maintain a healthy life ... without undue risk of losing such access', i.e. individual food security as well as the confidence that it can be maintained.¹⁵³ In the 2009 World Summit definition on Food Security, the Summit used for the first time the phrase 'four pillars of food security', representing the four dimensions, namely, availability, accessibility, utilisation and stability, of food security.¹⁵⁴

Global public health security has been defined as "the activities required, both proactive and reactive, to minimize the danger and impact of acute public health events that endanger people's health across geographical regions and international boundaries".¹⁵⁵

Water security has been described as 'the availability of an adequate quantity and quality of water to sustain socio-economic development, livelihoods, health, and ecosystems'.¹⁵⁶

Several definitions have been presented for environmental security. One relatively short and concise definition has been proposed by Glenn, Gordon and Perelet, entailing that environmental security is the relative safety from environmental dangers caused by natural or human processes due to ignorance, accident, mismanagement or design and originating within or across national borders.¹⁵⁷

As regards societal security, Møller opines that there is a need for 'a collective, yet non-state referent object of security, conceived of as collectivities, the security of which is termed 'societal security' '.¹⁵⁸ Waever has coined a well-known definition of societal security, '...the ability of a society to persist in its essential character under changing conditions and

¹⁵² Brauch (n 123) 79, 81

¹⁵³ Philippe Collomb, 'Population Growth and Food Security in the Countries of the Middle East and North Africa' in Hans Günter Brauch and others (eds) *Security and Environment in the Mediterranean. Conceptualising Security and Environmental Conflicts* (Springer 2003) 777

¹⁵⁴ Declaration of the World Summit on Food Security (FAO 2009)

¹⁵⁵ World Health Organization (WHO) website <https://www.who.int/health-topics/health-security/#tab=tab_1> accessed 12 February 2021

¹⁵⁶ World Water Council, *Global Water Security: Lessons Learnt and Long-Term Implications* (2018)

¹⁵⁷ Jerome C Glenn, Theodore J Gordon and Renat Perelet *Environmental Security: Emerging International Definitions, Perceptions and Policy Considerations* (American Council for the UNU 1998)

¹⁵⁸ Bjørn Møller, 'The Concept of Security: The Pros and Cons of Expansion and Contraction' (18th General Conference of the International Peace Research Association (IPRA) Tampere, 5-9 August 2000) 10

possible or actual threats'.¹⁵⁹ Undoubtedly, societal developments can impinge on the state level in various ways.

Sectoral concepts have been extensively explored and the subject of criticism. One example is Brock who was skeptical regarding the meaning of the normative concept of environmental security and stated that there were untenable generalisations that environmental scarcities lead to violent conflict.¹⁶⁰ Brauch points out that sectoral concepts (taking food security, health security and water security as examples) can be analysed from different perspectives.¹⁶¹ Food security can be seen as a human, a societal, and a national security issue, and during natural hazards and in periods of food shortage it can become an international security problem. Health security problems can be analysed both as issues of international security (e.g. major pandemics), but also of national security. However, arguably health security is foremost a problem of human security as it affects the individual human being.

4.5 Border security as seen by nation-states

Having explored some fundamental notions and the debate regarding security in a nation-state context above, it is appropriate to move to the concept of border security. Border security could be analysed from different perspectives. Border security is not a new security concept that has been developed in the academic debate in the last decades, but grounded in the theoretical approaches outlined above, border security could be seen as a dimension of security – or category or sectoral concept – both in relation to international security and national security, for the purpose of analysis and description. For the sake of consistency I henceforth use the term 'dimension' in relation to border security.

Above a number of factors that have influenced, or been seen as reasons, for a reconceptualisation of security were listed. The 'new' security threats merge internal and external security concerns, and have provided a reason for more expansive border controls, and a shift away from traditional military border concerns towards law enforcement concerns. For the purpose of this thesis it is not necessary to attempt to define or delimit national security. Rather, I have noted the debate on changing security

¹⁵⁹ Ole Waever, 'Societal Security: The Concept' in Ole Waever and others (eds) *Identity, Migration and the New Security Agenda in Europe* (Pinter Publishers 1993), 17, 23

¹⁶⁰ Lothar Brock 'Peace Through Parks. The Environment on the Peace Research Agenda' (1991) 28 *Journal of Peace Research* 40; Lothar Brock, 'The Environment and Security: Conceptual and Theoretical Issues' in: Nils-Petter Gleditsch (ed) *Conflict and the Environment* (Springer 1997) 17

¹⁶¹ Hans Günter Brauch, 'Environment and Security in the Middle East: Conceptualizing Environmental, Human, Water, Food, Health and Gender Security' in Clive Lipchin and others (eds) *Integrated Water Resources Management and Security in the Middle East* (Springer 2007) 139

concepts, and new threats and concerns for states, and will make use of theoretical factors from this debate when attempting to analyse border security, namely the questions security of whom, security of what, and security from whom/what.

The 'new threats', such as terrorism, transnational crime and proliferation of weapons of mass-destruction (hereinafter WMD), are often mentioned in relation to the necessity of increased border security. For instance Mitsilegas points to a general uncertainty regarding the stability and security of borders after the end of the Cold War, and that transnational organised crime and migration were flagged up as major new security threats by governments in the early 1990s.¹⁶² The 9/11 attacks acted as a catalyst for the evolution of what has been termed a securitised border environment. In particular related to the EU there are many studies exploring the securitisation of borders or migration; migration is pictured as a threat, mostly by governments.¹⁶³ de Wenden points out that in security discourses, migrants have often been referred to as 'threats' and 'challenges' and illegal stay has been linked with delinquency and radical Islamism.¹⁶⁴ Nanopoulos and Guild state that the securitisation of border control is a choice which political leaders make for their countries and regions based on geopolitical or other considerations.¹⁶⁵

Processes of globalisation, de-borderisation and de-territorialisation, as referred to above, make it more difficult for states to uphold security and a number of measures are put in place to cope. Carrera and Stefan assert that it is 'well known that migration management laws and policies are increasingly aimed at re-territorialising, delocalising, externalising, and outsourcing law enforcement and border management practices'.¹⁶⁶ One concrete example is border controls that are performed by Italy outside its own territory, both directly or through the Libyan authorities: an 'externalization of borders'.¹⁶⁷ Border security becomes more demanding to uphold, in particular concerning sea borders, and the means to achieve it becomes more complex.

¹⁶² Mitsilegas (n 3) 360

¹⁶³ Catherine Wihtol de Wenden, 'Migration as an International and Domestic Security Issue' in Hans Günter Brauch and others (eds) *Security and Environment in the Mediterranean. Conceptualising Security and Environmental Conflicts* (Springer 2003) 441, 442; Eva Nanopoulos, Elspeth Guild and Katharine Weatherhead, 'Securitisation of Borders and the UN's Global Compact on Safe, Orderly and Regular Migration' (2018) Queen Mary School of Law Legal Studies Research Paper No. 270 3; Mitsilegas 2007(n 3) 360

¹⁶⁴ Wihtol de Wenden (n 163) 441

¹⁶⁵ Nanopoulos, Guild and Weatherhead (n 163) 3

¹⁶⁶ Sergio Carrera and Marco Stefan, 'Introduction – justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' in Sergio Carrera and Marco Stefan (eds) *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union* (Routledge 2020) 5

¹⁶⁷ Riccardi and Natoli (n 63) 10

One important issue is whether the border zones themselves are perceived to be spaces that generate security threats. For instance Simmons has posed that question, and states that in some parts of the world, border zones have been sites of extraordinary and localised violence, for instance generated by rebel movements.¹⁶⁸ Simmons asserts that though borders are not always more violent than other regions – often depending on the reasons for the violence – between 2011 and 2015, about 48% of the violent incidents in civil and interstate conflicts have occurred in a very narrow 100 km band around the world's international borders.¹⁶⁹

Scholars in various fields (political science/International Relations/geopolitics) connect national security with border control or border security.¹⁷⁰ For instance, Klein opines that a state's steps taken to maintain border security could be seen as asserting exclusive rights in controlling movement across the state's borders, emanating from *inter alia* a state's national security.¹⁷¹

States' strategies to secure their borders are of varying kinds. Often the concept of border security or 'securing borders' are used to denote planning for the purpose of safeguarding national security. In Chinese strategic planning 'securing borders' could be seen as having a wide meaning, including state threats and threats by non-state actors.¹⁷² In the U.S., border security has in general been linked to national security. However, in most official documents the specific meaning of 'national security' remains undefined or was defined to serve the specific purposes of the respective organisation.¹⁷³ During the Cold War, the former U.S. Secretary of Defense Harald Brown suggested this definition:

National security ... is the ability to preserve the nation's physical integrity and territory; to maintain its economic relations with the rest of the world on reasonable terms; to protect its nature, institutions and governance from disruption from outside, and to control its borders.¹⁷⁴

¹⁶⁸ Beth A Simmons, 'Border Rules' (2019) 21 *International Studies Review* 256

¹⁶⁹ *ibid* 7; Halvard Buhaug and Scott Gates, 'The Geography of Civil War' (2002) 39 *Journal of Peace Research* 417

¹⁷⁰ Laine (n 6) 46; Nanopoulos, Guild and Weatherhead (n 163) 4

¹⁷¹ *ibid*; Susan Martin and Elizabeth Ferris, *Border Security, Migration Governance and Sovereignty* (International Organization for Migration 2017) 1

¹⁷² Taylor Fravel, 'Securing Borders: China's Doctrine and Force Structure for Frontier Defense' (2017) 30 *Journal of Strategic Studies* 705

¹⁷³ Hans Günter Brauch, 'Security Threats, Challenges, Vulnerabilities and Risks in US National Security Documents (1990–2010)' in Hans Günter Brauch and others (eds) *Coping with Global Environmental Change, Disasters and Security* (Springer 2011) 249

¹⁷⁴ Harold Brown, *Thinking about National Security: Defense and Foreign Policy in a Dangerous World* (Westview Press 1983) 4

A recent description of US border security is 'Protecting our borders from the illegal movement of weapons, drugs, contraband, and people, while promoting lawful trade and travel (..)'.¹⁷⁵ The 2020 U.S. Border Patrol Strategy contends that 'Ultimately, border security is national security. Enforcement of immigration law is the foundation of a secure border and a secure nation (..)'.¹⁷⁶ It can also be noted that in the first National Security Strategy¹⁷⁷ of President George W. Bush there were 18 references to the term 'threat' that pointed to a shift from states to non-state actors as the cause of insecurity.¹⁷⁸ Overall, the border security concept used widely now in the U.S. is linked to stopping terrorism, crime and migration.¹⁷⁹ Another example of national views is that at the Liberian-Ivorian border, border security seems to include controlling the spread of Ebola.¹⁸⁰ Such an approach, that pandemics and epidemics are national and border security concerns, has, as is well known, been the common stance among states during the COVID-19 pandemic.

Organisations of varying kinds, such as NATO and Interpol, use the term border security. Within NATO border security is connected to 'terrorism, small arms & light weapons, and the fight against illegal trafficking'.¹⁸¹ Interpol sees 'effective border security' as 'an essential part of combating transnational crime'.¹⁸² As mentioned, the WCO encompasses goods under the heading border security.¹⁸³

Based on theoretical elements from security analyses referred to above, and empirical examples of states' views and strategies, I suggest a non-exhaustive working hypothesis regarding border security as perceived by many nation-states today, perhaps mainly in the North, in Table 1 below. It builds on a table – which, however, does not include border security – compiled by Brauch 2008¹⁸⁴ with reference *inter alia* to Møller 2001¹⁸⁵ and Oswald 2001.¹⁸⁶

¹⁷⁵ Homeland Security website <<https://www.dhs.gov/topic/border-security>> accessed 12 February 2021

¹⁷⁶ United States Border Patrol Strategy 2020 2

¹⁷⁷ National Security Strategy October 2002 <<https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf>> accessed 15 February 2021

¹⁷⁸ Brauch (n 173) 257

¹⁷⁹ *ibid*

¹⁸⁰ Simmons (n 168) 24

¹⁸¹ Istanbul Cooperation Initiative 2004

¹⁸² Interpol website <<https://www.interpol.int/How-we-work/Border-management>> accessed 5 March 2021

¹⁸³ WCO website (n 60)

¹⁸⁴ Brauch (n 96) 29

¹⁸⁵ Møller (n 118)

¹⁸⁶ Úrsula Oswald Spring, 'Sustainable Development with Peace Building and Human Security' in Mostafa K Tolba (ed) *Our Fragile World. Challenges and Opportunities for Sustainable*

4.5.1 Table 1

Concept of security	Reference object (security of whom?)	Value at risk (security of what?)	Perception of source(s) of threat (security from whom/ what?)
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Border security (mainly law enforcement)	The state	Sovereignty, Territorial integrity	Non-state actors: Terrorism, Transnational crime, Migration
	Society, individuals	Survival, equality of life, identity	

Section 3 above, as well as this section, constitute background necessary to inform the analysis in the thesis. In sections 6 and 7 the question of the objectives of border security will be dealt with, first, in an internal security context in the EU, and second, in an international security context in the UN Security Council. However, first, the first research question on deterrence and threats, posed in a subsection 1.2.2, will be analysed.

Development, Forerunner to the Encyclopedia of Life Support System, vol. 1 (Oxford-EOLSS Publisher 2001) 873

5. Military exercises as deterrence or threats in the Baltic Sea region: article¹⁸⁷

5.1 General

The first research question posed above is dealt with in the published article, which is summarised in this section. The question concerns under what circumstances military exercises in the Baltic Sea region could be seen as illegal threats to international security against the background of requirements in Article 2(4) in the UN Charter.

As mentioned in section 1.2, a reason for the inclusion of this research question is that deterrence is a topical issue in the Baltic Sea region. An analysis of threats and deterrence from a legal perspective, within the *jus ad bellum* field, is both relevant and highly interesting in a Baltic Sea region context. Furthermore, importantly, the research for the purpose of arriving at conclusions regarding the research question was a part of a process to gain an understanding of the limits of the concept of border security.

In the published article on this topic an analysis is made of ‘threats’ from an international law perspective, as codified in Article 2(4) in the UN Charter, and ‘deterrence’. The example of ‘military exercises’, which are commonly used as deterrence, is pointed to.

The academic consensus regarding the test for the legality of a threat has been that a threat to use force is legal if the use of force threatened would be legal. In 1963 Brownlie stated that: ‘[if] the promise is to resort to force in conditions in which no justification for the use of force exists, the threat is itself illegal’.¹⁸⁸ This would mean one can only determine the legality of a threat of force retroactively (a ‘retroactive test’) or through hypothetical analysis. If the use of force threatened would be in accordance with the Charter, then the threat of such force would be lawful under the Charter.¹⁸⁹ On the other hand, if the use of the force threatened would be illegal, the threat itself would be illegal. Tsagourias calls this approach ‘a presumptive legality’, because the requirements that self-defence should meet – necessity, proportionality and armed attack – are not present at the time when the defensive threat is uttered.¹⁹⁰ Right away, the question can be posed if threats are as problematic as the actual use of armed force? Perhaps

¹⁸⁷ Gustafsson (n 1)

¹⁸⁸ Ian Brownlie, *International law and the Use of Force by States* (1963) 364

¹⁸⁹ Grimal (n 15) 38

¹⁹⁰ Nicholas Tsagourias, ‘The Prohibition of Threats of Force’ in Nigel White and Christian Henderson (eds) *Research Handbook on International Conflict and Security Law* (Elgar 2012) 82

not?¹⁹¹ However, there are different kinds of threats, of which some seem not acceptable in the international security context of today.

After the conceptual exploration of 'threats' and 'deterrence' in the article, a brief outline of Russian military exercises in the cases of Georgia 2008 and Ukraine 2014 follows, since this is assessed as of relevance for the Russia-Baltic sea region context. No detailed exploration is made of the Russian military exercises in question, since that would require an in-depth contextual analysis. Rather, the example of Russian 'military exercises', as a threat and deterrence of relevance for the Baltic Sea region, is seen against the background of requirements in Article 2(4) in the UN Charter and of the developments in Georgia 2008 and Ukraine 2014.

5.2 Concluding comments

A conclusion of a tentative character is that it is more probable that military exercises could be seen as an illegal threat in a conflict situation than as standalone exercises. Consequently, the conclusion concerning the Baltic Sea region is that it is not probable that military exercises would be assessed as illegal threats in the absence of 'traditional' international conflicts.

Threats for the purposes of Article 2(4) can be seen as inherent in deterrence. However, it seems probable that the wrestling with 'threats' under Article 2(4) will continue. As Grimal has pointed out, perhaps Article 2(4) was deliberately drafted in a nebulous way, leaving margins for interpretation.¹⁹² The reality of the international system is that threats will always exist as an option that states will wish to exercise when they deem it necessary.

'Innovations' that have been proposed, perhaps mostly as food for thought purposes, are along the lines of viewing 'defensive threats' as self-defence. Tsagourias asks whether 'defensive countervailing threats' such as messages, military build-ups, movement of troops, acquisition of weapons, or military exercises, should be removed from the scope of Article 2(4) and be treated as non-forcible self-defence actions; 'inchoate self-defence'. Beer has chosen a different path, but somewhat along the same line. Beer has not taken the notion of 'threat' in Article 2(4) as the point of departure. Instead he has suggested introducing 'defensive deterrence' considerations into lawful self-defence.

Concerning the international community's acceptance of threats, the conclusion by Grimal seems valid: even if state practice of many states is to threaten one another, there is insufficient *opinio juris* for the law to adapt and permit the use of threats. Both Georgia 2008 and Ukraine 2014 are interesting cases. Both might have involved illegal Russian threats

¹⁹¹ Gregory M Reichberg and Henrik Syse, Threats and Coercive Diplomacy: An Ethical Analysis (2018) 32 Ethics & International Affairs 179

¹⁹² Grimal (n 15) 10, 165

emanating from Russian 'military exercises'. A lesson from the wars in Georgia and Ukraine is seemingly that aggressive military exercises had an escalatory effect on the conflicts.

This research question deals with issues related to national security, collective security, and international security in the Baltic Sea region.¹⁹³ The topic concerns inter-state relations and the international rules on threats and use of force, *jus ad bellum*. Importantly, the conclusion is drawn that as a rule border security is not – as argued in this dissertation – used in a *jus ad bellum* context.

¹⁹³ Gustafsson (n 12)

6. Objectives of border security: the EU

6.1 Introduction

This section concerns the second research question, regarding the objectives of border security in EU law.

First, the above-mentioned point of departure for including the EU level in the thesis should be referred to: the main reason for exploring the EU 'border security system' in depth is that it is often referred to as an example of an advanced border security system.¹⁹⁴ When embarking on that endeavor it should be remembered that the term border security does not have any defined legal content in the EU. The CJEU has not pronounced itself on the concept. It becomes crucial to examine the developments that have led to the increased use of the term border security and inclusion of the term in policy documents and legal acts of the EU. A bid will be made to discern purposes and objectives of the supranational rules in question, with the use of the sources referred to in section 2.1 on Methods and materials, such as EU primary and secondary legislation, relevant Commission documents and opinions of legal scholars.

It is important to note that EU border security concerns the external borders. The only legal act where border security is mentioned is the Frontex regulation and Frontex's activities only concern the external borders. Moreover, internal borders and external borders are not 'the same'. Although Article 32 in the Schengen Borders Code states that where border control at internal borders is reintroduced by a member state the relevant provisions of the code relating to external borders are to apply *mutatis mutandis*, the Court has clarified that if a member state reintroduces internal border control according to the Code, this does not mean that the internal border in question is equivalent to an external border for the purpose of the Code.¹⁹⁵ Rather, Article 32 of the Schengen Borders Code provides the member states with discretion as to the processes to be conducted at internal border checkpoints.¹⁹⁶

Certain clarifications regarding EU terminology should be made here. There are a number of 'border terms' in the legal EU acts which require examination. Such terms have been examined in the published articles and to a certain extent also in this theoretical part of the thesis. Border management, border control and border surveillance are core terms. The

¹⁹⁴ Simmons (n 168) 14

¹⁹⁵ Case C-444/17 *Préfet des Pyrénées-Orientales v Abdelaziz Arib* [2019] EU:C:2019:220

¹⁹⁶ Stefano Montaldo, 'The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste' (2020) 5 *European papers* 523

concept of border management encompasses actions and/or decisions undertaken in the context of both border control and border surveillance.¹⁹⁷ Article 2 paragraph 10 in the Schengen Borders Code defines border control and states that it refers to ‘the activity carried out at a border, .., in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance’.¹⁹⁸

In the 2019 Frontex Regulation there are only references (in article 2.3 and 2.5) to the Schengen Borders Code when it comes to definitions of border control and border surveillance. However, article 3 in the 2019 Frontex Regulation elaborates further on what border control should encompass and states that border control should include ‘measures to facilitate legitimate border crossings and, where appropriate: measures related to the prevention and detection of cross-border crime at the external borders, in particular migrant smuggling, trafficking in human beings, and terrorism; ...’.

The EU Court has not taken a stand on the use of these border terms, but it should be mentioned that Advocate General Mengozzi elaborated on border surveillance in his Opinion in case C-355/10 and stated *inter alia* that surveillance is defined in the Schengen Borders Code essentially through its objectives, and that that definition sets out a particularly broad concept, capable of encompassing any measure aimed at avoiding or preventing circumvention of border checks.¹⁹⁹ Advocate General Mengozzi also asserted that the concept of surveillance must be interpreted in a dynamic and flexible manner.²⁰⁰

As mentioned in the Introduction, in the EU context I focus on both border control and border security when analysing texts, since my point of departure is that border control constitutes the core of border security.

Below, first, the development of the Area of Freedom, Security and Justice (hereinafter AFSJ) will be described, and second, EU internal security will be elaborated on. Third, sovereignty aspects will be highlighted. Thereafter, an overview of scholars’ views on border security will be given. Fifth, the

¹⁹⁷ Jörg Monar, ‘The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of External EU Borders’, in Jaap de Zwaan and Flora A N J Goudappel (eds) *Freedom, Security and Justice in the European Union: Implementation of The Hague Programme* (T.M.C. Asser Press 2006) 73–90. Cited *inter alia* by Sergio Carrera and Marco Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective remedies for victims of human rights violations?* (Centre for European Policy Studies 2018) 3

¹⁹⁸ Schengen Borders Code (n 47). The legal bases according to the regulation: ‘Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(b) and (e) thereof’.

¹⁹⁹ Case C-355/10 *European Parliament v Council of the European Union* [2012]

EU:C:2012:207, Opinion of AG Mengozzi, para 57

²⁰⁰ *ibid*

Schengen Borders Code and the Frontex Regulation will be analysed. Sixth, concluding comments will be made.

6.2 Development of an Area of Freedom, Security and Justice (AFSJ)

It is relevant to describe why the EU got involved in the AFSJ field and why the member states felt it necessary to confer these competences. None of the three founding treaties of the European Communities²⁰¹ gave any competences to the newly established Community institutions in the sphere of justice and home affairs. States were not prepared to consider any incursion on their sovereignty in these fields. One exception was that in the framework of the EEC Treaty the member states agreed on the free movement of workers as one of the 'four freedoms' of the common market. A range of EC legislative acts were gradually adopted in the 1960s and 1970s which forced member states to harmonise some of their national rules and practices regarding entry, movement and residence.²⁰² During the 1960s member states started to cooperate on some internal security issues arising from economic integration under the EEC Treaty.²⁰³ From the mid-1970s onward the abolition of internal border controls was increasingly discussed as a necessary element of a 'Europe of the citizens'.²⁰⁴

Border control and the Schengen cooperation were developed in the context of the communitarisation of a range of issues termed Justice and Home Affairs (hereinafter JHA) matters – immigration, border control and asylum. Also, judicial cooperation, police cooperation and criminal law can be mentioned. Border control was seen as a 'flanking' measure to the creation of internal market. The JHA was developed further and the AFSJ was created with the 1997 Amsterdam Treaty. As mentioned, for the first time internal security became an objective of EU law.²⁰⁵ This created the need for much closer cooperation on external border controls. If the EU only has the competences necessary to achieve the objectives set out in the treaty, then as these objectives change the competences have to evolve. Creating an AFSJ and not only an internal market, the member states –

²⁰¹ Treaty establishing the European Coal and Steel Community (hereinafter ECSC) 18 April 1951, Treaty establishing the European Economic Community (hereinafter EEC) 25 March 1957, Treaty establishing the European Atomic Energy Community (hereinafter EAEC or Euratom) 25 March 1957

²⁰² Mitsilegas, Monar and Rees (n 149) 19

²⁰³ *ibid* 27-28

²⁰⁴ *ibid*

²⁰⁵ *ibid* 36; TEU art 3.2 "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.

implicitly as well as explicitly – agreed that the EU was to have greater competences in the fields necessary to achieve those objectives.

Initially the Schengen cooperation was based on the 1985 Schengen Agreement²⁰⁶ and the 1990 Schengen Convention.²⁰⁷ The Schengen Agreement was originally signed between Belgium, France, Germany, Luxembourg, and the Netherlands, outside the EU's legal framework. Free movement of people was a core part of the original Treaty of Rome, but there was disagreement among member states how that should be realised.

The Schengen Area was formed partly due to the lack of consensus amongst EU member states over whether or not the EU had the jurisdiction to abolish border controls, and partly because those states that wanted to implement the idea did not wish to wait for others.²⁰⁸ The Schengen area gradually expanded to include more EU member states. However, Ireland and the UK opted out of joining the Schengen Area (and in 2020 the UK left the EU), and Romania, Bulgaria, Croatia, and Cyprus are EU members who plan to become Schengen countries but are not at present. Furthermore, four non-EU states form part of the Schengen Area; Iceland, Liechtenstein, Norway and Switzerland. The different standings of states regarding the Schengen cooperation, resulting in its geographical scope, originate from the tensions between supra-national control and state sovereignty over borders.

It has been argued that the foreign affairs ministries were ousted by justice and home affairs ministries at the time of the formation of the Schengen cooperation.²⁰⁹ In the home affairs-driven Schengen field, there have been struggles not least around the division of competences and sovereignty issues.

Looking at the developments from a treaty perspective the following can be highlighted: in connection with the 1999 entry into force of the Amsterdam Treaty, the Schengen cooperation was incorporated into the EU, according to the so-called Schengen Protocol that is attached to the Amsterdam Treaty. This entailed that the Schengen cooperation thereafter was implemented within the EU legal framework. Being part of the area without internal border controls means that the Schengen states do not – principally – carry out border checks at their internal borders, i.e. borders

²⁰⁶ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 14 June 1985 (the original official version only available in Dutch, French and German)

²⁰⁷ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 19 June 1990 (the original official version only available in Dutch, French and German)

²⁰⁸ Paul Craig and Gráinne de Burca, *EU Law: Text, Cases and Materials* (Oxford University Press 2003) 751

²⁰⁹ Virginie Guiraudon, 'European and Integration Policy: Vertical Policy Making as Venue Shopping' (2000) 38 *Journal of Common Market Studies* 251, 265

between two Schengen states, and carry out harmonised controls, based on clearly defined criteria, at their external borders, i.e. borders between a Schengen state and a non-Schengen state.²¹⁰

The Maastricht Treaty, which came into force in 1993, created the three pillars structure of the EU. Issues related to the management of borders were governed by inter-governmental decision-making and located in the 'third pillar'. However, following the entry into force in 1999 of the Amsterdam Treaty, and the end of a transition period in 2004, border management effectively became a shared competence between the EU and its member states.²¹¹ Some issues concerning border management were now part of the supranational decision-making. The first Schengen Borders Code Regulation was adopted in 2006.²¹² The definition of border control in the latest full revision in 2016 of the Schengen Borders Code²¹³ is still the same as in the 2006 Code. The structure of the Schengen Borders Code was due in large part to the fact that rules already adopted in various legal instruments such as, in particular, the Schengen Convention and the Common Manual on checks at the external borders, were incorporated in it.

The Lisbon Treaty entered into force in 2009. The Lisbon Treaty abolished the 'third pillar' (policing and criminal law) and moved its provisions into the same Title that concerned immigration, asylum and civil law. Perhaps some of the most significant changes that the Treaty of Lisbon entailed affected AFSJ law, concerning issues of relevance both for a holistic view on border management, and for national sovereignty.

A new explicit competence on 'an integrated management system for the external border' was introduced at treaty level with the Lisbon Treaty. Until the entry into force of the Lisbon Treaty, the notion of integrated border management was more a political concept than a legally binding one, even if it was already present as an objective in the 2001 Laeken Declaration.²¹⁴ In the 2016 Frontex Regulation²¹⁵ the concept 'integrated border management' was for the first time filled with a more precise content.

²¹⁰ Daniel Thym, 'Legal framework for entry and border controls', in Kay Hailbronner and Daniel Thym (eds), *EU immigration and asylum law – a commentary* (C.H. Beck/Hart/Nomos 2016) 31

²¹¹ eg Sarah Wolff, *EU Integrated Border Management Beyond Lisbon: Contrasting Policies and Practice* (Clingendael European Studies Programme 2009) 25

²¹² Schengen Borders Code (n 47)

²¹³ *ibid*

²¹⁴ Presidency Conclusions European Council meeting in Laeken 14 and 15 December 2001

²¹⁵ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No

6.3 EU internal security

One could pose the question how it has been feasible that such supranational rules have been adopted in the field of border control, which can be seen as the most sovereignty-sensitive issue of the areas included in the AFSJ.²¹⁶ As described above, the EU competence in the field of internal security has been a gradual development. With the Treaty of Amsterdam, as mentioned, internal security became a primary objective of the European Union.²¹⁷ In the field of internal security, the EU of today has competence to adopt legal measures. Importantly, Title V 'Area of Freedom, Security and Justice' in the TFEU bestows shared, not exclusive, competence, meaning that the member states can continue to legislate in these areas, as long as they do not violate existing EU rules.²¹⁸

A pragmatic definition of internal security encompasses what is now included in the AFSJ: border controls, measures relating to public order, including all aspects relating to national police forces, criminal law approximation, and the rules governing the entry and admission of third country nationals. As referred to above, article 3(2) TEU sets out the EU's key objectives in the AFSJ field.

The grouping and linking of a number of very different issues – terrorism, drug trafficking, organised crime, transborder crime, illegal immigration, and asylum seekers – under the heading of internal security has been criticised by a number of scholars.²¹⁹ Bigo has observed the emergence of an 'internal security field' in Western Europe that presupposes a single security continuum in which organized crime, terrorism, and illegal immigration are placed together.²²⁰

Notably, the EU policies in the AFSJ are characterised by a distribution of powers which allots legislative competencies to the EU, but gives executive powers to the member states.

863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L251/1

²¹⁶ eg Mitsilegas, Monar and Rees (n 149) 9

²¹⁷ *ibid* 36

²¹⁸ Art 4(2) Treaty of the Functioning of the European Union (TFEU) states: 'Shared competence between the Union and the Member States applies in the following principal areas: .. (j) area of freedom, security and justice'; Eva G Heidbreder, *Multilevel Elements of EU Migration Policy* (King Project-Political Science Unit, In-depth Study n.2 2014) 8; Iain Cameron, 'European Union Law Restraints on Intelligence Activities' (2020) 33 *International Journal of Intelligence and CounterIntelligence* 452

²¹⁹ eg Didier Bigo, 'The European internal security field stakes and rivalries in a newly developing area of police intervention', in Malcolm Anderson and Monica den Boer (eds) *Policing Across National Boundaries* (Pinter 1994) 164; Anderson and Apap (n 148)

²²⁰ *ibid*

In addition to the legal documents, internal security has also been dealt with in a number of political documents, such as the European internal security strategies for 2010–2014 and 2015–2020, and the 2016 European Union Global Strategy,²²¹ which emphasises the increasing intertwining of internal and external security. The first European internal security strategy for 2010–2014 stated that internal security and its development is increasingly dependent on the state and development of external security.

In section 8 on security exceptions in the Schengen Borders Code, the focus is on possibilities of a member state to invoke concerns regarding its internal security as a ground for derogating from provisions in the Code.

6.4 Sovereignty

In an analysis of the evolving border control rules in the EU, it is relevant to point to the sovereignty aspect. In the articles included in this thesis it is highlighted that many EU member states seemingly continue to see border control as a sovereignty-sensitive area and have been hesitant to further widening of the supra-national rules in that field.²²² Scholars as well as politicians have seen the control over the border as connected to sovereignty and national security. In international law, internal sovereignty can be understood as the supreme authority within a territory or the ultimate power within that territory.²²³ Martin and Ferris link sovereignty and national security to the control over the borders, and are of the view that within a sovereignty context ‘national security underlies the decisions of sovereign states with regard to border control’.²²⁴

Controlling the borders has often been seen as one of the core functions of a state and an exercise of the state’s sovereignty.²²⁵ The EU does not claim to be a sovereign state, but undeniably it has assumed a wide range of typically sovereign functions. Led by the German Constitutional Court, several supreme courts in Europe have sought to identify legal limits to the

²²¹ Shared Vision, Common Action: A Stronger Europe A Global Strategy for the European Union’s Foreign And Security Policy (2016)

²²² eg David Fernández Rojo, ‘It’s a new agency. It’s a federal agency. It’s the European Border Coast Guard! No wait... it’s Frontex’ (2017) EU Law Enforcement; Gustafsson (n 12)

²²³ eg Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999); Christopher Daase, ‘Security, Intervention, and the Responsibility to Protect: Transforming the State by Reinterpreting Sovereignty’ in Stephan Leibfried and others (eds) *The Oxford Handbook of Transformations of the State* (Oxford University Press 2015) 310 ff; Samantha Besson, *Sovereignty* (Max Planck Encyclopedia of Public International Law 2011) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472>> accessed 14 June 2021

²²⁴ Martin and Ferris (n 171) 1

²²⁵ eg Daniel Thym, ‘The Schengen Law: A Challenge for Legal Accountability in the European Union’ (2008) 8 European Law Journal 218, 220; Martin and Ferris (n 171) 2

transfer of sovereign functions to international institutions.²²⁶ Hintermeier points to the changes in the understanding of EU member state sovereignty.²²⁷ According to Hintermeier, although sovereignty has not become obsolete during the European integration process, its meaning has been adapted to new political conditions in the European multilevel system: 'Sovereignty is form, the content changes over time'.²²⁸ As concerns the EU border management rules, member states have agreed to the current balance of sovereignty aspects in them. However, as mentioned, there are factors contributing to member states retaining influence over border rules, *inter alia* the possibilities for member states to derogate from a provision for security reasons.

In this context, it should be noted that here are elements in the Frontex Regulations that have been adopted that seem to challenge the sovereignty of member states. The Frontex regulation as such will be elaborated on in subsection 6.6.3. In 2016 a new wording was included in Article 19 (now in Articles 41-42), perhaps the most controversial element at the time, which ruled that in situations 'at the external borders requiring urgent action', it is possible for the EU Council to require the member state in question to cooperate with Frontex in the implementation of certain measures. It created a possibility that a member state can be overruled by the Council regarding how a specific border situation should be handled. The essential elements of this provision remain the same in the 2019 Frontex Regulation. Both in 2016 and 2018 a majority of member states rejected calls for Frontex to carry out completely independent controls at EU external borders, as this would violate their national sovereignty.²²⁹ The main responsibility for what can be termed border security remains with the member state in question which retains the primary responsibility to control its part of the external borders.²³⁰ Furthermore, the reform in 2019 could not be used to strengthen Frontex specifically for the task of sea rescues in the Mediterranean.²³¹ The aim of the 2016 reform of Frontex was similar to the aim of the 2019 reform. A new element which received attention in the debate in the run-up to the adoption of the 2019 Regulation was the creation of a Frontex task force of 10,000 EU border guards.

²²⁶ Guglielmo Verdirame, 'Sovereignty' in Jean d'Aspremont and Sahib Singh (eds) *Concepts for International Law. Contributions to Disciplinary Thought* (Edward Elgar 2019) 827, 834

²²⁷ Stefan Hintermeier, 'Reconceptualization of External Security in the European Union since 1990' in Hans Günter Brauch and others (eds) *Globalization and Environmental Challenges Reconceptualizing Security in the 21st Century* (Springer 2008) 659, 664

²²⁸ *ibid*

²²⁹ Raphael Bossong, 'The Expansion of Frontex Symbolic Measures and Long-term Changes in EU Border Management' (2019) Stiftung Wissenschaft und Politik/German Institute for International and Security Affairs Comment C 47

²³⁰ 2019 Frontex Regulation (n 8) preambular para 12, art 7, Annex V (3)

²³¹ Bossong (n 229) 2

However, this Frontex task force will not be fully deployed until 2027.²³² Some of the main conclusions in the published articles in this thesis are that Frontex has become one of the major players in European external border management, but that member states still have not in any decisive way lost national sovereignty due to the new and enhanced role of Frontex. At least under normal circumstances it seems unlikely that Frontex would try to act against the will of a member state.²³³

6.5 Border security as seen by scholars

Turning now to the border security concept as seen by scholars, not many have attempted to explore what 'EU border security' encompasses as 'a whole'. As Bossong and Rhinard have pointed out perhaps the highest number of studies on EU internal security cooperation, of which border management is part, focus on policymaking within various sub-fields of EU internal security. Within this category, migration, border, and asylum policy in the EU, often from a rights perspective, stand out as the central and most frequent object of study, however not with a focus on the concept of border security as such.²³⁴ As mentioned above, the issue of securitisation of borders in the EU has been the subject of many analyses. For the purpose of this text, it is of interest to examine what conclusions scholars have drawn when looking closer at the term border security.

Hokovský has attempted to define border security as 'a whole system' and has proposed that there are six distinct primary functions of a border security system:

First, in the area of prevention, there is (1) deterrence of the potential flow and (2) prevention of the attempted flow. Second, in the area of interdiction there is (3) interdiction of the immediate attempted flow at the borders, either at border crossing points or in between them. Finally, in the area of removal, there is (4) apprehension of the illegal flow and (5) apprehension of the illegal population for the purpose of (6) removal of these unauthorised immigrants or residents outside the protected territory.²³⁵

Hokovský also asserts that there are secondary functions of the border security system, such as notifying security services about individuals and

²³² *ibid* 4

²³³ Gustafsson (n 12)

²³⁴ Raphael Bossong and Mark Rhinard, 'Alternative Perspectives on Internal Security Cooperation in the European Union: Setting the Scene' in Raphael Bossong and Mark Rhinard (eds) *Theorizing Internal Security in the European Union* (Oxford University Press 2016) 14

²³⁵ Radko Hokovský, *The Concept of Border Security in the Schengen Area* (2016) 10 *Central European Journal of International and Security Studies* 88

objects of interest, receiving asylum seekers, facilitating legitimate movement and trade across the border, and providing intelligence based on the execution of the primary functions.²³⁶ According to Ferrera, who linked the discursive or terminological shift in official EU documents to the 9/11 terrorist attacks in the US,²³⁷ a shift from 'border control' to 'border security' and 'border management' in the EU was given impetus by a debate, initiated at the Laeken European Council of December 2001, on 'Better management of the Union's external border controls (...)'.²³⁸

Hokosky stresses that the 2001 Laeken conclusions provided the first definition of 'management of external borders,' which comprises activities carried out by public authorities of the member states in order to *inter alia* analyse and propose responses to threats to border and internal security.²³⁹ However, Bigo opines that it would be inaccurate to refer to 9/11 as the critical juncture that moves to step up security around immigration and that the association of immigration with terrorism goes back considerably further than that as a result of approaches by politicians, security professionals and some media outlets, not necessarily linked to any strategic intention.²⁴⁰ He is of the view that for many years, in their public statements, policy-makers at national and European levels responsible for police and border issues directed attention towards illegal border crossings.²⁴¹ Carrera highlights the EU enlargement in 2004, and the shift of the EU's external territorial border towards the perimeters of the new Eastern and Central European member states, as factors of concern for the EU-15 member states' representatives, who felt the need for increasing the level of security, understood as external border protection.²⁴² The perception by some of the EU-15 member states of insecurities related to the 2004 EU enlargement as well as the 9/11 attacks added to the political momentum for a security-driven approach.

Mitsilegas opined in 2007 that *inter alia* the proliferation of border control measures and qualitative change in the nature of a number of border control-related measures justified a shift in terminology from 'border

²³⁶ *ibid*

²³⁷ Maria Ferreira, 'Risk Politicization Strategies in EU Migration and Asylum Policies' (2010) 1 *Journal of Global Analysis* 165

²³⁸ *ibid* 168; Presidency Conclusions European Council Laeken (n 214) para 42

²³⁹ Hokoský (n 235) 76

²⁴⁰ Didier Bigo, Immigration controls and free movement in Europe (2009) 91 *International Review of the Red Cross* 579, 588, 590

²⁴¹ *ibid* 586: 'For many years, in their public statements, policy-makers at national and European level responsible for police and border issues have focused almost exclusively on illegal border crossings, people smugglers and all the consequences of the "three-month" policy'.

²⁴² Monar (n 197); Sergio Carrera, *Towards a Common European Border Service?* (Centre for European Policy Studies Working Document No. 331 2010)

control' to 'border security' in the EU.²⁴³ Mitsilegas assessed in 2007 that the attempts to create a EU legal framework to achieve 'border security' had resulted in 'a multi-level, comprehensive framework, making use of a variety of legal and policy strategies: the adoption of 'internal' legally binding rules, the conclusion of international agreements, the establishment of agencies and the broadening of the scope of databases'.²⁴⁴ Mitsilegas pointed to the activities of Frontex, which he found were linked with the concept of 'secure borders'. Mitsilegas' definition seems valid, with reservation that a subjective element is not clearly spelled out. This dissertation's focus is not the whole 'multi-level, comprehensive framework' proposed by Mitsilegas. Rather, as clarified above, this thesis focuses on the rules governing the entry into the EU territory, the supranational border control rules applied at the external borders of the EU (/Schengen). However, the rules regarding the internal borders – the agreed absence of border controls – are also of a certain interest, since they are inextricably linked to the border control at the external borders and because that part has not been functioning very well in the sense that states on several occasions have reintroduced internal border controls, and kept them over long periods of time, as examined further in section 8.

As noted, scholars have been interested in how the EU rhetorics has developed with regard to border security. It is easily noted at a glance that border security is often mentioned in EU official documents, such as policy documents approved by the European Council.²⁴⁵ In connection with Frontex and its activities, border security or secure borders, or similar, are referred to quite often, which has been the case since the first 2004 Frontex regulation was adopted, as described in subsection 6.6.3.²⁴⁶ Media continuously use 'border security' in various EU contexts.²⁴⁷ And, as mentioned, 'border security' has been included in legislation in the EU.²⁴⁸ As such, the supranational legal rules are fundamental elements of the border system, but they also play a role in contributing to the EU discourse on border issues.

²⁴³ Mitsilegas (n 3) 359

²⁴⁴ Mitsilegas (n 3) 392

²⁴⁵ Presidency Conclusions of the Brussels European Council 16/17 December 2004 10 ('as regards border and document security'); EU Global Strategy (n 221) 34 ('We will back practical cooperation, including through the Union for the Mediterranean, on issues such as border security, trafficking, counter-terrorism, nonproliferation, water and food security, energy and climate, infrastructure and disaster management'.)

²⁴⁶ The current Frontex Mission statement: 'Together with the Member States, we ensure safe and well-functioning external borders providing security', Frontex website <<https://frontex.europa.eu/about-frontex/our-mission/>> accessed 10 May 2021

²⁴⁷ Charlotte Gifford, 'The true cost of the EU's border security boom', World Finance, 21 January 2020 <<https://www.worldfinance.com/featured/the-true-cost-of-the-eus-border-security-boom>> accessed 10 May 2021

²⁴⁸ 2013 Eurosur Regulation and 2019 Frontex Regulation (n 8)

6.6 Legal acts: the Schengen Borders Code and the Frontex regulation

6.6.1 Introduction

In this section the evolvments of the two core legal instruments crucial for the purpose of this thesis are probed: the Schengen Borders Code,²⁴⁹ and the 2019 Frontex Regulation.²⁵⁰ These regulations are part of the EU internal security and are directly applicable in the EU member states. There are also other EU legal acts that are relevant for the entrance of third country nationals into the territory of the EU, such as the regulation listing the third countries whose nationals must be in possession of visas when crossing external borders,²⁵¹ the Family Reunification Directive²⁵² and the Qualification Directive (recast).²⁵³ Further acts of relevance are for instance the Directive on the collection of Advance Passenger Information (API) ²⁵⁴ and the Regulation (EU) establishing an Entry/Exit System (EES).²⁵⁵

However, the focus in this thesis is on the two mentioned core legal acts, the Schengen Borders Code and the Frontex Regulation, since they contain the core provisions regarding border control and border security. The aim when analysing the sources below is to examine whether there are discernable objectives for the adoption of border control or border security rules, or for the strengthening of such rules.

²⁴⁹ Schengen Borders Code (n 47)

²⁵⁰ 2019 Frontex Regulation (n 8). The legal base according to the regulation: 'Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(b) and (d) and Article 79(2)(c) thereof'.

²⁵¹ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1

²⁵² Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12

²⁵³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9

²⁵⁴ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data ('API Directive') [2004] OJ L261/24

²⁵⁵ Regulation (EU) 2017/2226 of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 [2017] OJ L327/20

6.6.2 The Schengen Borders Code

As explained above there has been a gradual development towards the EU supranational rules in the field of border control. The Schengen rules on movement of persons across borders have a long history preceding the adoption of the Schengen Borders Code as an EU law regulation.²⁵⁶ The 'sovereignty dimension' and the 'human rights dimension' have created tensions and have influenced both the development of the treaties and secondary legislation.²⁵⁷ A fundamental goal has been to establish internal security linked to strong external border control.

First, it should be clarified that border security has not been used in a Schengen context – it was with the adoption of the Eurosur surveillance system and Frontex provisions that the term was included in EU legislation.²⁵⁸ There were no references to border security or securing borders in 1985 Schengen Agreement or 1990 Schengen Convention. Border security is not mentioned in the current 2016 Schengen Borders Code. However, it can be noted that in the Code, the 'security of ... borders' is mentioned in preambular paragraph 8.²⁵⁹

Turning to current EU primary law, Title V Area of Freedom, Security and Justice in the TFEU has been referred to above. The legal bases for the Schengen Borders Code are found in 77(2)(b) and (e) in Title V in the TFEU.²⁶⁰ The articles include references to the external borders as well as the absence of any controls on persons when crossing internal borders.

If one focuses on the EU regulations the following developments should be noted: In the first 2006 Schengen regulation preambular paragraph 6 stated that 'Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations'.²⁶¹ The same formulation is included in the preamble in the current 2016 Schengen Borders Code.²⁶² Furthermore, it is stated in the current Code that

²⁵⁶ Gustafsson (n 12)

²⁵⁷ *ibid*

²⁵⁸ 2013 Eurosur Regulation and 2019 Frontex Regulation (n 8)

²⁵⁹ Preambular para 8: 'Border control comprises not only checks on persons at border crossing points and surveillance between those border crossing points, but also an analysis of the risks for internal security and of the threats that may affect the security of external borders'.

²⁶⁰ 77(2)(b) and (e) TFEU: 'For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

(b) the checks to which persons crossing external borders are subject; ...

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.'

²⁶¹ Schengen Borders Code (n 47)

²⁶² Preambular para 6 in both regulations.

a fundamental purpose of the Code is the establishment of rules applicable to the movement of persons across borders.²⁶³ Notably, in preambular paragraph 26 it is stated that '[m]igration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security'.

Turning to Commission proposals, in the first 2004 Commission proposal for a Schengen regulation overarching goals were not touched on.²⁶⁴ The proposal explains that, in sum, it seeks to establish a genuine Community Code on the rules governing the movement of persons across borders, with one part on external borders and one part on internal borders. However, in a number of later Communications on border management and border control, such goals as hindering illegal immigration and achieving well-managed legal migration are mentioned.²⁶⁵ In 2017 the Commission refers to the pressure from the mass irregular migration influx and the multiplication of terrorist attacks in various member states and refers to the 'border management and border security of the European common external borders'.²⁶⁶ The Commission also states that the proposed system aims at better identifying and apprehending 'foreign terrorist fighters',²⁶⁷ and clarifies that an objective is 'to reinforce internal security and the fight against terrorism and serious crime'.²⁶⁸ The Commission is of the view that 'The strength of the tools within the Schengen legal framework, as detailed above, has allowed stemming irregular flows of migrants to the EU and secondary movements, which were a cause of great concern for many Member States and citizens'.²⁶⁹

Finally, it is not possible to examine border security only in relation to the control of external borders when analysing purposes and objectives, since border security is linked to the absence of internal borders control – it is a precondition for it – which, in the end, means that economic factors are in play. In order to enhance the free movement of services and goods and to stimulate their economy, member states in the Schengen system have given up on permanent border checks at the internal borders. The economic importance of the free movement has on many occasions been stressed publicly by the Commission, lately in connection with members states'

²⁶³ Preamble para 34: 'Since the objective of Regulation (EC) No 562/2006 and its successive amendments, namely the establishment of rules applicable to the movement of persons across borders (...)'.
²⁶⁴ European Commission, 'Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders' COM (2004) 391 final
²⁶⁵ European Commission 'Delivery of the European Agenda on Migration COM (2017) 558 final
²⁶⁶ European Commission, 'Communication on preserving and strengthening Schengen' COM (2017) 570 final 2
²⁶⁷ *ibid* 2, 6
²⁶⁸ *ibid* 7
²⁶⁹ *ibid* 11

reinstatement of internal border controls during the COVID-19 pandemic.²⁷⁰ Many have attempted to analyse the economic impact of Schengen or ‘non-Schengen’, for instance the European Parliament’s Research Service,²⁷¹ but have usually arrived at somewhat different numbers. The Research Service presented a range of scenarios in 2016 and estimated that full Schengen suspension would represent lost GDP of around 0.06-0.14 per cent of EU GDP annually.²⁷² There have been efforts to calculate other costs of interest for EU border management, such as the costs for external border management or border security.²⁷³ However, no certain calculations can be made, since resources come from various sources – those that can be identified – such as the External Borders Fund, Borders and Visa fund, Frontex, the European Neighbourhood Instrument, the Schengen Facility, the emergency fund and the research programs FP7 and Horizon2020.²⁷⁴ Frontex received 1,6 billion euro from 2006 until 2018.²⁷⁵

6.6.3 Frontex

First, on the origins of Frontex: the idea of a European system of border guards (ESBG) made its official debut in November 2001 in a Commission Communication wherein the Commission called for a more ‘coherent strategy’ on European border management and identified as a core element of the latter the creation of a European border guard.²⁷⁶ The Laeken European Council Conclusions of December 2001 reiterated the need for more effective and ‘integrated’ management of the EU external borders, and underlined the necessity to examine the conditions in which ‘a mechanism’ or ‘common services’ to control external borders could be created in the future.²⁷⁷ Subsequently, Frontex was established in 2004 through the first

²⁷⁰ Gabriela Baczyńska and Sabine Siebold, ‘EU to keep COVID-19 curbs on non-essential travel amid chaotic border measures’ *Reuters* (23 February 2021)

<<https://www.reuters.com/article/us-eu-borders-idUSKBN2AN0TL>> accessed 10 April 2021

²⁷¹ Directorate General for Parliamentary Research Services (DG EPRS) for the European Parliament’s Internal Market and Consumer Protection Committee, European Parliamentary Research Service *The Cost of Non-Schengen Impact of border controls within Schengen on the Single Market* (2016)

<https://www.europarl.europa.eu/RegData/etudes/STUD/2016/581383/EPRS_STU%282016%29581383_EN.pdf> accessed 10 April 2021

²⁷² *ibid* 44

²⁷³ Sjoerd Visser, ‘The costs of EU’s policy on external border security: Revealing the financial consequences for the bordering industry and undocumented migrants’ (Bachelor thesis, Radboud University Nijmegen 2018)

²⁷⁴ *ibid* 50

²⁷⁵ *ibid*

²⁷⁶ European Commission, ‘Communication on a common policy on illegal immigration’ COM (2001) 672 final

²⁷⁷ Presidency Conclusions European Council Laeken (n 214)

Frontex Regulation.²⁷⁸ The Frontex Regulation has since been amended on several occasions.²⁷⁹ The latest version of the Frontex regulation dates from 2019, the previous from 2016.²⁸⁰

As concerns primary EU law, it has been referred to above in sections 6.2 and 6.3. The legal bases for the Frontex Regulation are found in articles 77²⁸¹ and 79 in Title V Area of Freedom, Security and Justice in the TFEU.²⁸² Article 79 states *inter alia* that the EU shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in member states, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.²⁸³

The creation of Frontex can be seen as a part of a security-driven approach, as referred to above. However, for instance Neal has argued that Frontex was established not on the basis of securitisation, exceptional politics and urgency, but in response to the disintegration of a common EU response to migration, security and borders, and adds that despite its unexceptional origins, Frontex may nevertheless be a tool of securitisation or a securitising actor.²⁸⁴ Scholars have pointed to the activities of Frontex as

²⁷⁸ Council Regulation (EC) 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1

²⁷⁹ The regulation on Frontex has been reformed for instance through, first, Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] OJ L199/30, and, second, Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1

²⁸⁰ 2019 Frontex Regulation (n 8)

²⁸¹ art 77: 'The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; (c) the gradual introduction of an integrated management system for external borders'; Art 79: 'The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'.

²⁸² arts 77(2)(b) and (e) TFEU: 'For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

(b) the checks to which persons crossing external borders are subject; ...

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders'.

²⁸³ *ibid*

²⁸⁴ Andrew W Neal, 'Securitization and Risk at the EU Border: The Origins of FRONTEX' (2009) 47 JCMS 333, 346

securitising practices and opined that Frontex contributes to a significant extent to the ongoing securitisation of migration in the EU.²⁸⁵

Interestingly, the first 2004 Frontex regulation did not include the term security, except in one place simply in reference to the AFSJ. On the other hand, once Frontex became operational, a security rhetoric started to be used. For instance, the then Frontex mission statement on its website stated that 'FRONTEX strengthens border security by ensuring the co-ordination of Member States' actions in the implementation of Community measures relating to the management of the external borders'.²⁸⁶

A security rhetoric gradually found its way into the legal Frontex text. In 2011 Article 11 c) was included in the Frontex regulation, mentioning the security of the external borders of the member states.²⁸⁷ In the 2016 Frontex Regulation border security was included in article 37.3 which deals with research in the field.²⁸⁸ The 2019 Frontex Regulation references to border security in two articles: Article 34²⁸⁹ and Article 66²⁹⁰. The references in Article 34 have their origin in the 2013 Eurosur regulation. In the regulation that established the Eurosur surveillance system in 2013, the term border security was used in Article 15 in the context of assessing incidents related to illegal immigration or cross-border crime, and whether such incidents had 'a significant impact on border security'.²⁹¹ In 2019, the Eurosur surveillance system regulation was incorporated into the 2019 Frontex Regulation (including Article 15 which became Article 34 in the 2019 Frontex Regulation).

Looking closer at the Frontex rules' stated purposes and objectives, it can be noted that in the first Frontex regulation of 2004, it is clarified that the Agency is established with a view to improving the integrated management of the external borders.²⁹² Furthermore, it is stated that Community policy in the field of the EU external borders aims at an integrated management ensuring a uniform and high level of control and surveillance, which is a necessary corollary to the free movement of persons within the European Union.²⁹³ In the Commission proposal for the 2004 Frontex regulation,²⁹⁴

²⁸⁵ Sarah Léonard, 'EU border security and migration into the European Union: FRONTEX and securitisation through practices' (2010) 19 European Security 231

²⁸⁶ Neal (n 284) 250

²⁸⁷ 2011 Frontex amendment (n 279)

²⁸⁸ 2016 Frontex Regulation (n 215) art 37.3

²⁸⁹ art 34 'Attribution of impact levels to external border sections'

²⁹⁰ art 66 'Research and innovation'

²⁹¹ 2013 Eurosur Regulation (n 8)

²⁹² 2004 Frontex Regulation (n 278) art 1

²⁹³ *ibid* para 1

²⁹⁴ European Commission, 'Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders' COM (2003) 687 final 4

there is not a focus on threats, security or crime. Security is only mentioned in the context of freedom, security and justice.

As mentioned in section 6.1, in the 2019 Frontex Regulation there are references in Article 2.3 and 2.5 to the Schengen Borders Code when it comes to definitions of border control and border surveillance. However, article 3 in the 2019 Frontex Regulation elaborates further on what border control should encompass and states that border control should include ‘measures to facilitate legitimate border crossings and, where appropriate: measures related to the prevention and detection of cross-border crime at the external borders, in particular migrant smuggling, trafficking in human beings, and terrorism; ...’. It can be noted that in Article 3 ‘European integrated border management’ is defined, as a list of a number of measures, including return of third country-nationals who are the subject of return decisions, and the establishment of solidarity mechanisms.

Furthermore, in the current 2019 Frontex regulation (which built on the 2016 Frontex Regulation) there are reformulations and additions included regarding purposes and objectives in comparison to the 2004 Regulation: It is still stated that integrated border management of the external borders is an objective of Union policy – although now it is clarified that this concerns both national and Union level – and that this is a necessary corollary to the free movement of persons within the Union.²⁹⁵ It is highlighted that European integrated border management is central to improving migration management and that an aim is to manage the crossing of the external borders efficiently and address migratory challenges and potential future threats at those borders, thereby contributing to addressing serious crime with a cross-border dimension and ensuring a high level of internal security within the Union.²⁹⁶ In Article 1 it is asserted that the Regulation ‘addresses migratory challenges and potential future challenges and threats at the external borders’ and that it contributes to ‘the detection, prevention and combating of cross-border crime at the external borders’. In the 2019 Regulation there are a number of references to threats and challenges, such as ‘migratory challenges’ and ‘potential future threats’, and ‘threats of a hybrid nature’.²⁹⁷ The goal of ensuring a high level of internal security within the Union, safeguarding the functioning of the Schengen area, is mentioned.²⁹⁸ In the Commission proposal for the 2019 Frontex regulation the effective control of EU external borders is referred to as part of a

²⁹⁵ 2019 Frontex Regulation (n 8) preambular para 2

²⁹⁶ *ibid*

²⁹⁷ *ibid* preambular para 18

²⁹⁸ *ibid* preambular para 10

comprehensive approach on migration.²⁹⁹ Furthermore, future threats and challenges were mentioned in relation to the need for a standing corps of 10,000 operational staff.³⁰⁰

6.7 Concluding analysis

What has been presented above shows that the concept border security has found its way into legal EU documents. Factors of both an objective and subjective character have seemingly played a role in the developments towards a use of the term border security. Those factors are, at least, a qualitative change in the nature of a number of border control related measures, and the perception of insecurities related to both the 2004 EU enlargement and the 9/11 attacks.

As concerns the purposes and objectives there has been a gradual development of these as stated in the legal provisions and acts in question and their legislative history. Regarding Frontex and the external borders both ‘migratory challenges’ and potential future threats, such as serious crime with a cross-border dimension, are explicitly mentioned in the regulation in force, and these factors are connected to achieving a high level of internal security in the EU. Also, regarding the Schengen Borders Code the link to the internal security is crucial, and concerning border control at the external borders, it is highlighted that it is important to hinder illegal immigration and trafficking in human beings and to prevent any threat to the member states’ internal security, public policy, public health and international relations. However, as noted, in preambular paragraph 26 in the Code it is stated that ‘[m]igration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security’.

Finally, an important – and to a certain extent complicating – factor, is that the upholding of the internal security and the absence of internal border controls, in the end are grounded in economic factors.

²⁹⁹ European Commission, ‘Proposal for a Regulation on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council’ COM (2018) 631 final 1

³⁰⁰ *ibid* 9, 10

7. Objectives of border security: the UN Security Council

7.1 Introduction

Also this section concerns the second research question, however, now with a focus on the objectives of border security as applied by the UN Security Council.

As mentioned above, the analysis of the use of the concept of border security focuses on where it is used most frequently at global level: the UN Security Council. Therefore, at the global level the main interest is to map the UN Security Council's use of and discourse on border security.

However, in subsection 7.3, reference is made to treaty provisions on border control, which have been in force since 2003-4, the first of their kind. They are part of the UN Convention against Transnational Organized Crime³⁰¹ and the Protocols thereto.³⁰² The Protocols on trafficking and migrant smuggling include provisions on control of documents and border controls as well as on the collection, analysis and exchange of information at borders. The Convention's smuggling and human trafficking protocols require states *inter alia* to strengthen border controls. These provisions will not be examined in detail, since that is not crucial for the use of the term border security by the UN Security Council. The expression border security is not used in these treaties, but they are still of relevance since they contain border control provisions: For the purposes of this text the most interesting aspect is the objective of these border control provisions. The treaty provisions will not be legally analysed any further. Instead they are seen as an element in the discourse, as explained in subsection 7.3.

Above in subsection 2.2.2 it has been explained which documents that have been examined and analysed. For the early period until after the end of the Cold War the Annual Reports from the Security Council to the UN General Assembly during the period 1947-1995/96 were examined. The reports contained *inter alia* resolutions and Security Council debates. For the later period 1997-2020, relevant decisions and resolutions adopted under this period were analysed.

In subsection 2.2.1 I outlined the way I examined the documentation in question. In brief, the term border security and references to secure

³⁰¹ UN Convention against Transnational Organized Crime, 15 November 2000. It came into force 29 September 2003.

³⁰² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art 11, 15 November 2000. It came into force on 25 December 2003. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, art 11, 15 November 2000. It came into force on 28 January 2004.

border/borders or border controls, have been identified, and the context in question analysed. When analysing references to border security or secure borders the question 'security from whom/what' has been posed. When a reference to border control has been found, the aim has been to identify the objective of it. Also other significant words have been noted, such as border, territorial integrity, demarcation, war, non-state actor, terrorism, migration, crime, smuggling, trafficking.

As mentioned in subsection 2.2.1, in this section I point specifically to Chapter VII resolutions that refer to border control or border security, taking the binding status of resolutions adopted under Chapter VII of the UN Charter into account. However, this does not affect the outcome of the discourse analysis, in which all relevant references are taken into account on an equal basis.

Before turning to the analysis and results of the empirical exploration, it is necessary to elaborate on the evolving international security as applied by the UN Security Council so that the framework in which border security has evolved is clarified.

7.2 Evolving international security as applied by the UN Security Council

The maintenance of international peace and security is, as Article 1 in the UN Charter states, the most important goal of the Charter. Chapter VII of the Charter gives the Security Council extensive powers in this regard. The UN Charter relies on a narrow nation-centred concept of international security, as described above, which is essentially characterized by an absence of military violence between states, mirroring the situation and considerations made at the end of the Second World War. However, the UN Security Council has modified the concept of security from what can be said to be a formal concept of the absence of inter-state military violence to a more value-oriented concept, but to what extent usually remains unclear.³⁰³

Under the Charter the Council is to determine the existence of any threat to the peace. Article 39 in Chapter VII states that the Council determines the existence of such a threat and makes recommendations or decides what measures shall be taken in accordance with arts. 41 and 42 in Chapter VII to maintain or restore international peace and security.³⁰⁴ The practice of the

³⁰³ Bothe (n 52) 484-5

³⁰⁴ As concerns the determination of a threat, ICTY, *Tadić (Jurisdiction)*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), paras 28-29, is often referred to. The following is an excerpt from para 29: 'While the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter'.

UN Security Council to declare new threats to international peace and security, and the implications of the Council's expanding practice in this regard, has been the focus of attention of many scholars.³⁰⁵ Only a few aspects of relevance are highlighted here. There is no definite formula to be included in the resolutions in which a new threat is declared, *inter alia* since resolutions are the subject and outcome of negotiations between states. The Council usually does not explicitly invoke Article 39 in the resolutions in question, but has usually referred to Chapter VII and often used the phrase that an issue is a 'threat to international peace and security', when determining on which issues it can make use of its Chapter VII powers.³⁰⁶ However, other formulas are also in play. One important aspect of the practice to declare new threats is that enforcement measures under Chapter VII do not follow as a matter of course – that is up to the Security Council to take a stand on.

One of the new traits of the Council is that since the end of the Cold War and after the 9/11 attacks it increasingly started to identify generic threats to international peace and security in connection with its consideration of thematic issues. In a number of decisions, the Council has recognised a wide range of non-traditional threats that might constitute a threat to international peace and security, such as terrorist acts,³⁰⁷ the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery,³⁰⁸ the illicit transfer, destabilising accumulation and misuse of small arms and light weapons³⁰⁹, and transnational crime.³¹⁰ There are also

³⁰⁵ Karel Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future' (2003) 8 Journal of Conflict and Security Law 15

³⁰⁶ For an overview of art 39 practice by the UN Security Council secretariat see Repertoire of the Practice of the Security Council, UN Security Council website

<<https://www.un.org/securitycouncil/content/repertoire/actions#rel1>> accessed 12 February 2021

³⁰⁷ eg UNSC Res 1373 (2001) (n 40); UNSC Res 1530 (11 March 2004) UN Doc S/RES/1530; UNSC Res 1611 (7 July 2005) UN Doc S/RES/1611; UNSC Res 1618 (4 August 2005) UN Doc S/RES/1618; UNSC Res 2178 (2014) (n 41); UNSC Res 2368 (20 July 2017) UN Doc S/RES/2368; UNSC Res 2462 (28 March 2019) UN Doc S/RES/2462; UNSC RES/2396 (n 9)

³⁰⁸ eg UNSC Res 1540 (2004) (n 40); UNSC Res 1673 (27 April 2006) UN Doc S/RES/1673

³⁰⁹ UNSC Res 2220 (22 May 2015) UN Doc S/RES/2220 (no reference to it being adopted under Chapter VII) preambular para 5 states that 'the illicit transfer, destabilizing accumulation and misuse of small arms and light weapons in many regions of the world continue to pose threats to international peace and security', and preambular paras 15,16, paras 1, 4,13 refer to borders or border security; UNSC Res 2457 (27 February 2019) UN Doc S/RES/2457 (includes references to Chapter VII 'in various ways') preambular para 7 refers to 'the illicit trade, destabilizing accumulation and misuse of small arms and light weapons in many regions of the world' as a continued threat to international peace and security and para 6 refers to 'border control'.

³¹⁰ eg UNSC Res 1373 (2001) (n 40) (adopted under Chapter VII) called for national, regional and international cooperation to combat terrorism financing and money laundering; UNSC Res 2462(2019) (n 168) (adopted under Chapter VII) on the financing of terrorism addressed the linkages between terrorism and crime; UNSC Res 2482 (19 July 2019) UN Doc

other new threats to international peace and security connected to specific situations or generic in character, according to the Security Council's assessment,³¹¹ but I have chosen the mentioned examples since they involve cross-border activities and, therefore, are relevant in a border control context.

In the context of elaborating on the UN Charter, I take the opportunity to refer to my article on illegal inter-state threats, in which I have explored the *jus ad bellum* provision in Article 2(4) of the UN Charter, as an example of a debated topic in the *jus ad bellum* field – see section 5 above. Plenty of issues in the UN Charter, and related customary rules, are extensively debated, including many of the *jus ad bellum* provisions, for instance terrorism and cyber threats in relation to the concept of armed attack.

When it comes to the Security Council adoption of border control measures, it is not the *jus ad bellum* provisions that come into play. Rather, it is the move of the Security Council towards generic regulation and deeper involvement in the internal governance structures of states, which is also one of the new and debated traits of the Security Council's work that have developed gradually after the end of the Cold War and the 9/11 attacks.³¹² The Security Council can be seen as replicating a strong state model, with effective security institutions.

The Council's adoption of measures requiring the strengthening of states' administration or governance structures based on Article 41, which deals with non-military measures, in the UN Charter have been of various characters. The inclusion of provisions requiring states to adopt border control measures in resolutions of a generic character are seen as based on Article 41, although commonly it is not stated explicitly in the resolution text. For instance, in UNSC Resolutions 1373(2001) and 1540(2004) there are only general references to Chapter VII.

When it comes to implementation of Article 41 on non-military enforcement measures, this normally lies with the member states, and,

S/RES/2482 (no explicit mentioning of being adopted under Chapter VII) para. 1 refers to linkages between international terrorism and organized crime, whether domestic or transnational, which constitute a serious challenge and a threat to international security and refers to border management and control in para 15.

³¹¹ eg Repertoire of the Practice of the Security Council Supplement 2000-2003 (n 306) 917, where it is stated that 'In a number of decisions, the Council recognized and expressed concern at a wide range of non-traditional threats that might constitute a threat to international peace and security, such as the deliberate targeting of civilian populations, including children, in armed conflicts; the widespread violations of international humanitarian and human rights law in situations of armed conflict; and the HIV/AIDS pandemic'; UNSC Res 2177 (18 September 2014) UN Doc S/RES/2177 addresses Ebola as a threat to international peace and security; UNSC Res 2178 (2014) (n 41) qualified the threat from ISIL/Da'esh as a 'global and unprecedented threat' to international peace and security.

³¹² Nico Krisch, 'General Framework' in Bruno Simma and others (eds) *The Charter of the United Nations: A Commentary vol. II., 3d ed* (Oxford University Press 2012) MN 36, 1243 MN

briefly stated, depends primarily on the will and capabilities of the member states. Measures under Article 41 bind a state under international law, but it depends on the legal system in the state in question whether they are directly applicable before domestic courts. Regarding certain types of measures adopted under Article 41, such as arms embargoes, it is not excluded that such non-military measures could be militarily enforced – that is up to the Security Council to take a stand on.³¹³

Regarding border controls, states' strengthening of them to a large extent depends on the capacity of the state in question. In order to facilitate and monitor the implementation of its measures, the Security Council has established an ever-growing administrative structure, for instance through the establishment of sub-committees.³¹⁴ However, in the field of border control there has not been any specific administration building. Rather, in the field of anti-terrorism measures, the UNSC CTC and CTED activities have mainly consisted of contributing to states' capacity building in various ways.³¹⁵ Later, the UN General Assembly has also taken the initiative of the establishment of a UN administration for the purpose of contributing to the fight against terrorism.³¹⁶

Having briefly clarified the UN Security Council's stand on 'new threats' subsumed under 'international security threats', I will now turn to the UN Security Council discourse on border security. In subsections 7.4-7.5 the Security Council discourse on this issue is explored and elaborated on. However, first, the treaty provisions on border control will be described in subsection 7.3.

7.3 Treaties

As mentioned, only a few global treaties contain obligations of border control measures. International anti-terrorism agreements have not mentioned border controls or measures. Similarly, treaties to control international drug trafficking make little reference to border controls.³¹⁷ None of what can be assessed as the three most important anti-drug trafficking treaties mention an obligation of border control.³¹⁸

³¹³ *ibid* 1326 MN 40

³¹⁴ *ibid*

³¹⁵ Luis Miguel Hinojosa Martínez, 'A Critical Assessment of the Implementation of Security Council Resolution 1373 (2014)' in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing 2014) 9. For an overview of the UN administration established to deal with terrorism through UNGA Res 71/291 UN Doc A/RES/71/291 (19 June 2017) see *inter alia* the UN website <<https://www.un.org/counterterrorism/about>> accessed 14 March 2021

³¹⁶ *ibid*

³¹⁷ Simmons (n 168) 14

³¹⁸ Single Convention on Narcotic Drugs of 1961 (as amended in 1972), the Convention on Psychotropic Substances of 1971, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The only formulations on border

However, when a (first) multilateral transnational crime treaty was negotiated in 2000, for the first time obligations regarding border control and management found their way into an international treaty. The UN Convention against Transnational Organized Crime³¹⁹ and the Protocols thereto provided the starting point for the combating of transnational organized crime. The Protocols include provisions on control of documents and border controls as well as on the collection, analysis and exchange of information at borders. The Convention's smuggling and human trafficking protocols require states to 'strengthen border controls as may be necessary to prevent trafficking and detect smuggling, including...denial or revocation of visas for protocol violators (..)' and to 'consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication'.³²⁰ These provisions are basically identical for both protocols. Also, the Protocol against Illicit Manufacturing of and Trafficking in Firearms contains provisions on border controls.³²¹

Article 2 in the anti-trafficking Protocol states that the purposes of the Protocol is to prevent and combat trafficking in persons, paying particular attention to women and children, to protect and assist the victims of such trafficking, with full respect for their human rights, and to promote cooperation among States Parties in order to meet those objectives. Article 2 in the anti-smuggling Protocol states that the purposes of the Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

As clarified above, no legal analysis will be made of these treaty provisions. For the purpose of this thesis it is only necessary to note, first, that the objectives of these provisions are to contribute to combatting transnational organized crime, preventing and combatting trafficking in persons and smuggling of migrants, and second, that references have been made to the two Protocols by the UN Security Council. As pointed out in

controls use non-binding language and refer to free trade zones and free ports, not borders generally, see United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art 18.2 (c); 'To establish and maintain surveillance systems in harbour and dock areas and at airports and border control points in free trade zones and free ports'.

³¹⁹ UN Convention against Transnational Organized Crime, 15 November 2000. It came into force on 29 September 2003.

³²⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (n 302); Protocol against the Smuggling of Migrants by Land, Sea and Air (n 302)

³²¹ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, arts 11, 31 May 2001. It came into force on 3 July 2005.

section 7.5 below, the Protocols on migrant smuggling and trafficking have been referred to in a Chapter VII resolution.³²²

7.4 UN Security Council discourse 1947-1996

In the Annual Reports 1947-1996 mentions of such words as terrorism, crime, smuggling and trafficking were initially non-existent or rare. If for instance terrorism was mentioned it generally referred to 'state terrorism'.

There are few early examples of mentions of border security in the debates regarding the various issues on the Security Council's agenda, and until at least around the end of the Cold War, the term is as a rule not included in resolutions. In this context it should be reminded that in the early years of the UN Security Council, resolutions adopted per year were much fewer and they were in general much shorter and not detailed.³²³ Four early examples of references to border security in debates are pointed to below.

First, in a debate in 1953 on the upholding of an Armistice Agreement between Israel and Jordan the Representative of Israel stated that:

[H]is Government proposed that senior political and military representatives of Israel and Jordan should meet at United Nations Headquarters without delay to discuss armistice problems, and especially the prevention of border incidents and the co-operation of the respective authorities in maintaining *border security*.³²⁴

It is clear from the statement and the context – the Israeli-Jordanian conflict – that border security refers to the prevention of border incidents that are perceived as provoked or carried out by states.

Second, in a debate in 1955 on an Armistice Agreement between Israel and Egypt the Representative of the U.S. stated that:

After the recent incidents, any further reluctance on the part of either party to give the Truce Supervision Organization an honest chance to prevent further disorder would be unthinkable and would call into question its whole attitude towards the problem of *border security* (...).³²⁵

³²² UNSC Res 2240 (9 October 2015) UN Doc S/RES/2240

³²³ Stanley Meisler, *United Nations: The First Fifty Years* (Atlantic Monthly Press 1995)

³²⁴ Report of the Security Council to the General Assembly Covering the period from 16 July 1953 to 15 July 1954 A/2712 (1954) 11 (emphasis added)

³²⁵ Report of the Security Council to the General Assembly Covering the period from 16 July 1954 to 15 July 1955 A/2935 (1955) 11 (emphasis added)

It is clear from the statement and the context – the Israeli-Egyptian conflict – that border security refers to the prevention of disorder that is perceived as provoked or carried out by states.

Third, in a debate in 1965 on the Israeli-Jordanian Armistice Agreement, the Representative of Israel informed the Council that:

Jordanian army posts had opened fire from the Old City across the armistice demarcation line into Israeli territory, and the casualties there had been two killed and four wounded, all of them civilians. There had been no firing from the Israel side. The attack aroused particular revulsion since it had taken place in the city of Jerusalem with its universal associations and its exceptionally sensitive *border security* problems.³²⁶

It is clear from the statement and the context – the upholding of the Israeli-Jordanian Armistice Agreement – that border security problems refer to the problems that are perceived as emanating from states.

Fourth, the Representative of the Syrian Arab Republic stated in a debate in 1973:

Thus Israel, having sabotaged the activity of the Security Council, was conducting a policy of obstruction designed to prevent any peaceful and just solution to the problem. Commenting on Israel's call for a return to the positions held before 6 October and for negotiations for an agreement on *secure borders* (..).³²⁷

In sum, references to border security or secure borders are, as mentioned, scarce in the debates, and there were none in the resolutions. With regard to the state representatives' statements referred to above the conclusion is that inter-state relations were in play, and that the stated aim was the securing of a border or border area from frontier incidents or localised violence perceived as emanating from states in an ongoing interstate conflict. Regarding these four statements the answer to the question security from whom/what, is 'other states, possibly including terrorism/terrorists'.

³²⁶ Report of the Security Council to the General Assembly Covering the period from 16 July 1964 to 15 July 1965 A/6002 (1965) 56 (emphasis added)

³²⁷ Report of the Security Council to the General Assembly Covering the period from 16 June 73 to 15 June 1974 A/9602 (1973) 13 (emphasis added)

7.5 UN Security Council resolutions 1997-2020

In this section documentation of the UN Security Council 1997-2020 is explored, with a focus on resolutions. Basically, I proceeded in the same way as described in section 7.1, and applied in section 7.4. I focused on looking for the term border security, references to secure border/borders or border controls. When analysing references to border security or secure borders the question 'security from whom/what' has been posed. When a reference to border control has been found, the aim has been to identify the objective of the border control in question. Below a number of the resolutions that contain references to border security, or references to secure border/borders or border controls, are listed and analysed. Also other significant words have been noted, such as border, territorial integrity, demarcation, war, non-state actor, terrorism, migration, crime, smuggling, trafficking. In this time period, 1997-2020, the use of these terms or words became frequent compared to the earlier period that was explored. However, before proceeding to the analysis it is necessary to make a few initial comments.

In this section it is relevant to refer to Simmons' and Schaffer's examination of states' official discourse above all in the yearly General Debates of the United Nations General Assembly (UNGA) during approximately the years 2005-2020 for the purpose of documenting states' growing concerns surrounding border issues.³²⁸ Simmons and Schaffer have detected swelling references to security concerns in relation to borders at the UN, especially in the past decade or so, which they interpret as concerns about non-state forces.³²⁹ Simmons contends that the last 15 years of debate in the UN has shifted from the legitimization of specific borders to their security, control and governance.³³⁰ Simmons and Schaffer state that the density of state-to-state words (such as 'demarcation', 'settlement', 'international', 'state', and 'war') remain high but are on the decline.³³¹ Mentions of 'terrorism', 'migration', 'crime', and 'smuggling/trafficking' are gaining rhetorical share.³³² They conclude that while interstate border threats appears to have decreased or not given the same amount of attention, challenges from a host of non-state agents and forces are believed to be on the rise.³³³ They assert that in sum, systematic discourse of states world-wide reveals increasingly frequent, localised and negative concerns

³²⁸ Simmons and Shaffer (n 126)

³²⁹ *ibid* 8

³³⁰ Simmons (n 168). Simmons and Shaffer (n 126) 5

³³¹ Simmons and Shaffer (n 126) 15

³³² *ibid*

³³³ *ibid* 36

about non-state actors around international borders.³³⁴ Simmons and Shaffer view this discourse as evidence of motivation for consequential decisions and choices such as unilateral actions of border hardening.³³⁵ They contend that the border concerns are reflected also in the activities of the UN Security Council and that the Council's business has recently been less concerned with 'legitimate borders'. Rather, the Security Council has increasingly obligated members states to secure, control and manage their borders in the name of international peace and security, under Chapter VII in the UN Charter.³³⁶ The findings on border security in this thesis gain support by these findings of Simmons and Schaffer.

Turning to my own exploration of the UN Security Council's decisions, mostly resolutions, but also to a certain extent presidential statements and debates, in the period 1997-2020, a first observation that should be pointed to right away since it is both well-known and crucial for the purposes of this text is the major shift in the UN Security Councils' views on terrorism and non-state actors after the 9/11 attacks. Due to this, the role of border control for the purpose of identifying and/or hindering the movement of terrorists across international borders gained importance. However, actual references in resolutions to border security have overall not been plentiful. On the other hand, in the rhetoric by the CTED the term border security is well established. As defined by the CTED in 2017, border security 'includes controls on the movement of people (immigration) and goods (customs) across borders, as well as prevention of unlawful interference in civil aviation, maritime navigation and international cargo movement'.³³⁷ For concrete examples of border security measures as seen by the CTED, see section 7.7. Knowingly no state has objected to the CTED use and definition of the term. States have referred to border security in debates in the UN Security Council, linking border controls to anti-terrorism measures, although such examples are not abundant. A few examples of statements in debates can be pointed to. In connection with the adoption of a presidential statement in 2020 state representatives referred to enhanced *border security*, secure borders and coordination in relation to border management as elements in the fight against terrorism.³³⁸ In the debate in connection

³³⁴ *ibid*

³³⁵ Beth A Simmons and Michael Kenwick, 'Border Orientation in a Globalizing World: Concept and Measurement' (Conference on International Borders in a Globalizing World, University of Pennsylvania, 2-3 May 2019) <https://msuconflictworkshop.github.io/assets/pdf/SIMMONS_KENWICK_latent_2.24.2019-1.pdf> accessed 15 March 2021

³³⁶ Simmons and Shaffer (n 126)

³³⁷ Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions (United Nations Security Council CTED 2017) 5

³³⁸ S/PRST/2020/5, Office for the Coordination of Humanitarian Affairs (OCHA) ReliefWeb website <<https://reliefweb.int/report/world/security-council-issues-presidential-statement-calling-greater-efforts-help-africa>> accessed 10 February 2021 (emphasis added)

with the adoption of UNSC Resolution 2370 in 2017 on preventing terrorists from acquiring weapons, the Russian Representative stated that ‘..strengthening *border security* in Syria and Iraq’s neighbours, because the information that we have shows that their border controls have been ineffective’.³³⁹ The statement connects, or equates, border security with borders controls. During the debate in connection with the adoption of UNSC Resolution 2457(2019), the Representative of Morocco stated that ‘[t]errorism and transnational organized crime are fresh threats that highlight the importance of the initiative and that require further cooperation for *border security*’.³⁴⁰ In sum, these statements highlight the importance of border security or border control in the context of combatting terrorism and transnational organised crime.

Turning to my further explorations, first, I found that if there were references to borders in resolutions on inter-state conflicts in the late 1990s, they (still) as a rule referred to the inviolability of borders (connected to sovereignty and territorial integrity), demarcation of borders, or localised violence in border regions due to inter-state conflict.³⁴¹ It is also relevant to note that the expression ‘non-state actor’ was hardly used at all until the end of the 1990s.³⁴²

As concerns further results, focusing on resolutions, for the sake of getting a better overview I have chosen to divide the found references to the term border security, or secure border/borders or border controls, into three categories or groups. I have chosen the following three categories for the listings below: 1) (subsection 7.5.1) UN Security Council resolutions adopted under Chapter VII that contain border control provisions, although they do not mention border security, 2) (subsection 7.5.2) UN Security Council resolutions not adopted under Chapter VII that contain references to

³³⁹ UNSC Res 2370 (2 August 2017) UN Doc S/RES/2370 Website of the Permanent Mission of the Russian Federation to the United Nations <https://russiaun.ru/en/news/sc_ter2> accessed 10 February 2021 (emphasis added)

³⁴⁰ UN Meetings Coverage and Press Releases website <<https://www.un.org/press/en/2019/sc13721.doc.htm>> accessed 10 February 2021 (emphasis added)

³⁴¹ eg UNSC Res 1138 (14 November 1997) UN Doc S/RES/1138 preambular para 4: ‘Reaffirming its commitment to the sovereignty and territorial integrity of the Republic of Tajikistan and to the inviolability of its borders’; UNSC Res 1124(31 July 1997) UN Doc S/RES/1124 para 4: ‘Reaffirms its commitment to the sovereignty and territorial integrity of Georgia, within its internationally recognized borders’; UNSC Res 1226 (29 January 1999) UN Doc S/RES/1226 preambular para 2: ‘the risk of armed conflict between Ethiopia and Eritrea and the escalating arms build-up along the common border between the two countries’, and para 5 on the border dispute between Ethiopia and Eritrea. UNSC Res 1304 (16 June 2000) UN Doc S/RES/1304 para 12: ‘(..) relating to the normalization of the security situation along the borders of the Democratic Republic of the Congo with its neighbours’; UNSC Res 1344 (15 March 2001) UN Doc S/RES/1344 para 3: ‘demarcation of the Ethiopia-Eritrea border’.

³⁴² One example of the use of the term is found in UNSC Res 1286 (19 January 2000) UN Doc S/RES/1286 para 6: ‘Condemns continuing violence perpetrated by all parties, and in particular by those non-State actors who refuse to participate in the Arusha peace process’.

border control, although they do not mention border security, and 3) (subsection 7.5.3) resolutions or presidential statements than mention border security or secure borders or similar. In the third grouping there are examples of resolutions adopted under Chapter VII that include references to border security.

7.5.1 UN Security Council resolutions adopted under Chapter VII that contain border control provisions

In this subsection I refer to UN Security Council resolutions adopted under Chapter VII that contain border control provisions, although they do not mention border security. As mentioned, there are Chapter VII resolutions with provisions of a generic character that are not limited to a particular geographic situation or temporally, and, therefore, can be considered as 'legislating' by the Security Council. The issue of Security Council 'legislating' is a debated and controversial issue, but as I have clarified above, I will not discuss that in any detail, only point to the 'strong' border control requirements in a number of resolutions of this character. For the sake of clarity, I have separated them under thematic headings below.

Terrorism

UN Security Council Chapter VII resolutions with generic elements that include border control provisions in the field of anti-terrorism encompass Resolutions 1373(2001)³⁴³ and 2178(2014)³⁴⁴.

Resolution 1373(2001) is perhaps the best known of these resolutions, since it was the first major resolution of a generic character. Paragraph 2 (g) in the resolution requires states to '[p]revent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents'. The provision speaks for itself.

In Resolution 2178(2014) paragraph 2 states: 'Reaffirms that all States shall prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents (...)'. The resolution was a follow-up resolution to Resolution 1373(2001). Paragraph 2 speaks for itself: effective border controls are to prevent the movement of terrorists or terrorist groups.

³⁴³ UNSC Res 1373(2001) (n 40) para 2 (g) requires states to 'Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents'.

³⁴⁴ UNSC Res 2178(2014) (n 41) para 2: 'Reaffirms that all States shall prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents (...)'.

In these examples of anti-terrorism resolutions – 1373(2001) and 2178(2014) – the aim of the control of the borders is to prevent the movement of terrorist non-state actors over international borders. The answer to the question ‘security from whom/what’ is the threat of terrorists/terrorism.

Proliferation of Weapons of Mass-Destruction (WMD)

In the field of non-proliferation, Resolution 1540(2004) is a Chapter VII resolution with generic elements which include a reference to border controls.³⁴⁵ There are several follow-up resolutions which reiterate requirements regarding border controls, such as 1673(2006)³⁴⁶, 1810(2008)³⁴⁷ and 1977(2011).³⁴⁸

Resolution 1540(2004) is aimed at preventing non-state actors from acquiring nuclear, biological, and chemical weapons, their means of delivery, and related materials. The resolution addresses the risk that terrorists might obtain, proliferate, or use WMD. Paragraph 3 (c) in Resolution 1540(2004) states:

Develop and maintain appropriate effective *border controls* and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law (..) (emphasis added)

As concerns control of borders Resolution 1540(2004) focuses on illicit trafficking of material. This is inextricably linked to the border control of individuals, and states refer also to measures regarding border control of individuals in their implementation of it.³⁴⁹ The overarching aim of the control of the borders in the Resolution is to detect, deter, prevent and combat the illicit trafficking in WMD, with the aim that terrorists do not obtain, proliferate, or use WMD. The answer to the question ‘security from whom/what’ is the threat of WMD.

³⁴⁵ UNSC Res 1540(2004) (n 40)

³⁴⁶ UNSC Res 1673(2006) (n 169) para 5 (c)

³⁴⁷ UNSC Res 1810 (25 April 2008) UN Doc S/RES/1810 para 10

³⁴⁸ UNSC Res 1977 (20 April 2011) UN Doc S/RES/1977 para 9

³⁴⁹ eg Report of China on implementation of United Nations Security Council resolution 1540(2004), Ministry of Foreign Affairs of the People's Republic of China website

<https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/jks_665232/kjfywj_665252/t196944.shtml> accessed 13 March 2021

Spread of small arms and light weapons (SALW)

In Resolution 2457 (2019) references to Chapter VII are included, although not in a standard formula.³⁵⁰ The resolution refers to ‘the illicit trade, destabilizing accumulation and misuse of small arms and light weapons in many regions of the world’ as a continued threat to international peace and security.³⁵¹ Border control is mentioned in two provisions: Preambular paragraph 5 refers enormous challenges in Africa, including ‘inadequate border monitoring and control that facilitates transnational organized crime’. Paragraph 6 ‘encourages enhancement of border control, management, and cooperation measures’.³⁵²

The overarching goal of the Resolution is to prevent the illicit trade, destabilizing accumulation and misuse of small arms and light weapons. Based on the context it can be assessed that ‘border control’ in the provisions in question concerns the control of individuals crossing borders – and probably also goods. The aim of the ‘border control’ is – at least – to contribute to the prevention of transnational organised crime, including illicit trade in SALW. The answer to the question ‘security from whom/what’ is the threat of transnational organised crime, including illicit trade in SALW.

Conclusion

In conclusion, these above-mentioned resolutions in the first grouping are examples in which border control provisions are found. The provisions envisage border control of individuals, in some cases probably also goods, crossing international borders. The border control provisions are intended to contribute to the prevention of terrorism/terrorists, the use of WMD by terrorists, and transnational organised crime, including illicit trade in SALW.

³⁵⁰ UNSC Res 2457 (2019) (n 309)

³⁵¹ Preambular para 7: ‘Gravely concerned that the illicit trade, destabilizing accumulation and misuse of small arms and light weapons in many regions of the world, including Africa, continue to pose threats to international peace and security, cause significant loss of life, contribute to instability and insecurity’

³⁵² Para 6: ‘Expresses concern over the challenging security situation in parts of Africa, notably threats posed by terrorism, maritime piracy, tensions between pastoralists and farmer communities, subversive mercenary activities, transnational organized crime, which can include illicit trafficking in persons, arms, drugs, and natural resources, and the persistent violence perpetrated by insurgents, rebel, and armed groups, and, in this regard, encourages enhancement of border control, management, and cooperation measures’.

7.5.2 UN Security Council resolutions not adopted under Chapter VII that contain references to border control

Turning to the second category – UN Security Council resolutions not adopted under Chapter VII that contain references to border control, although they do not mention border security – an example is Resolution 2482(2019).³⁵³ The resolution deals with linkages between international terrorism and organised crime, whether domestic or transnational. A goal – in paragraph 15 – is to ‘strengthen border management, including by increasing awareness, training and capacity of relevant practitioners in border control’.

The resolution refers to border control of individuals crossing international borders. The border control is intended to contribute to the prevention of terrorism and organised crime. The answer to the question ‘security from whom/what’ is the threat of terrorism and organised crime.

7.5.3 UN Security Council resolutions or presidential statements that mention border security or secure borders

Regarding the third grouping, resolutions or presidential statements that mention border security or secure borders, or similar, including resolutions adopted under Chapter VII, a list follows below. For the sake of clarity, the documents are separated under thematic headings. The documents are listed and analysed in chronological order under each thematic heading.

Terrorism

Resolution 1624 (2005) (not adopted under Chapter VII) mentions the security of states’ international borders in the context of terrorism.³⁵⁴

In PRST/2015/24 border security is mentioned in the context of efforts made *inter alia* for the purpose of combatting terrorism.³⁵⁵

In PRST/2017/2 on West-Africa and Sahel, border security relates to anti-terrorism measures.³⁵⁶

³⁵³ UNSC Res 2482(2019) (n 310)

³⁵⁴ UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624 para 1: ‘Calls upon all States to cooperate, *inter alia*, to strengthen the security of their international borders, including by combating fraudulent travel documents and, to the extent attainable, by enhancing terrorist screening and passenger security procedures with a view to preventing those guilty of the conduct in paragraph 1 (a) from entering their territory’.

³⁵⁵ S/PRST/2015/24 para 4: ‘(..) combat in a comprehensive and integrated manner the activities of terrorist groups, and to prevent the expansion of those groups as well as to limit the proliferation of all arms and transnational organized crime’.

³⁵⁶ S/PRST/2017/2 para 14: ‘(..) through the United Nations Office for West Africa and the Sahel to strengthen subregional and regional cooperation to address cross-border security threats and prevent the spread of terrorism (..)’, and para 16: ‘The Council commends the efforts of the African Union and the Economic Community of West African States, as well as of

The subject of Resolution 2368(2017)³⁵⁷ (adopted under Chapter VII), and (2370)2017³⁵⁸ (not adopted under Chapter VII) is the threat from ISIL/Da'esh, Al-Qaida – border security in these resolutions refer to anti-terrorism measures.

In Resolution 2395(2017) (not adopted under Chapter VII) with a renewed mandate of the CTED, border security is included.³⁵⁹ CTED is, as mentioned, an expert body within the field of terrorism.

Resolution 2396 (2017) (adopted under Chapter VII) contains six references to border security, underling *inter alia* the importance of strengthening international cooperation to address the threat posed by foreign terrorist fighters, including on border security.³⁶⁰

In PRST/2020/5 border security is related to the increasing threat posed to peace and security in Africa by terrorism.³⁶¹

Based on an analysis of the context in these anti-terrorism resolutions and presidential statements, border security, or secure borders, refer to individuals crossing international borders. 'Border security' is intended to prevent terrorist non-state actors to cross such borders. The answer to the question 'security from whom/what' is 'terrorists/terrorism'.

Spread of small arms and light weapons (SALW)

The border security references in Resolution 2220 (2015) (not adopted under Chapter VII) concern the illicit transfer, destabilising accumulation

Member States in West Africa and the Sahel, to strengthen border security and regional cooperation ..'.

³⁵⁷ UNSC Res 2368(2017) (n 307) preambular para 14: 'Urging all States, including States where ISIL is present, to prevent any trade, economic, and financial ties with ISIL, Al-Qaida, and associated individuals, groups, undertakings, and entities, including through enhancing their border security efforts'.

³⁵⁸ UNSC Res 2370(2017) (n 339) preambular para 18: 'Urging all States, including States where ISIL is present, to prevent any trade, economic and financial ties with ISIL (also known as Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities, including through enhancing their border security efforts'. In the debate in connection with the adoption of Res 2370(2017), border security is referred to by some. The Russian Representative (p 11) states ' (...) strengthening border security in Syria and Iraq's neighbours, because the information that we have shows that their border controls have been ineffective'.

³⁵⁹ UNSC Res 2395 (21 December 2017) UN Doc S/RES/2395 preambular para 25: 'Noting the work of the GCTF, in support of the balanced implementation of the GCTS, in particular its publication of several framework documents and good practices, including in the areas of countering violent extremism as conducive to terrorism, border security'.

³⁶⁰ Res 2396(2017) (n 9) preambular para 17: 'Underlining the importance of strengthening international cooperation to address the threat posed by foreign terrorist fighters, including on information sharing, border security (...)'.

³⁶¹ S/PRST/2020/5 para 19: '(...) detecting terrorist and other serious crimes through the use of travel information and international databases, sharing good practices on border security and management'.

and misuse of small arms and light weapons,³⁶² i.e. the main focus is certain goods transferred over borders. Preambular paragraphs 15 and 16, as well as paragraphs 1, 4 and 13, refer to borders or border security.

Based on an analysis of the context, border security refers to individuals and goods crossing international borders. The answer to the question 'security from whom/what' is 'security from illicit transfer, destabilising accumulation and misuse of small arms and light weapons'.

Migrant smuggling and human trafficking

Resolution 2240(2015)³⁶³ was adopted under Chapter VII in 2015 in connection with the situation in Libya. It was the first resolution condemning migrant smuggling and human trafficking. Migration in general has not been assessed as a threat to security by the Security Council, but for instance in Resolution 1529(2004) on Haiti the Security Council assessed mass flows of human beings as threatening to international peace and security.³⁶⁴ Resolution 2240(2015) condemned migrant smuggling and human trafficking into, through and from the Libyan territory and off the coast of Libya. The Resolution does not state explicitly that migrant smuggling and human trafficking are threats to international peace and security – as mentioned, a phrase otherwise commonly included – but in preambular paragraph 12 it refers to the maintenance of international peace and security. It has been interpreted by some as labelling migrant smuggling and human trafficking a threat to international peace and security.³⁶⁵ In the Resolution there are references both to the border security policies of member states³⁶⁶ and of Libya.³⁶⁷ The Resolution was not adopted unanimously – Venezuela abstained. Venezuela explained its abstention by stating *inter alia* that the possibility of applying the Charter's Chapter VII to a humanitarian situation was a 'serious mistake'.³⁶⁸ Follow-up resolutions to

³⁶² Res 2220 (2015) (n 309) preambular paras 15 and 16, and paras 1, 4 and 13, refer to borders or border security.

³⁶³ UNSC Res 2240 (2015) (n 322)

³⁶⁴ UNSC Res 1529 (29 February 2004) UN Doc S/RES/1529

³⁶⁵ Thomas Dayer, 'The use of force in interception of vessels with respect to smuggling offenses. UNSC Resolution 2240 (2015), the imprint of a new paradigm' (Lancaster University 2017)

³⁶⁶ Preambular para 8: 'stressing also the obligation of States, where applicable, to protect the human rights of migrants regardless of their migration status, including when implementing their specific migration and border security policies'.

³⁶⁷ Para 2: 'Calls on Member States acting nationally or through regional organisations, including the EU, to assist Libya, upon request, in building needed capacity including to secure its borders and to prevent, investigate and prosecute acts of smuggling of migrants and human trafficking through its territory and in its territorial sea'.

³⁶⁸ UN Meetings Coverage and Press Releases website (n 340)

<<https://www.un.org/press/en/2015/sc12072.doc.htm>> accessed 10 March 2021

Resolution 2240(2019), also mentioning border security, have been adopted.³⁶⁹

Based on an analysis of the context in these resolutions, border security, or secure borders, concern individuals crossing international borders. The aim of the 'border security' is to prevent migrant smuggling and human trafficking. The answer to the question 'security from whom/what' is 'security from migrant smuggling and human trafficking'.

Joint Border Commission (JBC) of the Republic of South Sudan and the Republic of Sudan

Resolution 2352(2017) (not adopted under Chapter VII), which extends the mandate of the United Nations Interim Security Force for Abyei (UNISFA), mentions border security.³⁷⁰ The references to border security are made in the context of tasks of the Joint Border Commission (JBC) of the Republic of South Sudan and the Republic of Sudan, which is involved in the demarcation of the boundary between the Republic of South Sudan and the Republic of Sudan.³⁷¹ The Joint Border Commission and Joint Demarcation Committee are established *inter alia* to enable dialogue and coordination on matters of border security (preambular paragraph 5). Seemingly references to 'border security' signifies efforts to establish secure border regions.³⁷²

Based on an analysis of the context, border security refers to an inter-state relationship. The term border security seemingly refers to the establishment and upholding of the security of border regions in inter-state relations. In this case, the answer to the question 'security from whom/what' is 'other states'.

³⁶⁹ UNSC Res 2312 (6 October 2016) UN Doc S/RES/2312 (under Chapter VII) para 2: 'Reiterates its calls on Member States acting nationally or through regional organizations, including the EU, to cooperate with the Government of National Accord and with each other, including by sharing information to assist Libya, upon request, in building needed capacity including to *secure its borders*' (emphasis added); UNSC Res 2380 (5 October 2017) UN Doc S/RES/2380 preambular para 9: 'stressing also the obligation of States, where applicable, to protect the human rights of migrants regardless of their migration status, including when implementing their specific migration and border security policies'.

³⁷⁰ UNSC Res 2352 (15 May 2017) UN Doc S/RES/2352 (reference to Chapter VII in para 1) preambular para 4: 'Encouraging progress on improving bilateral relations between the Sudan and South Sudan, and stressing the need for regular meetings of the Joint Political and Security Mechanism and other joint mechanisms, including the Joint Border Commission and Joint Demarcation Committee, to enable dialogue and coordination on matters of border security'.

³⁷¹ African Union Press Release, 'Sudan and South Sudan Conclude the Third Meeting of Their Joint Border Commission' (2015) <<https://www.peaceau.org/uploads/auc-comm-sudan-south-sudan-aubp-20-03-15.pdf>> accessed 12 March 2021

³⁷² Foreign Brief Geopolitical Risk Analysis, *Sudan-South Sudan Boundary Demarcation Commission to meet* (2020) <<https://www.foreignbrief.com/daily-news/sudan-south-sudan-boundary-demarcation-commission-to-meet/>> accessed 15 March 2021

Conclusion

In the above third grouping there are resolutions adopted under Chapter VII, as well as resolutions not adopted under Chapter VII, that contain border security provisions. The border security provisions envisage border control of individuals, in some cases probably also goods, crossing international borders. The border security provisions are intended to contribute to the prevention of terrorists/terrorism, and illicit transfer, destabilising accumulation and misuse of small arms and light weapons. Furthermore, there are examples of border security provisions in resolutions that are intended to prevent migrant smuggling and human trafficking.

However, there is also one exception – Resolution 2352(2017) – to the conclusion that border security refers to individuals crossing international borders, see further below under section 7.6.

7.6 Concluding analysis

My hypothesis presented in section 2.2 was that the UN Security Council's concept of border security of today concerns control of individuals crossing international borders. It has been confirmed by the empirical explorations of UN Security Council documents that the concept of border security has been reconceptualised from a broader and more vague concept, mostly concerning localised violence in border regions emanating from inter-state conflict, as applied by the UN Security Council. Based on the empirical findings, I suggest that *as a main rule* (my emphasis) today it is a more specific concept entailing control of individuals crossing international borders. As mentioned, the CTED interprets the concept along these lines, and as far as is known no states have objected to that. However, I use the expression 'as a main rule', since an exception to this conclusion was found. As seen above, the exception was identified in Resolution 2352(2017) (not adopted under Chapter VII), where references to border security seemingly signify efforts to establish secure border regions in inter-state relations.

The earlier approach, which started to change gradually around the end of the Cold War and in particular after 9/11, can be illustrated as under A) in Table 2 below. The later approach, following after A), can be illustrated as under B) in Table 2 below, in line with the interpretation of the CTED. Table 2 builds on a table – which, however, does not include border security – created by Brauch 2008³⁷³ with reference *inter alia* to Møller 2001³⁷⁴ and Oswald 2001³⁷⁵.

The empirical findings regarding the objectives of border security or border controls are illustrated in Table 2. All empirically identified sources

³⁷³ Brauch (n 96) 29

³⁷⁴ Møller (n 118)





³⁷⁵ Oswald Spring (n 186)

of threats are included under the heading 'Security from whom/what'. The state' is per definition a referent object in the context of international security. For the state, the values at risk in 2.A are 'sovereignty and 'territorial integrity', as mentioned in section 2.3 Further delimitations.

In Table 2.B below 'the state' and 'individuals' are used as reference objects, answering the question security of whom. 'Individuals' are necessarily reference objects in relation to the mentioned sources of threat in 2.B. For individuals the values at risk are 'survival' and 'quality of life'. These choices have been made based on the reasoning in section 4 on Theoretical perspectives on security.

7.6.1 Table 2

Concept of security	Reference object (security of whom?)	Value at risk (security of what?)	Perception of source(s) of threat (security from whom/ what?)
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A) Border security (military dimension)	The state	Sovereignty, Territorial integrity	Other states: Use of force, Terrorism
			
B) Border security (mainly law enforcement)	The state	Sovereignty, Territorial integrity	Non-state actors and/or goods: Terrorism, Proliferation of Weapons of Mass Destruction (WMD), Transnational crime, The illicit transfer, destabilizing accumulation and misuse of small arms and light weapons (SALW), Migrant smuggling, Human trafficking
	Individuals	Survival, Quality of life	

Thus, the conclusion is that the UN Security Council border security or border control measures are aimed at contributing to countering threats

from non-state actors and/or goods in the context of (at least) terrorism, proliferation of Weapons of Mass Destruction (WMD), transnational crime, the illicit transfer, destabilising accumulation and misuse of small arms and light weapons (SALW), migrant smuggling and human trafficking. In this analysis border security is a dimension of international security.

No references to illegal migration as such constituting a challenge or threat for international security have been found, although, as mentioned, mass flows of human beings have been referred to as threatening international peace and security. However, 'in real life' border control measures established by states under the requirements in Resolutions 1373(2001) and 1540(2004) will affect individuals crossing borders in general, despite the narrow focus of them in the resolutions in question.

7.7 Border security as seen by the Counter-Terrorism Committee Executive Directorate (CTED)

Finally, it is appropriate to describe concrete measures that have been seen as part of states' enhanced border security in compliance with requirements in UN Security Council resolutions according to the CTED. CTED has emphasised *inter alia* that the 'border-security-related obligations set forth in Resolution 1373 (2001) require action in a number of areas, including immigration and customs control and aviation, maritime and cargo security'.³⁷⁶ According to an assessment of states' progress in 2015, states have taken steps to strengthen border security including passport confiscation, the introduction of a requirement for transit visas, and more effective use of the databases of the International Criminal Police Organization (Interpol) to screen for potential Foreign Terrorist Fighters (FTFs). Some states have extended access to the Interpol I-24/7 secure communications network beyond their national central bureaus to other relevant border authorities, such as immigration at the frontline, and increased the use of the Interpol database on stolen and lost travel documents; more States are also populating the Interpol database of suspected FTFs. CTED highlights that important tools in enhancing border security are Advance Passenger Information (API) and Passenger Name Records (PNR). In its simplest form, API is an electronic communications system that collects biographical passenger data and basic flight details from airline carriers and transmits the data to border security authorities in the destination country prior to the flight's arrival.³⁷⁷

³⁷⁶ CTED technical guide (n 337) 5

³⁷⁷ CTED Fact sheet

<https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/cted_factsheets_jan_2022.pdf> accessed 15 January 2022

8. EU member states' continued influence over EU border control or border security from a security perspective: possibilities to derogate from legal obligations for security reasons

8.1 Introduction

As stated above, the EU 'border control system' or 'border security system' is often referred to as the most advanced regional 'border system' in the world. The third research question concerns how this system functions from a security perspective, with the overarching aim to assess to which extent member states can continue to influence border control in the EU from a legal perspective.

In an examination of how member states continue to influence border control rules from a security perspective it is relevant to explore under which circumstances a member state can refer to security reasons for derogating from the main rule concerning 'border provisions'. A bid will be made to discern if there is such a space and, if so, what that encompasses, using the sources referred to in section 2.1 on Methods and materials, such as EU primary and secondary legislation, CJEU case law and opinions of legal scholars.

Above all the specific provisions in the Schengen Borders Code³⁷⁸ are of interest, but it is necessary to describe also other parts of the security systems and 'security exceptions' at treaty level, not only the explicit exceptions included in the secondary legislation of the Schengen Borders Code.³⁷⁹ From the perspective of member states, a crucial part of the EU border control system is that there are certain 'safety valves' for states. There are provisions both in primary and secondary EU law that allow member states to invoke security reasons to derogate from their legal obligations, also within the AFSJ, which I will explain further below. The system as a whole is quite complex, encompassing security exceptions at treaty level and in many pieces of secondary legislation, with the CJEU as the final arbiter.

It should be clarified that when possible 'security exceptions' are referred to below, this means possible exceptions to the supremacy of EU law in the sense that member states are allowed to derogate from the main rules in EU law to protect security interests. In sections 8.2-8.5 I examine the security exceptions at treaty level and in the Schengen Borders Code.

³⁷⁸ Schengen Borders Code (n 47)

³⁷⁹ *ibid*

Below, first, it is necessary to describe the concept public security in EU law. Second, Article 4(2) TEU, which is of an overarching character when it comes to security exceptions, will be examined. Third, the AFSJ security exception in Article 72 TFEU is described. Fourth, security exceptions in secondary legislation, in the Schengen Borders Code, will be explored. Finally, concluding comments are made.

8.2 Public security

This section on ‘public security’ – closely associated with what is traditionally understood as the core of national sovereignty – is included since it is a classical notion in the EU and since a common characteristic reappearing in CJEU cases is that decisions often combine both public policy and public security arguments while differences of these two exceptions are not always delineated.³⁸⁰ Public policy is a notion that appears in a number of provisions in the Schengen Borders Code.

The background is that a public security exception was incorporated in the founding treaties at the outset of EU integration. Security exceptions have since been inserted into several provisions of EU law and interpreted by the CJEU. There are also many of them in EU external agreements. However, the CJEU has clarified that there is no inherent general exception from the full application of EU law based on public security and that any justification on public security grounds must strictly rest on an individual legal basis.³⁸¹

Neither the EU primary nor secondary law gives any definition of what is understood by public security in the EU law. The concept and conditions for its application are shaped mostly in the case-law of the CJEU. The term ‘public security’ can be seen as rather narrowly defined and refers to reasons ‘of fundamental importance for a country’s existence’ on which ‘not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend’.³⁸² The CJEU has concluded that public security covers both a member state’s internal security and its

³⁸⁰ Panos Koutrakos, ‘Public Security Exceptions and EU Free Movement Law’ in Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis (eds) *Exceptions from EU Free Movement Law* (Hart Publishing Limited 2016) 190

³⁸¹ Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] EU:C:1986:206, para 26; Václav Stehlík, ‘Discretion of Member States Vis-à-vis Public Security: Unveiling the Labyrinth of EU Migration Rules’ (2017) 17 *International and Comparative Law Review* 127, 12; Václav Stehlík, ‘Metamorphosis of Public Security Exception in the EU Internal Market and EU Citizens’ Rights’ in Agnieszka Bień-Kacała, Lóránt Csink, Tomasz Milej, Maciej Serowaniec (eds) *Liberal constitutionalism - between individual and collective interests* (Nicolaus Copernicus University 2017) 237

³⁸² Case C-72/83 *Campus Oil Limited and others v Minister for Industry and Energy and others* [1984] EU:C:1984:256, 34

external security.³⁸³ The CJEU jurisprudence makes it clear that exceptions to the fundamental freedoms must be construed narrowly.³⁸⁴ The tests that apply in each policy area largely follow the same logic, but are context-specific in character.³⁸⁵

If a member state wants to invoke the public security exception it has the burden of proof, meaning the member state has to provide concrete evidence of the substantive argument made for a deviation from EU law.³⁸⁶

8.3 The national security exception in Article 4(2) TEU

It is necessary to briefly describe the content of Article 4(2) TEU, since it is of an overarching character. At first sight Article 4 (2) TEU appears to be the basic rule of the Treaties governing national security. Article 4(2) TEU states; ‘... It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security (...).’ The clause is an extension of the identity clause which was for the first time inserted into primary law by the Treaty of Maastricht, which was signed in 1992. Its second sentence goes back to the 2004 Treaty establishing a Constitution for Europe, which did not enter into force, but was taken up by the Treaty of Lisbon (2009). The third sentence, however, was agreed in the course of the negotiations to the Lisbon Treaty in order to prevent extensive EU policies in case of a terrorist attack based on Article 67 TFEU, in spite of the fact that Article 72 TFEU already governs the matter.³⁸⁷

A prevailing understanding of Article 4 (2) TEU is that this provision does not set an absolute limit but is subject to a balancing out of conflicting interests, and that its function in relation to the numerous public order and security clauses in primary and secondary EU law is of a supplementary nature.³⁸⁸

Article 4(2) contains two obligations of the EU that are of interest here; the duties to respect the national identities and to respect the essential functions of the member states. The national security clause in the third sentence reinforces the latter guarantee. The terms of the second and third

³⁸³ Case C-367/89 *Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC* [1991] EU:C:1991:376, 22

³⁸⁴ Stefan Kadelbach, ‘The Law of the European Union and National Security Exceptions of Member States: Legal expertise presented to the Ministry of Justice of the Republic of Estonia’ (Goethe-Universität 2018) 15

³⁸⁵ *ibid* 5

³⁸⁶ Kristina Irion, *Public Security Exception in the Area of non-personal Data in the European Union* (European Parliament, the IMCO committee Institute for Information Law, University of Amsterdam 2018) 4

³⁸⁷ Walter Obwexer, ‘Artikel 4 EUV’, in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (Nomos 2015) para 42

³⁸⁸ Kadelbach (n 384) 5; Iain Cameron (n 218) 452

sentences of Article 4 (2) TEU have not been applied so far by the CJEU, so their interpretation can to date only be tentative.³⁸⁹

8.4 The Area of Freedom, Security and Justice (AFSJ) security exception in Article 72 TFEU

The 'security exception' specifically within the AFSJ, Article 72 TFEU, is of importance in a 'border rules' context, since border controls are part of the AFSJ area. In this context it is of interest to mention that some scholars hold that Article 72 TFEU can be referred to as a justification to introduce internal border controls in exceptional cases even if the requirements of the Schengen Borders Code for a suspension of free movement are not met, provided that the circumstances are of exceptional urgency and the measures remain proportional and temporary.³⁹⁰ However, that is seemingly not a very likely scenario.

Article 72 TFEU states that title V TFEU 'shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. The concept of security is restricted to internal security, that is to the matters of justice and home affairs regulated in Title V TFEU. Consequently it is narrower than the term 'national security' in Article 4 (2) TEU.³⁹¹ Historically, above all, Article 72 TFEU aims at preserving the executive and operational powers of the state, but also captures functions of the state that are essential.³⁹² The CJEU reached the conclusion in Case 9/16³⁹³ that *inter alia* the wording of Article 72 TFEU confirm that the abolition of internal border controls has not affected the responsibilities of the member states with regard to the maintenance of law and order and the safeguarding of internal security.

In the context of security exceptions, Article 347 TFEU should also be mentioned. On the face of it, Article 347 TFEU primarily sets out a procedural duty of a member state to consult in cases in which national security is threatened. However, it is common understanding that the provision also encompasses a ground of justification for measures of the member states.³⁹⁴ This follows from the wording 'measures which a Member

³⁸⁹ Kadelbach (n 384) 23

³⁹⁰ With regard to the previous version of the Schengen Borders Code: Stephan Breitenmoser and Robert Weyeneth, 'Artikel 72 AEUV' in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds) *Europäisches Unionsrecht* (Nomos 2015) para 20

³⁹¹ Kadelbach (n 384) 17

³⁹² *ibid*; Reinhard Priebe, 'Innere Sicherheit – eine europäische Aufgabe?' in Ulrich Becker and others (eds) *Verfassung und Verwaltung in Europa – Festschrift für Jürgen Schwarze* (Nomos 2014) 394, 399

³⁹³ Case C-9/16 *A v Staatsanwaltschaft Offenburg* [2017] EU:C:2017:483, para 50

³⁹⁴ Kadelbach (n 384) 26

State may be called upon to take', which trigger the need to take 'steps needed to prevent the functioning of the internal market'. Like Articles 4(2) TFEU and Article 72 TFEU, Article 347 TFEU does not describe an absolute exception of sovereignty, but is construed in a relative sense. Article 347 TFEU refers to three types of situation, 'the event of serious internal disturbances affecting the maintenance of law and order', 'war, serious international tension constituting a threat of war', and obligations accepted by a Member State 'for the purpose of maintaining peace and international security'.

8.5 Security exceptions in secondary legislation; Schengen Borders Code

The central issue here is whether, and when, it is possible for member states to refer to security concerns as a reason for derogating from the provisions in the Schengen Borders Code. As mentioned above in subsection 6.61, there are also other EU legal acts that are relevant for the entry of third country national into the territory of the EU. At least some of these legal acts also contain security exceptions. Acts that can be mentioned as examples in that context are the SIS II Regulation³⁹⁵ and the Family Reunification Directive.³⁹⁶ However, in this section the focus is on the core legal act, the Schengen Borders Code, which contains definitions of core legal border terms.

In the current 2016 Schengen Borders Code there are a number of references to 'security exceptions' related to internal security in combination with public policy.³⁹⁷ National security is not mentioned in the Code. The 1990 Schengen Convention provided for the abolition of border controls but allowed member states to maintain checks on their internal borders on 'public policy' or 'national security' grounds.³⁹⁸

First of all, it is necessary to refer to the CJEU stance regarding security exceptions in relation to the internal market. I have chosen cases of the Court in the field of the free movement of goods to exemplify the Court's approach. The public security exception in relation to the free movement of goods is found in Article 36 TFEU. The CJEU has interpreted it in several decisions, the first time in *Campus Oil*.³⁹⁹ A later judgement is the one in

³⁹⁵ Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) OJ L381/4

³⁹⁶ Council Directive (n 252)

³⁹⁷ Schengen Borders Code (n 47), in which arts 5, 6, 8, 25, 26, 27, 28, 29, and 30 refer to public policy or internal security. There is also a reference to public security in art 23 in the Code, giving some leeway for police measures in border areas when the measures are based on 'general police information and experience' regarding possible threats to public security.

³⁹⁸ art 2.1

³⁹⁹ *Campus Oil* (n 382)

Commission v Greece,⁴⁰⁰ which could be interpreted as suggesting that the outcome of *Campus Oil* does not provide member states with a *carte blanche* when they claim that public security entails a deviation from EU law.⁴⁰¹ Concretely, however, a conclusion that could be drawn is that public security includes at least the safeguarding of state's institutions, essential public services and survival of its inhabitants.⁴⁰² An overarching conclusion of the Court's approach in case law in this field is that exceptions to the fundamental freedoms must be construed narrowly, and public security or internal security may be invoked by member states only in cases of serious threats to the society. Importantly, the tests that apply are context-specific in character.⁴⁰³ It should also be kept in mind that the measures taken must always be proportionate, according to settled CJEU case law. Crucial points for the purpose of this text are, first, that the context-specific approach makes it difficult to draw definite conclusions if one aims at finding core functions that fall under member states' sovereignty, and second, that exceptions to the fundamental freedoms must be construed narrowly.

Turning to the AFSJ area, and in particular the Schengen Borders Code, it is relevant to exemplify how an internal security exception in the Code has been viewed by the Court based on recent cases concerning Article 6 of the Code, *inter alia* since Article 6 is a core article governing the entry conditions for third-country nationals.⁴⁰⁴ In two cases from December 2019, *E.P.*⁴⁰⁵ and *G.S. & V.G.*⁴⁰⁶, the Court confirmed its approach taken in *Koushkaki*⁴⁰⁷ and *Fahimian*⁴⁰⁸, ruling that the specific legislative context is key for determining the margins for administrative discretion.⁴⁰⁹ By virtue of Schengen law, national administrations are accorded a wider margin of discretion to decide whether a third-country national poses a threat to public security. However, as mentioned, the principle of proportionality invariably comes into play, according to settled case law. A number of observations can be made when probing the Court's reasoning. For instance, although the Court

⁴⁰⁰ Case C-398/98 *Commission of the European Communities v Hellenic Republic* [2011] EU:C:2001:565

⁴⁰¹ *Campus Oil* (n 382); *Koutrakos* (n 380)

⁴⁰² *Stehlík* (n 381) 216

⁴⁰³ *Kadelbach* (n 384) 5

⁴⁰⁴ The provision in 6 e): 'they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States'.

⁴⁰⁵ Case C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* [2019] EU:C:2019:1071

⁴⁰⁶ Joined Cases C-381/18 and C-382/18 *G.S. and V.G. v Staatssecretaris van Justitie en Veiligheid* [2019] EU:C:2019:1072

⁴⁰⁷ Case C-84/12 *Ezatollah Rahmanian Koushkaki v Federal Republic of Germany* [2013] EU:C:2013:862

⁴⁰⁸ Case C-544/15 *Sahar Fahimian v Bundesrepublik Deutschland* [2017] EU:C:2017:255

⁴⁰⁹ Jonas Bornemann, 'Threats to public security in EU immigration law: Finding the right discretion' (European Law Blog, 6 January 2020) <<https://europeanlawblog.eu/2020/01/06/threats-to-public-security-in-eu-immigration-law-finding-the-right-discretion/>> accessed 15 March 2021

can be said to award a wide margin of discretion to administrative authorities if they carry out complex assessments, it seems that the Court would still apply a stricter standard and require that the individual in question must represent a genuine, present and sufficiently serious threat, affecting a fundamental interest of society to be considered as a threat to public security, if the consequences are severe for the applicant.⁴¹⁰ In such cases the standard from the internal market context is seemingly upheld.⁴¹¹ This will not be explored any further, since the main point that is necessary to highlight here is the highly contextual approach.

Having exemplified how the Court has viewed the application of the 'security exception' and the recourse to a member state's internal security in a provision in the Schengen Borders Code, it is appropriate to also briefly point to another field in the Code where member states invoke internal security to a large degree, namely the reinstatement of internal border controls. This is allowed under the Schengen Borders Code through a quite complex system of provisions, in which core provisions are found in arts. 25-30.

During two major crises member states have reintroduced internal border controls with references to security concerns: the 2015 migration crisis and the COVID-19 crisis in spring 2020. There have also been reinstated internal border controls during other time periods and for other reasons, such as terrorist attacks in member states.⁴¹² For instance, several terrorist attacks led France to introduce and carry out border controls at all its internal borders since November 2015.⁴¹³ It should also be pointed out that there has been criticism towards the presumed absence of internal border control in between major crises, according to which the borders between Schengen states have never been as 'open' as they were pictured to be and member states continue 'with other means' to carry out immigration and crime control measures.⁴¹⁴ In that regard member states can rely on, or attempt to rely on, Article 23 of the Code, according to which the exercise of police powers by the competent authorities of the member state is allowed insofar as the exercise of those powers does not have an effect equivalent to border checks.

⁴¹⁰ *ibid*; eg Case C-601/15 *PPU J. N. v Staatssecretaris van Veiligheid en Justitie* [2016] EU:C:2016:84

⁴¹¹ Bornemann (n 409)

⁴¹² COM proposal 570 (n 266) 4: The Commission pointed out that there had been terrorist attacks 2015-17 in seven member states; Belgium, Denmark, Finland, France, Germany, Spain, Sweden and the United Kingdom.

⁴¹³ *ibid*

⁴¹⁴ Maartje van der Woude, 'The Patchwork that is Schengen' (Border Criminologies blog, 3 Apr 2020) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/04/patchwork>> accessed 15 March 2021

Thalmann has explored the response to the 2015 migration crisis: the reinstating of the internal border controls, in the context of the Schengen rules.⁴¹⁵ He assesses that such a response to a serious threat to public policy or internal security may be valid under EU law, but he opines that the re-establishment of border controls within the Schengen Area, effectively partially suspending them, may be perceived as a resurrection of the essentially state-centred 'Westphalian culture of border control' and even understood as a resurrection of the Westphalian territorial (or nation) state as such.⁴¹⁶ In 2015, initially, most member states used the Schengen Borders Code Article 28 (cases requiring immediate action), later Articles 25-27 (foreseeable cases), Articles 29-30 (the overall functioning of the area without internal border is put at risk), and then again Articles 25-27 (foreseeable cases).

The measures introduced by member states during the corona pandemic in spring 2020 can be summarised as follows. By the end of March 2020, 16 EU Member States had reintroduced internal border controls in the name of COVID-19. In August 2020 five Schengen countries continued to apply these controls.⁴¹⁷ Most EU Member States continued to apply a conglomerate of restrictive travel measures that apply prior to and/or after entry throughout 2020. A handful of EU Member States applied intra-EU travel bans (Hungary, Cyprus, Denmark and Finland), which are not formally foreseen or permitted by the Schengen Borders Code. These ranged from a total prohibition of entry for certain persons, to what can be called 'conditioned or qualified entry'. There was also an EU entry ban for extra-Schengen travel. Criticism towards member states' measures include the contention that by extending the originally envisaged time period, through the use of different legal bases of the Schengen Borders Code, member states have made temporary internal border checks quasi-permanent. Member states have made 'expansionist use of the notions of public policy and internal security as grounds to justify the reintroduction of internal border controls and travel restrictions'.⁴¹⁸ Furthermore, an intra-EU travel ban is clearly unlawful under EU law. The idea of a ban runs contrary to the obligation by EU Schengen countries to carry out an individualised assessment.

Regarding the external travel ban, there was political agreement on it, but until October 2020 there was no legally binding legislative act or executive regulation underlying the ban, which, instead, seemingly emanated from the

⁴¹⁵ Peter Thalmann, 'Schengen, Migration – and the Resurrection of the Westphalian Nation-State?' in Clara Rauchegger and Anna Wallerman (eds) *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law* (Hart Publishing 2019) 109, 111

⁴¹⁶ *ibid*

⁴¹⁷ Sergio Carrera and Ngo Chun Luk, *In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU* (Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies 2020) 9

⁴¹⁸ *ibid* 10

administrative practices of the member states.⁴¹⁹ However, although the external travel ban did affect a large group of third country nationals, it did not amount to a veritable closure of the external border.⁴²⁰ Carrera and Chung Luk point out that a high level of discrepancies and inconsistencies can be seen in EU member states' application of the EU travel ban to third countries, and that all participating member states have a clear obligation under the Recommendation and EU law to coordinate their policies and avoid unilateral and *ad hoc* responses in light of the EU general principle of sincere and loyal cooperation.⁴²¹ However, overall, most criticism regarding the application of the Schengen rules by member states during the COVID-19 crisis seems to focus on the reintroduction and keeping of internal border controls, not on how the external border was managed.

Finally, regarding the reintroduction of internal border controls and the invocation by member states of internal security reasons in that regard, no such case has been taken up by the Court as a result of the launching of an infringement procedure. Arguably the Schengen Evaluation Mechanism is being used 'instead' of infringement procedures regarding this issue.⁴²²

8.6 Concluding analysis

Regarding the security context, a brief assessment based on the above is that the EU has various legislative competences which touch the fields of national security, including concerning border control.⁴²³ Concerning the possibilities for member states to invoke security concerns, it seems that the margins for national administrations are somewhat broader in the AFSJ area than within the internal market. However, member states' possibilities to derogate from legal obligations for security reasons are highly contextualised which makes it difficult to draw definite conclusions if one aims at finding core functions that fall under member states' sovereignty.

⁴¹⁹ Daniel Thym and Jonas Bornemann, 'Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics' (2020) 5 European Papers 1143, 1155

⁴²⁰ *ibid* 1159

⁴²¹ Carrera and Chun Luk (n 417) 11

⁴²² Salla Heinikoski, 'Covid-19 Bends the Rules on Border Controls – Yet Another Crisis Undermining the Schengen Acquis?' (2020) UPI Briefing Paper 5

⁴²³ cf Kadelbach (n 384) 39

9. Three articles on EU member states' application of EU border rules in the Baltic Sea region⁴²⁴

9.1 General

This section deals with the fourth research question, which focuses on EU member states' application of EU border rules in the Baltic Sea region. The third research question, which was analysed above, focused on how EU member states can continue to influence border controls in the EU from a security perspective. Likewise, the aim of the fourth research question is to look closer at how EU member states can 'continue to influence' EU border rules, namely, as concerns the nature of the national authority applying the rules in question. Importantly, the characteristics and nature of the national authorities are in the hands of EU member states.

In these three published articles the focus has been on how the EU supranational – and multilevel – rules are applied by member states and by national authorities in the Baltic Sea region. As mentioned above, it is highly relevant to examine authorities also in the Baltic Sea region, since commonly the sole focus is on Mediterranean 'border actors'. Below each of the published articles are summarised and it is explained how the articles contribute to this thesis.

9.2 Article 2: 'The Baltic Sea Region Border Control Cooperation (BSRBCC) and border management in the Baltic Sea region: A case study'⁴²⁵

The article examines the extensive supranational EU rules on border management and Frontex. It does so in relation to the border cooperation Baltic Sea Region Border Control Cooperation, BSRBCC, which is founded on a 'soft-law' instrument. It asserts that border management is related to core national interests and guarded by states, which has an impact on the relationship between the different regulatory layers and the implementation of the provisions in the case at hand; national, sub-regional and regional. It finds that the national level is still 'strong' in the domain of border management. The conclusion is drawn that several 'safeguards' for national competences in the EU treaties constitute restraints that will prevent the EU from entirely exercising its power to develop a common policy on border control. Regarding Frontex, it is stated that its mandate was extensively

⁴²⁴ Gustafsson (n 12)

⁴²⁵ Gustafsson (n 12)

enlarged in the 2016 Frontex Regulation, but concerns about losing national sovereignty due to the new and enhanced role of Frontex seemed groundless. In practice, the fact that the BSRBCC is founded on 'soft-law' instruments rather than legally binding international agreements has not been an obstacle to the Frontex-BSRBCC cooperation. It was assessed that the border cooperation in the Baltic Sea within the BSRBCC had adapted well to the changing EU and Schengen contexts, and that the cooperation seemed, despite its legally weak status, to be of added value for the national authorities that participate, including Russia.

The article is relevant for and contributes to an analysis of how the EU border rules system functions. The article analysed parts of the EU system, the supranational rules on border management, and how these rules had evolved over time and in relation to security and sovereignty concerns by EU member states. The conclusion was drawn that the national level is still 'strong' in the domain of border management for formal reasons, since the member states continuously have guarded their sovereignty when negotiating both at treaty level and concerning secondary legislation, which has resulted in texts that balance sovereignty interests.

9.3 Article 3: 'Maritime Security and the Role of Coast Guards: The Case of Finland and the Åland Islands' Demilitarisation'⁴²⁶

The article analyses the activities of a 'border actor', the Finnish Border Guard, which applies the supranational EU rules on border management and border control. The main aim was to analyse aspects of a military nature of the Finnish Coast Guard functions. Military aspects were identified, which, however, were not assessed as being decisive.

The article explores the issue of security concerns as a basis for the on-going widening of powers of the Finnish Border Guard, which includes the Coast Guard, in particular how such a widening of the powers relates to the Åland Islands' demilitarised status, the main question being whether there is a conflict between possible military aspects of the Coast Guard vis-à-vis the demilitarised status of the Åland Islands.⁴²⁷ However, as mentioned, the conclusion is reached that the military aspects of the Finnish Border Guard were not decisive.

⁴²⁶ Gustafsson (n 12)

⁴²⁷ The Åland Islands is an autonomous region within Finland. The Parliament of Åland, known as 'Lagtinget', exercises legislative power regarding certain fields in the Islands, but this does not include border management or border surveillance. The Parliament of Finland exercises the legislative power in these fields and adopts legislation applicable also in the Åland Islands and the Åland Islands is not represented in international fora in this field.

The article is relevant for and contributes to an analysis of how the EU border rules system functions. The purpose of the article was to analyse the nature of an 'EU border actor' in the Baltic Sea region, with a focus on the issue of possible military aspects of such an EU border actor, in this case the Finnish Border Guard. It seemed of added value to conduct research concerning a coast guard in the Baltic Sea region, taking into account that coast guard functions in the EU have been performed by civil, paramilitary and military actors. Carrera and Stefan stated that according to an overview of countries, in six countries (Turkey, Serbia, Italy, Greece, Bulgaria and Austria) out of eleven examined Council of Europe countries, border surveillance was performed by both civil and military authorities (the other countries examined were Hungary, Romania, Poland, Spain and Slovakia). A total of 26 authorities were performing border control and border surveillance in the 11 countries investigated.⁴²⁸

The debate on border security in the EU often focuses on border actors in the Mediterranean Sea region, due to the migration pressure in that region. However, it is also of interest to examine an actor in the Baltic Sea region, taking into account *inter alia* the vast fragmentation regarding authorities with responsibilities in border management in the EU. In 2017 it was assessed that more than 50 national authorities were involved in the border control functions that are included in the Schengen Borders Code, and that more than 300 national authorities were engaging in coast guard functions in the EU.⁴²⁹ Also, the multilevel system of rules as well as of actors – Frontex and the member states' authorities – makes it relevant to make such an investigation, and not solely focus on the Mediterranean region.

The findings in this article can be seen as examples of a member state deciding over the characteristics and nature of the national authority applying EU border control rules.

9.4 Article 4: 'Multilevel Governance of Maritime Border Surveillance in the EU and Accountability: The Coast Guard in Sweden'⁴³⁰

The article strives to examine the accountability of the Swedish Coast Guard in the field of maritime border surveillance. A point of departure is that border surveillance lies close to states' core interests and that this has affected the developments of the regulatory framework at the EU level in different ways. The question is posed how EU law, and the instruments that are directly applicable in the member states, impact on the accountability of the Swedish Coast Guard in the field of maritime border surveillance. It is

⁴²⁸ Carrera and Stefan (n 197) 46-47

⁴²⁹ Carrera and others (n 2) 26, 29, 30

⁴³⁰ Gustafsson (n 12)

argued that among other things the multilevel system of rules as well as of actors – Frontex and the member states’ authorities – makes it relevant to make such an investigation. The conclusion is drawn that whether multi-level regulation promotes or undermines accountability is to some extent dependent on which concept of accountability one holds. When applying a concept of individual accountability, the existence of a range of accountability avenues regarding the Coast Guard’s activities transpired as quite satisfactory. However, if more actors would be involved in the Coast Guard’s maritime border surveillance activities based on the existing multilevel system of actors and rules, this would negatively impact the possibilities to hold the different actors accountable, for instance since different ‘accountability rules’ apply to different actors.

This article is relevant for and contributes to an analysis of how the EU border rules system functions. The findings in this article can be seen as example of a member state deciding over the characteristics and nature of the national authority applying the EU border rules. The aim was to examine the accountability aspect of a national ‘EU border actor’. It is pointed out in the article that theoretically, the reasoning often heard in connection with Mediterranean states and border surveillance could also be applied to Sweden. Maritime border surveillance takes place on out-of-sight locations (where for instance physical integrity could be at risk),⁴³¹ as well as through technological means (where for instance the protection of personal data could be at risk), and in most cases if a person is no longer in the territory of the concerned state the initiation of an accountability procedure could be less easily accessible.⁴³²

Frontex has become one of the major players in European external border management, and the importance of the accountability of Frontex is increasing. While member states can be held accountable before their own national courts and before international courts, neither of these options are available in relation to Frontex. It can be brought before the CJEU to account for the conformity of its conduct with EU law, but in practice this does not, for different reasons, such as the limited actions available to individuals, play an important role, as things stand today.⁴³³

⁴³¹ Giuseppe Campesi, ‘Police accountability and human rights at the Italian borders’ in Sergio Carrera and Marco Stefan (eds) *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020) 137

⁴³² Aikaterini Drakopoulou, Alexandros Konstantinou and Dimitris Koros, ‘Border management at the external Schengen Borders: Border controls, return operations, and obstacles to effective remedies in Greece’ in Sergio Carrera and Marco Stefan (eds) *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020) 159

⁴³³ Melanie Fink, ‘The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable’ (2020) 21 German Law Journal 532

One important conclusion is that increasing involvement of additional actors – Frontex, other member states, third states – which takes place in accordance with the multilevel rules, decreases accountability possibilities in the sense that it would make it more difficult for the individual to address the ‘right’ actor. The attempt to answer the research question in the article has shed further light on the fragmentation caused by the complex multi-actor landscape related to maritime border surveillance in the EU, a fact which apparently impacts the accountability.

9.5 Concluding comments

First, on a general note, the conclusion has been drawn that the national level is still ‘strong’ in the domain of border management for formal reasons, since the member states continuously have guarded their sovereignty when negotiating both at treaty level and concerning secondary legislation, which has resulted in texts that balance sovereignty interests.

Second, the aim of the published articles focusing on ‘border actors’ in the Baltic Sea region has been to illustrate one of the ways that member states continuously influence the application of border rules, namely that the characteristics and nature of the national authority applying the EU border rules are in the hands of EU member states. It is important for member states that at a general level the internal structure of national border authorities is a national affair and the EU is only competent for regulating co-operation between such authorities of member states, or between such authorities and for instance Frontex.

10. Conclusion

First, it is appropriate to recapitulate the research questions.

The first research question was posed against the background of inter-state tensions and the debate on deterrence in the Baltic Sea region. It focused on whether military exercises in the Baltic Sea region can be seen as illegal threats to international security against the background of requirements in Article 2(4) in the UN Charter. An aim was to explore whether the term border security is referred to in a *jus ad bellum* context.

The second research question focused on the objectives of the EU border control or border security rules and the UN Security Council application of border control provisions or the concept of border security.

The third research question dealt with the EU 'border control system' or 'border security system', with the overarching aim to assess to which extent member states can continue to influence border control in the EU from a security perspective.

The aim of posing the fourth research question was to arrive at possible conclusions regarding EU member states' application of EU border rules in the Baltic Sea region.

As concerns the first research question on threats and deterrence, the conclusion is drawn that for the purposes of Article 2(4) threats can be seen as inherent in deterrence. A 'retroactive test' is used to determine the legality of a threat of force retroactively or through hypothetical analysis — if the use of force threatened would be in accordance with the Charter, then the threat of such force would be lawful under the Charter. If the use of the force threatened would be illegal, the threat itself would be illegal.

The wrestling with 'threats' under Article 2(4) will most likely continue. The reality of the international system is that threats will always exist as an option that states will wish to exercise when they deem it necessary. It is more probable that military exercises could be seen as a legal threat in a conflict situation, than as standalone exercises. A conclusion concerning the Baltic Sea region as of today is that it does not seem probable that military exercises would be assessed as illegal threats – according to a 'retroactive test' – in the absence of 'traditional' international conflicts. The research for the purpose of arriving at conclusions regarding the first research question was a part of a process to gain an understanding of the concept of border security. Importantly, the conclusion was drawn that as a rule the term border security is not used in a *jus ad bellum* context.

Turning to the concept of border security, the aim has not been to determine any exact scope of border security. Nevertheless, a general difficulty all along has been that the concept of border security is not clearly established. Without doubt, at least such processes and practices as border management, border control and border surveillance play a role as parts of the concept, and those elements have been my focus. However, also these

seemingly concrete measures or processes are elusive, at least from a legal perspective. It can be reminded that in an EU context Advocate General Mengozzi reached the conclusion that border surveillance is defined in the EU essentially through its objectives, and that the definition sets out a particularly broad concept, capable of encompassing any measure aimed at avoiding or preventing circumvention of border checks, and that the concept of border surveillance must be interpreted in a dynamic and flexible manner.⁴³⁴ As stated above, I have drawn the conclusion that factors of both an objective and subjective character have seemingly played a role in the developments towards the use of the term border security, such as, at least, a qualitative change in the nature of a number of border control related measures, the perception of insecurities related to the 2004 EU enlargement and the 9/11 attacks. The term border security is now found in both policy and legal EU documents. It is difficult to escape the impression that it is useful for legislators, as well as those who operationalise the rules, to use such a security term, since it creates space for continuing subjective assessments.

As concerns the purposes and objectives of the EU rules there has been a gradual development of these as stated in the legal acts in question and related documents, such as Commission proposals. Regarding Frontex and the external borders both 'migratory challenges' and potential future threats, such as serious crime with a cross-border dimension, are explicitly mentioned in the regulation in force, and these factors are connected to achieving a high level of internal security in the EU. As concerns the Schengen Borders Code objectives pursued are combatting of illegal immigration and trafficking in human beings, and to prevent any threat to the member states' internal security, public policy, public health and international relations. The overall conclusion is that the purposes and objectives of the border control provisions related to the external border aim at managing migration in general, for internal security reasons – although, as noted above, it is explicitly stated in the Schengen Borders Code that migration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security. An important and complicating factor is that upholding of the internal security and the absence of internal border controls in the end are grounded in economic factors.

Turning to the UN in the context of the second research question, the use of 'border security' by the UN Security Council and, consequently, how it is used within the UN international security system, the term security can be used as a tool to understand and describe processes or problems. For international law, security is by definition a normative concept. When border security is used in UN Security Council resolutions it is by definition

⁴³⁴ Case C-355/10 Opinion of AG Mengozzi (n 199)

connected to the mandate of the Security Council, the upholding of international peace and security, and it is an element of norms which are to induce a certain behavior. In the context of the mandate of the UN Security Council, border security can be seen as a dimension of international security.

Political realities, or rather the realities as perceived by relevant actors, have resulted in a modification of the notion of border security, which is a part of a composite norm. The explored documentation of the Security Council shows that the dominant use of border security by the Security Council involves perceived threats from non-state actors that are crossing inter-state borders. The conclusion in the field of border security and border control, seen as a dimension of international security, is that the border control measures taken are aimed at contributing to countering threats from non-state actors and/or goods in the context of at least terrorism, proliferation of Weapons of Mass Destruction (WMD), transnational crime, the illicit transfer, destabilizing accumulation and misuse of small arms and light weapons (SALW), migrant smuggling and human trafficking. Without having performed a detailed analysis of the whole resolutions in question, the parts that have been analysed confirm that a verbal practice exists in the UN Security Council regarding border security and border control, and at least regarding the latter there are concrete requirements that impact and change states' behaviour.

No references to illegal migration as such constituting a challenge to or threat for international security have been found (although, as mentioned, mass flows of human beings has been referred to as threatening international peace and security). However, 'in real life', border control measures established by states under the Chapter VII resolutions' requirements will affect individuals crossing borders in general, despite the focus of these measures in the resolutions.⁴³⁵ Although the stated or discernable objectives of EU border control or border security rules, applied in an internal security context, and the objectives of the application of border control and border security by the UN Security Council, applied in an international security context, differ, the results are similar.

The measures that the UN Security Council requires states to take in the field of border control can obviously never reach the same level and sophistication as those that are possible to establish within the EU legal system, with its *sui generis* traits such as direct effect. One example of advanced EU action is the EU establishment of an automated IT system for registering travellers from third-countries, the Entry/Exit System (EES). The system will *inter alia* register the person's name, type of the travel document, biometric data (fingerprints and captured facial images) and the date and place of entry and exit (of both short-stay visa holders and visa exempt travellers). It will also record refusals of entry. The EES will replace

⁴³⁵ Report of China (n 349)

the current system of manual stamping of passports. According to the Commission the 'EES will contribute to prevent irregular migration and help protect the security of European citizens'.⁴³⁶

Turning to the third research question, a brief assessment is that the EU has various legislative competences which touch the field of national security, including concerning border control. However, a number of circumstances seemingly alleviate member states' concerns regarding a relinquishment of their sovereignty. Defence of the territorial integrity is per definition excluded. The supranational rules regarding the control of entry into EU member states have been developed gradually, despite sovereignty concerns, and a balance has been achieved. Member states can, and will, continue to guard their positions. Furthermore, legally internal security does not fall within the EU's exclusive competence. In addition, member states' have certain 'safety valves' and possibilities to derogate from legal obligations for security reasons, which are decided on a case-by-case basis. Regarding possibilities to derogate specifically concerning border control, member states' public policy and internal security can be referred to as a ground for derogating from the Schengen Borders Code's rules. The case law makes it clear that exceptions to the fundamental freedoms must be construed narrowly. Within the AFSJ field the margins for member states are presumably somewhat larger, possibly with reservation for cases where consequences are severe. However, the case law of the CJEU regarding security exceptions entails a contextualised approach, which makes it difficult to draw definite conclusions of a more general character.

A further aspect that alleviate member states' concerns regarding supranational rules on border control is the retaining of their competencies to determine the volume of admission of third-state nationals to their territory (Article 79.5 TFEU) and to combat irregular immigration. When listing factors allowing space for member states from a security and sovereignty perspective, also the discretionary space left by the EU as to how member states implement 'article 23 Schengen Border Code checks' could be mentioned. To a certain extent that shows how member states interpret 'free movement'. The varying application of the implementation of this article has led to a rather fragmented landscape – it can even be argued that the intra Schengen borders never really disappeared, they were just moved.

Another field in the Schengen system that is relevant in the context of the interpretation of internal security, and member states' margin to act, is member states' possibilities to reintroduce internal border controls with reference to security concerns. Arguably the Schengen Evaluation Mechanism is being used 'instead' of infringement procedures. The research

⁴³⁶ European Commission website <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/smart-borders/ees_en> accessed 14 March 2021

for this thesis included materials up until and including 2020, but there are more recent developments of interest that should be mentioned here. The Commission has continued to maintain a political and technical dialogue with member states having long-lasting controls at internal borders, with a view to exploring options for specific alternative measures.⁴³⁷ Attempts to reform the Schengen Borders Code have been made earlier on. In 2017 the Commission presented a Communication for preserving and strengthening Schengen which included a proposal to reform the rules on temporary reintroduction of border control at internal borders, but member states were not able to reach a position on it.⁴³⁸ However, based on more recent discussions and consultations with member states, in December 2021 the Commission presented new amendments to the Schengen Borders Code, replacing its previous proposal. The proposed amendments are said to draw on lessons learnt as well as on the experiences gathered during the COVID-19 pandemic. Furthermore, in the Grand Chamber ruling in Joined Cases C-368/20 and C-369/2026 on 26 April 2022, the CJEU stressed that as an exceptional measure, the possibility of reintroducing internal border control must be interpreted strictly. The Commission and the Council have launched discussions with the member states on the implications of the judgment.⁴³⁹

On a general note, the ‘taking-back’ of powers over the borders by EU member states during the 2015 migration crisis and the 2020 pandemic crisis shows the sensitivity concerning borders – termed by some a return of the Westphalian nation-state.⁴⁴⁰ However, it should be kept in mind that the agreement on the border management rules as a whole is symbolically important for European integration, and the freedom of movement is usually referred to as one of the most positive results of the EU integration process by EU citizens. A total suspension of the Schengen area might be interpreted as being a setback for the European project as a whole.⁴⁴¹

The fourth research question focused on the national application of the EU ‘border rules’. The three published articles analyse how the EU supranational – and multilevel – rules are applied and by what kind of actors in the Baltic Sea region. It is highly relevant to examine authorities also in the Baltic Sea region, since commonly the sole focus is on Mediterranean border actors. An aim of the published articles focusing on ‘border actors’ in the Baltic Sea region was to illustrate one of the ways that member states

⁴³⁷ European Commission, ‘State of Schengen Report 2022’ COM (2022) 301 final/2 10

⁴³⁸ European Commission ‘Proposal for a Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders’ COM (2017) 571 final

⁴³⁹ State of Schengen Report 2022 (n 437)

⁴⁴⁰ Thalmann (n 416)

⁴⁴¹ Andrew Lilico, Summayah Leghari and Marika Hegg, *The Cost of Non-Schengen Impact of border controls within Schengen on the Single Market* (European Parliamentary Research Study 2016) 42

continuously influence the application of EU border rules. Importantly, at a general level the internal structure of national border authorities is a national affair. The characteristics and nature of national authorities applying the EU border rules are in the hands of EU member states. As seen in the published articles border authorities in the Baltic Sea region show different traits. The EU is only competent for regulating co-operation between such authorities of member states or between such authorities and, for instance, Frontex, and Frontex is still not an independent actor.

Finally, an observation made when this research was initialised gains support from the findings: a lasting definition of security, or of security dimensions for that matter, does not seem achievable, since the political and scientific concepts of security change when the political contexts change. Although 'security' in general is a positively value-laden term that can be difficult to argue against – 'more security' is better than 'less security' – continuous attention should be paid to the margins that it creates for those who are in a position to define it.

References

Table of Cases

Permanent Court of International Justice (PCIJ) and International Court of Justice (ICJ)

Monastery of Saint-Naoum (Advisory Opinion) (1924) PCIJ Series B 9

North Sea Continental Shelf cases (Germany v Denmark/Germany v the Netherlands) (1969) ICJ Rep 3

Permanent Court of Arbitration (PCA)

North Atlantic Coast Fisheries Case (Great Britain, United States) (1910) RIAA Vol XI

International Criminal Tribunal for the former Yugoslavia (ICTY)

Tadić (Jurisdiction) Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995)

European Court of Human Rights (ECtHR)

Engel and Others v the Netherlands, 8 June 1976, Series A no. 22

Hadjianastassiou v Greece, 16 December 1992, Series A no. 252

Klass and Others v Germany, 6 September 1978, Series A no. 28

Leander v Sweden, 26 March 1987, Series A no. 116

McCann and Others v the United Kingdom, 27 September 1995, Series A no. 324

United Communist Party of Turkey and Others v Turkey, 30 January 1998, Reports of Judgments and Decisions 1998-I

Court of Justice of the European Union (CJEU)

A v Staatsanwaltschaft Offenburg (C-9/16) [2017] EU:C:2017:483

Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and Others (C-84/95) [1996] EU:C:1996:312

Campus Oil Limited and others v Minister for Industry and Energy and others (C-72/83) [1984] EU:C:1984:256

Commission of the European Communities v Hellenic Republic (C-398/98) [2001] EU:C:2001:565

Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC (C-367/89) [1991] EU:C:1991:376

European Parliament v Council of the European Union (C-355/10) [2012] EU:C:2012:207 Opinion of AG Mengozzi

Ezatollah Rahmanian Koushkaki v Federal Republic of Germany (C-84/12) [2013] EU:C:2013:862

G.S. and V.G. v Staatssecretaris van Justitie en Veiligheid (Joined Cases C-381/18 and C-382/18) [2019] EU:C:2019:1072

Gemeente Emmen (C-468/93) [1996] EU:C:1996:139

Haegeman v Belgium (C-181/73) [1974] EU:C:1974:41

J. N. v Staatssecretaris van Veiligheid en Justitie (C601/15) [2016] EU:C:2016:84

Johnston v Chief Constable of the Royal Ulster Constabulary (C-222/84) [1986] EU:C:1986:206

Kadi and Al Barakaat (Joined cases C-402/05P and C-415/05P) [2008] EU:C:2008:461

Préfet des Pyrénées-Orientales v Abdelaziz Arib Case (C-444/17) [2019] EU:C:2019:220

Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen (C-14/83) [1984] EU:C:1984:153

Sahar Fahimian v Bundesrepublik Deutschland (C-544/15) [2017] EU:C:2017:255

Staatssecretaris van Justitie en Veiligheid v E.P. (C-380/18) [2019] EU:C:2019:1071

Table of treaties and legislation

International treaties including EU treaties

Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 14 June 1985 (the original official version only available in Dutch, French and German)

Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 19 June 1990 (the original official version only available in Dutch, French and German)

Convention on Psychotropic Substances 21 February 1971

Covenant of the League of Nations 28 April 1919

European Convention on Human Rights (ECHR) 4 November 1950

International Covenant on Civil and Political Rights (ICCPR) 16 December 1966

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime 31 May 200

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime 15 November 2000

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000

Rome Statute of the International Criminal Court 17 July 1998

Single Convention on Narcotic Drugs 30 March 1961

Treaty establishing the European Atomic Energy Community (EAEC or Euratom) 25 March 1957

Treaty establishing the European Coal and Steel Community (ECSC) 18 April 1951

Treaty establishing the European Economic Community (EEC) 25 March 1957

Treaty on European Union (TEU) consolidated version [2016] OJ C202/1

Treaty on the Functioning of the European Union (TFEU) consolidated version [2016] OJ C202/1

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 20 December 1988

United Nations Convention against Transnational Organized Crime 15 November 2000

Vienna Convention on the Law of Diplomatic Relation 19 April 1961

European Union secondary legislation (in chronological order)

Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12

Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data ('API Directive') [2004] OJ L261/24

Council Regulation (EC) 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1

Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [2006] OJ L381/4

Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] OJ L199/30

Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9

Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) [2013] OJ L295/11

Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L251/1

Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 [2017] OJ L327/20

Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1

UN Security Council Resolutions and Presidential Statements (in chronological order)

UNSC Res 1124 (31 July 1997) UN Doc S/RES/1124
UNSC Res 1138 (14 November 1997) UN Doc S/RES/1138
UNSC Res 1226 (29 January 1999) UN Doc S/RES/1226
UNSC Res 1286 (19 January 2000) UN Doc S/RES/1286
UNSC Res 1304 (16 June 2000) UN Doc S/RES/1304
UNSC Res 1344 (15 March 2001) UN Doc S/RES/1344
UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373
UNSC Res 1529 (29 February 2004) UN Doc S/RES/1529
UNSC Res 1530 (11 March 2004) UN Doc S/RES/1530
UNSC Res 1535 (26 March 2004) UN Doc S/RES/1535
UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540
UNSC Res 1611 (7 July 2005) UN Doc S/RES/1611
UNSC Res 1618 (4 August 2005) UN Doc S/RES/1618
UNSC Res 1624 (14 September 2005) UN Doc S/RES/
UNSC Res 1673 (27 April 2006) UN Doc S/RES/1673
UNSC Res 1810 (25 April 2008) UN Doc S/RES/1810
UNSC Res 1977 (20 April 2011) UN Doc S/RES/1977
UNSC Res 2177 (18 September 2014) UN Doc S/RES/2177
UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178
UNSC Res 2220 (22 May 2015) UN Doc S/RES/2220
UNSC Res 2240 (9 October 2015) UN Doc S/RES/2240
UNSC Res 2312 (6 October 2016) UN Doc S/RES/2312
S/PRST/2017/2
UNSC Res 2352 (15 May 2017) UN Doc S/RES/2352
UNSC Res 2396 (20 July 2017) UN Doc S/RES/2396
UNSC Res 2368 (20 July 2017) UN Doc S/RES/2368
UNSC Res 2370 (2 August 2017) UN Doc S/RES/2370
UNSC Res 2380 (5 October 2017) UN Doc S/RES/2380
UNSC Res 2395 (21 December 2017) UN Doc S/RES/2395
UNSC Res 2457 (27 February 2019) UN Doc S/RES/2457
UNSC Res 2462 (28 March 2019) UN Doc S/RES/2462
UNSC Res 2482 (19 July 2019) UN Doc S/RES/2482
S/PRST/2020/5

Bibliography

African Union Press Release, 'Sudan and South Sudan Conclude the Third Meeting of Their Joint Border Commission' (2015) <<https://www.peaceau.org/uploads/auc-comm-sudan-south-sudan-aubp-20-03-15.pdf>> accessed 12 March 2021

Anderson M and Apap J, *Changing Conceptions of Security and their Implications for EU Justice and Home Affairs Cooperation* (Centre for European Policy Studies, Policy Brief 1, 2002) <<https://www.ceps.eu/ceps-publications/changing-conceptions-security-and-their-implications-eu-justice-and-home-affairs/>> accessed 10 March 2021

Andreas D, 'Redrawing the Line: Border Security in the 21st Century' (2003) 28 *International Security* 78

Baczynska G and Siebold S, 'EU to keep COVID-19 curbs on non-essential travel amid chaotic border measures' *Reuters* (23 February 2021) <<https://www.reuters.com/article/us-eu-borders-idUSKBN2AN0TL>> accessed 10 April 2021

Baldwin D A, 'The Concept of Security' (1997) 23 *Review of International Studies* 5

Barrett J, 'Securing Polar Regions Through International Law' in Mary E Footer and others (eds) *Security and International Law* (Hart Publishing 2016)

Beaulac S, 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004) 8 *Australian Journal of Legal History* 181

Besson S, *Sovereignty* (Max Planck Encyclopedia of Public International Law 2011) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472>> accessed 14 June 2021

Bigo D, 'The European internal security field stakes and rivalries in a newly developing area of police intervention', in Malcolm Anderson and Monica den Boer (eds) *Policing Across National Boundaries* (Pinter 1994)

Bigo D, 'When Two Become One: Internal and External Securitisations in Europe' in Morten Kelstrup and Michael Williams (eds) *International Relations Theory and the Politics of European Integration* (Routledge 2000)

Bigo D, 'Internal and External Aspects of Security' (2006) 15 *European Security* 385

Bigo D, 'Immigration controls and free movement in Europe' (2009) 91 *International Review of the Red Cross* 579

Bigo D, 'The (in)securitization practices of the three universes of EU border control: Military/Navy – border guards/police – database analysts' (2014) 45 *Security Dialogue* 209

Blumann C, 'Frontières et Limites' in Pedone (eds) *La Frontière* (Société Française pour le Droit International 1980)

Bornemann J, 'Threats to public security in EU immigration law: Finding the right discretion' (European Law Blog, 6 January 2020) <<https://europeanlawblog.eu/2020/01/06/threats-to-public-security-in-eu-immigration-law-finding-the-right-discretion/>> accessed 15 March 2021

Bossong R and Rhinard M, 'Alternative Perspectives on Internal Security Cooperation in the European Union: Setting the Scene' in Raphael Bossong and Mark Rhinard (eds) *Theorizing Internal Security in the European Union* (Oxford University Press 2016) 14

Bossong R, 'The Expansion of Frontex Symbolic Measures and Long-term Changes in EU Border Management' (2019) *Stiftung Wissenschaft und Politik/German Institute for International and Security Affairs Comment C* 47

Bothe M, 'Security in International Law Since 1990' in Hans Günter Brauch and others (eds) *Globalization and Environmental Challenges Reconceptualizing Security in the 21st Century* (2008)

- Brauch H G, 'Environment and Security in the Middle East: Conceptualizing Environmental, Human, Water, Food, Health and Gender Security' in Clive Lipchin and others (eds) *Integrated Water Resources Management and Security in the Middle East* (Springer 2007)
- Brauch H G, 'Conceptual Quartet: Security and its Linkages with Peace, Development, and Environment' in Hans Günter Brauch and others (eds) *Globalization and Environmental Challenges Reconceptualizing Security in the 21st Century* (2008)
- Brauch H G, 'Introduction: Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century' in Hans Günter Brauch and others (eds) *Globalization and Environmental Challenges Reconceptualizing Security in the 21st Century* (Springer 2008)
- Brauch H G, 'Introduction: Facing Global Environmental Change and Sectorialization of Security' in Hans Günter Brauch and others (eds) *Facing Global Environmental Change Environmental, Human, Energy, Food, Health and Water Security Concepts* (Springer 2009)
- Brauch H G, 'Concepts of Security Threats, Challenges, Vulnerabilities and Risks', in Hans Günter Brauch and others (eds) *Coping with Global Environmental Change, Disasters and Security* (Springer 2011)
- Brauch H G, 'Security Threats, Challenges, Vulnerabilities and Risks in US National Security Documents (1990–2010)' in Hans Günter Brauch and others (eds) *Coping with Global Environmental Change, Disasters and Security* (Springer 2011)
- Brauch H G and Oswald Spring Ú, 'Introduction: Coping with Global Environmental Change in the Anthropocene' in Hans Günter Brauch and others (eds) *Coping with Global Environmental Change, Disasters and Security* (Springer 2011)
- Breitenmoser S and Weyeneth R, 'Artikel 72 AEUV' in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (Nomos 2015)
- Brock L, 'Peace Through Parks. The Environment on the Peace Research Agenda' (1991) 28 *Journal of Peace Research* 40; Lothar Brock, 'The Environment and Security: Conceptual and Theoretical Issues' in: Nils-Petter Gleditsch (ed) *Conflict and the Environment* (Springer 1997)
- Brown H, *Thinking About National Security: Defense And Foreign Policy In A Dangerous World* (Westview Press 1983)
- Brownlie I, *International law and the Use of Force by States* (1963)
- Brownlie I, *Principles of Public International Law* (Oxford University Press 2008)
- Buhau H and Gates S, 'The Geography of Civil War' (2002) 39 *Journal of Peace Research* 417
- Buzan B and Wæver O, 'Slippery? contradictory? sociologically unstable? The Copenhagen school replies' (1997) 23 *Review of International Studies* 143
- Buzan B, Wæver O and de Wilde J, *Security. A New Framework for Analysis* (Lynne Rienner 1997, 1998, 2004)
- Buzan B, *People, States & Fear. The National Security Problem in International Relations* (Harvester Books. University of North Carolina Press, 1983; 2nd ed 1991; reprint with new preface 2007)
- Buzan B and Hansen L, *The Evolution of International Security Studies* (Cambridge University Press 2009)
- Cambridge English Dictionary website, <<https://dictionary.cambridge.org/dictionary/english>> accessed 3 June 2021
- Cameron I, 'European Union Law Restraints on Intelligence Activities' (2020) 33 *International Journal of Intelligence and CounterIntelligence* 452
- Campesi G, 'Police accountability and human rights at the Italian borders' in Sergio Carrera and Marco Stefan (eds) *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020)
- Carrera S, *Towards a Common European Border Service?* (Centre for European Policy Studies Working Document No. 331 2010)

Carrera S and others, *The European Border and Coast Guard: Addressing Migration and Asylum Challenges in the Mediterranean?* (Centre for European Policy Studies 2017)

Carrera S and Stefan M, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective remedies for victims of human rights violations?* (Centre for European Policy Studies 2018)

Carrera S and Chun Luk N, *In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU* (Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies 2020)

Carrera S and Stefan M, 'Introduction – justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' in Sergio Carrera and Marco Stefan (eds) *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union* (Routledge 2020)

Casolari F, Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation in Enzo Cannizzaro, Paolo Palchetti, and Ramses A Wessel (eds) *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012)

Chipman J, 'The Future of Strategic Studies: Beyond Grand Strategy' (1992) 34 *Survival* 109

Collomb P, 'Population Growth and Food Security in the Countries of the Middle East and North Africa' in Hans Günter Brauch and others (eds) *Security and Environment in the Mediterranean. Conceptualising Security and Environmental Conflicts* (Springer 2003)

Concannon C W, 'Border Security in Ancient Rome' (March 5 2019) <<https://brewminate.com/border-security-in-ancient-rome/>> accessed 15 January 2021

Conze W, 'Sicherheit, Schutz' in Otto Brunner, Werner Conze and Reinhart Koselleck (eds) *Geschichtliche Grundbegriffe. Historische Lexikon zur politisch-sozialen Sprache in Deutschland, Vol. 5* (Ernst Klett Verlag 1984)

Counter-Terrorism Committee Executive Directorate (CTED) Fact sheet Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions (United Nations Security Council CTED 2017)

Counter-Terrorism Committee Executive Directorate (CTED) Fact sheet (United Nations Security Council CTED 2022)
<https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/cted_factsheets_jan_2022.pdf> accessed 15 January 2022

Craig P and de Burca G, *EU Law: Text, Cases and Materials* (Oxford University Press 2003)

Cryer R and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011)

Daase C, 'Security, Intervention, and the Responsibility to Protect: Transforming the State by Reinterpreting Sovereignty' in Stephan Leibfried and others (eds) *The Oxford Handbook of Transformations of the State* (Oxford University Press 2015)

d'Aspremont J and Singh S, 'The Life of International Law and its Concepts' in Jean d'Aspremont and Sahib Singh (eds) *Concepts for International Law. Contributions to Disciplinary Thought* (Edward Elgar 2019)

Dayer T, 'The use of force in interception of vessels with respect to smuggling offenses. UNSC Resolution 2240 (2015), the imprint of a new paradigm' (Lancaster University 2017)

de Vattel E (1758). *Le droit des gens, ou Principes de la loi naturelle* (Tome II). London: [s.n.] ch. VII, para 92

de Wenden C W, 'Migration as an International and Domestic Security Issue' in Hans Günter Brauch and others (eds) *Security and Environment in the Mediterranean. Conceptualising Security and Environmental Conflicts* (Springer 2003)

Declaration of the World Food Summit on Food Security (Food and Agriculture Organization of the United Nations) 2009

Deleuze G and Guattari F, *What Is Philosophy?* (Hugh Tomlinson and Graham Burchell III trs, Columbia University Press 1996)

Directorate General for Parliamentary Research Services (DG EPRS) for the European Parliament's Internal Market and Consumer Protection Committee, European Parliamentary Research Service *The Cost of Non-Schengen Impact of border controls within Schengen on the Single Market* (2016) <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/581383/EPRS_STU%282016%29581383_EN.pdf> accessed 10 April 2021

Dowty A, *Closed Borders: The Contemporary Assault on the Freedom of Movement* (Yale University Press 1987)

Drakopoulou A, Konstantinou A and Koros D, 'Border management at the external Schengen Borders: Border controls, return operations, and obstacles to effective remedies in Greece' in Sergio Carrera and Marco Stefan (eds) *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020)

Ebbesson J and others (eds), *International Law and Changing Perceptions of Security Liber Amicorum Said Mahmoudi* (Brill Academic Publishers 2014)

European Commission, 'Communication on a common policy on illegal immigration' COM (2001) 672 final

European Commission, 'Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders' COM (2003) 687 final

European Commission, 'Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders' COM (2004) 391 final

European Commission, 'Delivery of the European Agenda on Migration, COM (2017) 558 final

European Commission, 'Communication on preserving and strengthening Schengen' COM (2017) 570 final

European Commission, 'Proposal for a Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders' COM (2017) 571 final

European Commission, 'Proposal for a Regulation on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council' COM (2018) 631 final

European Commission, 'State of Schengen Report 2022' COM (2022) 301 final/2

European Commission website <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/smart-borders/ees_en> accessed 14 March 2021

European Commission website <https://ec.europa.eu/taxation_customs/general-information-customs/customs-security/general_en> accessed 14 February 2021

Fennelly N, 'Legal Interpretation at the European Court of Justice' (1996) 20 Fordham International Law Journal 656; Koen Lenaerts, 'Interpretation and the Court of Justice: A Basis for Comparative Reflection' (2007) 41 The International Lawyer 1011

Fernández Rojo D, 'It's a new agency. It's a federal agency. It's the European Border Coast Guard! No wait... it's Frontex' (2017) EU Law Enforcement

Ferreira M, 'Risk Politicization Strategies in EU Migration and Asylum Policies' (2010) 1 Journal of Global Analysis 165

Ferruccio P, *Reconciling the Prince's two 'Arms'. Internal-External Security Policy Coordination in the EU* (Occasional Papers no. 30, Institute for Security Studies 2001)

Fink M, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 532

Foreign Brief Geopolitical Risk Analysis, *Sudan-South Sudan Boundary Demarcation Commission to meet* (2020) <<https://www.foreignbrief.com/daily-news/sudan-south-sudan-boundary-demarcation-commission-to-meet/>> accessed 15 March 2021

Fox G H, Boon K E and Jenkins I, 'The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law' (2018) 67 AM. U. L. REV. 649

- Franckx E, 'Gaps in Baltic Sea Maritime Boundaries' in Henrik Ringbom (ed) *Regulatory Gaps in Baltic Sea Governance: Selected Issues* (Springer 2018) 7
- Fravel T, 'Securing Borders: China's Doctrine and Force Structure for Frontier Defense' (2017) 30 *Journal of Strategic Studies* 705
- Frontex website <<https://frontex.europa.eu/about-frontex/our-mission/>> accessed 10 May 2021
- Gifford C, 'The true cost of the EU's border security boom', *World Finance*, 21 January 2020 <<https://www.worldfinance.com/featured/the-true-cost-of-the-eus-border-security-boom>> accessed 10 May 2021
- Glenn J C, Gordon T J and Perelet R, *Environmental Security: Emerging International Definitions, Perceptions and Policy Considerations* (American Council for the UNU 1998)
- Grimal F, *Threats of Force International Law and Strategy* (Routledge Oxon 2013)
- Grotius H (2005) [1625]. The rights of war and peace (R. Tuck ed) (Vol. 2). Indianapolis, in Liberty Fund 477
- Guild E, *Security and Migration in the 21st Century* (London Polity 2009)
- Guiraudon V, 'European and Integration Policy: Vertical Policy Making as Venue Shopping' (2000) 38 *Journal of Common Market Studies* 251
- Gustafsson Å, 'Aspects légaux et conceptuels de la dissuasion: les exercices militaires russes', ('Legal and conceptual aspects of threats and deterrence: Russian military exercises') (Matthieu Chillaud trs), 2019 *Stratégie* 293
- Gustafsson Å, 'Maritime Security and the Role of Coast Guards: The Case of Finland and the Åland Islands' Demilitarisation' (2019) 12 *Baltic Journal of Law & Politics* 1
- Gustafsson Å, 'Multilevel Governance of Maritime Border Surveillance in the EU and Accountability: The Coast Guard in Sweden' (2020) 3 *Nordic Journal of European Law* 60
- Gustafsson Å, 'The Baltic Sea Region Border Control Cooperation (BSRBCC) and border management in the Baltic Sea region: A case study' (2018) 98 *Marine Policy* 309
- Haelg F, 'The KOF Globalisation Index – A Multidimensional Approach to Globalisation' (2020) 240 *Journal of Economics and Statistics (Jahrbuecher fuer Nationaloekonomie und Statistik)* 691
- Heidbreder E G, *Multilevel Elements of EU Migration Policy* (King Project-Political Science Unit, In-depth Study n.2 2014)
- Heinikoski S, 'Covid-19 Bends the Rules on Border Controls – Yet Another Crisis Undermining the Schengen Acquis?' (2020) UPI Briefing Paper 5
- High-level Panel Report on Threats, Challenges and Change, A more secure world: our shared responsibility 2 December 2004
- Hinojosa Martínez L M, 'A Critical Assessment of the Implementation of Security Council Resolution 1373 (2014)' in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing 2014)
- Hintermeier S, 'Reconceptualization of External Security in the European Union since 1990' in Hans Günter Brauch and others (eds) *Globalization and Environmental Challenges Reconceptualizing Security in the 21st Century* (Springer 2008)
- Hokovský R, The Concept of Border Security in the Schengen Area (2016) 10 *Central European Journal of International and Security Studies* 88
- Homeland Security website <<https://www.dhs.gov/topic/border-security>> accessed 12 February 2021
- Human Development Report 1994. New Dimensions of Human Security
- In larger freedom: towards development, security and human rights for all (21 March 2005)
- Interpol website <<https://www.interpol.int/How-we-work/Border-management>> accessed 5 March 2021

Irion K, *Public Security Exception in the Area of non-personal Data in the European Union* (European Parliament, the IMCO committee Institute for Information Law, University of Amsterdam 2018)

Istanbul Cooperation Initiative 2004

Kadelbach S, 'The Law of the European Union and National Security Exceptions of Member States: Legal expertise presented to the Ministry of Justice of the Republic of Estonia' (Goethe-Universität 2018) 15

Katajala K, 'Drawing Borders or Dividing Lands?: the peace treaty of 1323 between Sweden and Novgorod in a European context' (2012) 37 *Scandinavian Journal of History* 23

Keynes J M, *The economic consequences of the peace* (MacMillan 1919)

Kohlenberg P J and others, *Introducing UNSCdeb8 (beta) A Database for Corpus-Driven Research on the United Nations Security Council* (German Institute for International and Security Affairs WP 1 2019)

Kolodziej E A, 'The Foundations of Security Studies: Hobbes, Clausewitz, and Thucydides' *Security and International Relations* (Cambridge University Press 2005)

Kolosov V A, 'Theoretical approaches in the study of borders' in Sergei V Sevastianov, Jussi P Laine and Anton A. Kireev (eds) *Introduction to Border Studies* (Dalnauka 2015)

Koselleck R, 'Introduction and Prefaces to the "Geschichtliche Grundbegriffe"' (Michaela Richter trs) (2011) 6 *Contributions to the History of Concepts* 1

Koutrakos P, 'Public Security Exceptions and EU Free Movement Law' in Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis (eds) *Exceptions from EU Free Movement Law* (Hart Publishing Limited 2016)

Krasner S, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999)

Krell G, 'The Development of the Concept of Security' in Egbert Jahn and Yoshikazu Sakamoto (eds) *Elements of World Instability: Armaments, Communication, Food, International Division of Labour* (Campus 1981)

Krisch N, 'General Framework' in Bruno Simma and others (eds) *The Charter of the United Nations: A Commentary vol. II, 3d ed* (Oxford University Press 2012) MN 36, 1243 MN 13

Laclau E, 'Metaphor and social antagonism' in Carey Nelson and Lawrence Grossberg (eds) *Marxism and the interpretation and culture* (Macmillan Education 1988)

Laine J P, 'A historical view on the study of borders' in Sergei V Sevastianov, Jussi P Laine and Anton A Kireev (eds) *Introduction to Border Studies* (Dalnauka Vladivostok 2015)

Lenaerts K and Gutiérrez-Fons J A, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice* (European University Institute Working Paper, Academy of European Law 2013/9)

Léonard S, 'EU border security and migration into the European Union: FRONTEX and securitisation through practices' (2010) 19 *European Security* 231

Lilico A, Summayah Leghari and Marika Hegg, *The Cost of Non-Schengen Impact of border controls within Schengen on the Single Market* (European Parliamentary Research Study 2016)

Martin S and Ferris E, *Border Security, Migration Governance and Sovereignty* (International Organization for Migration 2017) <<https://publications.iom.int/books/border-security-migration-governance-and-sovereignty>> accessed 7 March 2021

Mearsheimer J J, 'Back to the Future: Instability in Europe After the Cold War' (1990) 15 *International Security* 5

Meisler S, *United Nations: The First Fifty Years* (Atlantic Monthly Press 1995)

Mitsilegas V, 'Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance' in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing 2007) 392

Mitsilegas V, Monar J and Rees W, *The European Union and Internal Security: Guardian of the People?* (Palgrave MacMillan 2003)

- Møller B, 'The Concept of Security: The Pros and Cons of Expansion and Contraction' (18th General Conference of the International Peace Research Association (IPRA) Tampere, 5-9 August 2000)
- Møller B, 'National, Societal and human security: General Discussion with a Case Study from the Balkans' in UNESCO (ed) *First International Meeting of Directors of Peace Research and Training Institutions. What Agenda for Human Security in the Twenty-first Century* (UNESCO 2001)
- Møller B, 'National, Societal and Human Security: Discussion - Case Study of the Israel-Palestine Conflict' in Hans Günter Brauch and others (eds) *Security and Environment in the Mediterranean: Conceptualising Security and Environmental Conflicts* (Springer 2002)
- Monar J, 'The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of External EU Borders', in Jaap de Zwaan and Flora A N J Goudappel (eds) *Freedom, Security and Justice in the European Union: Implementation of The Hague Programme* (T.M.C. Asser Press 2006)
- Montaldo S, 'The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste' (2020) 5 *European papers* 523
- Morgenthau H J, 'Another 'Great Debate': The National Interest of the United States' (1952) 46 *American Political Science Review* 961
- Morgenthau H J, *Politics Among Nations. The Struggle for Power and Peace, 3rd edition* (Alfred A. Knopf 1960) 562
- Morgenthau H J, *Politics in the Twentieth Century* (University of Chicago Press 1971)
- Nanopoulos E, Guild E and Weatherhead K, 'Securitisation of Borders and the UN's Global Compact on Safe, Orderly and Regular Migration' (2018) Queen Mary School of Law Legal Studies Research Paper No. 270
- Nasu H, 'The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System' (2011) 3 *Amsterdam Law Forum* 15
- Nasu N, 'Law and Policy for Antarctic Security' in Alan D Hemmings, Donald R Rothwell, Karen N Scott (eds) *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives* (Routledge 2012)
- Nasu H, 'Human Security and International Law' in Mary E Footer and others (eds) *Security in International Law* (Hart Publishing 2016)
- National security and European case-law* (Council of Europe/European Court of Human Rights 2013)
- National Security Strategy October 2002 <<https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf>> accessed 15 February 2021
- Neal A W, 'Securitization and Risk at the EU Border: The Origins of FRONTEX' (2009) 47 *JCMS* 333
- Németh S, Németh Á and Kaisto V, 'Research design for studying development in border areas: casestudies towards the big picture?' (2013) 1 *Belgeo* <<http://belgeo.revues.org/10582>> accessed 15 February 2021
- Newman D, 'Borders and Bordering Towards an Interdisciplinary Dialogue' (2006) 9 *European Journal of Social Theory* 171
- Nicolosi S F, 'Disconnecting Humanitarian Law from EU Subsidiary Protection: A Hypothesis of Defragmentation of International Law' (2016) 29 *Leiden Journal of International Law* 463
- Obwexer W, 'Artikel 4 EUV', in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (Nomos 2015)
- Oswald Spring Ú, 'Sustainable Development with Peace Building and Human Security' in Mostafa K Tolba (ed) *Our Fragile World. Challenges and Opportunities for Sustainable Development, Forerunner to the Encyclopedia of Life Support System, vol. 1* (Oxford-EOLSS Publisher 2001)
- Owsiak A P, Cuttner A K and Buck B, 'The International Border Agreements Dataset' (2016) 35 *Conflict Management and Peace Science* 559

Paulus A L (2004) 'From territoriality to functionality? Towards a legal methodology of globalization' in Ige F Dekker and Wouter G Werner (eds) *Governance and international legal theory* (Martinus Nijhoff Publishers 2004)

Presidency Conclusions European Council meeting in Laeken 14 and 15 December 2001

Presidency Conclusions of the Brussels European Council 16/17 December 2004

Priebe R, 'Innere Sicherheit – eine europäische Aufgabe?' in Ulrich Becker and others (eds) *Verfassung und Verwaltung in Europa – Festschrift für Jürgen Schwarze* (Nomos 2014)

Reichberg G M and Syse H, *Threats and Coercive Diplomacy: An Ethical Analysis* (2018) 32 *Ethics & International Affairs* 179

Repertoire of the Practice of the Security Council, UN Security Council website

<<https://www.un.org/securitycouncil/content/repertoire/actions#rel1>> accessed 12 February 2021

Report of China on implementation of United Nations Security Council resolution 1540(2004), Ministry of Foreign Affairs of the People's Republic of China website

<https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/jks_665232/kifywj_665252/t196944.shtml> accessed 13 March 2021

Report of the Security Council to the General Assembly Covering the period from 16 July 1953 to 15 July 1954 A/2712 (1954)

Report of the Security Council to the General Assembly Covering the period from 16 July 1954 to 15 July 1955 A/2935 (1955)

Report of the Security Council to the General Assembly Covering the period from 16 July 1964 to 15 July 1965 A/6002 (1965)

Report of the Security Council to the General Assembly Covering the period from 16 June 73 to 15 June 1974 A/9602 (1973)

Riccardi A and Natoli, T 'Borders and International Law: Setting the Stage' in Alice Riccardi and Tommaso Natoli (eds) *Borders, Legal Spaces and Territories in Contemporary International Law* (Springer, Cham. 2019)y

Rosand E, 'The Security Council As "Global Legislator": Ultra Vires or Ultra Innovative?' (2004) 28 *Fordham Int'l L.J.* 542

Ruggie J G, 'Territoriality and beyond: Problematizing modernity in international relations' (1993) 47 *International Organization* 1

Ruys T, 'Quo Vadit Jus ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq' (2008) 9 *Melbourne Journal of International Law* 334

Scattola M, 'Die Grenze der Neuzeit' in Markus Bauer and Thomas Rahn (eds) *Die Grenze* (Akademie Verlag 1997)

Sending O J, 'Security, Development and UN Coordination' in Hans Günter Brauch and others (eds) *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century* (Springer 2008)

Shared Vision, Common Action: A Stronger Europe A Global Strategy for the European Union's Foreign And Security Policy (2016)

Simmons B A and Kenwick M, 'Border Orientation in a Globalizing World: Concept and Measurement' (Conference on International Borders in a Globalizing World, University of Pennsylvania, 2-3 May 2019) <https://msuconflictworkshop.github.io/assets/pdf/SIMMONS_KENWICK_latent_2.24.2019-1.pdf> accessed 15 March 2021

Simmons B A and Shaffer R, 'Globalization and Border Securitization in International Discourse' (Social Science Research Network 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3480613> accessed 14 June 2021

Simmons B A, 'Border Rules' (2019) 21 *International Studies Review* 256

Smits J M, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research in Rob van Gestel, Hans W Micklitz and Edward L Rubin (eds) *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017)

Stehlík V, 'Discretion of Member States Vis-à-vis Public Security: Unveiling the Labyrinth of EU Migration Rules' (2017) 17 *International and Comparative Law Review* 127

Stehlík V, 'Metamorphosis of Public Security Exception in the EU Internal Market and EU Citizens' Rights' in Agnieszka Bień-Kacała, Lóránt Csink, Tomasz Milej, Maciej Serowaniec (eds) *Liberal constitutionalism - between individual and collective interests* (Nicolaus Copernicus University 2017) 237

Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions (United Nations Security Council CTED 2017) 5 <<https://www.un.org/sc/ctc/wp-content/uploads/2017/08/CTED-Technical-Guide-2017.pdf>> accessed 12 February 2021 5

Thalmann P, 'Schengen, Migration – and the Resurrection of the Westphalian Nation-State?' in Clara Rauchegger and Anna Wallerman (eds) *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law* (Hart Publishing 2019)

Thirlway H, 'Territorial disputes and their resolution in the recent jurisprudence of the international court of justice' (2018) 31 *Leiden Journal of International Law* 117

Thomas N and Tow W T, 'The Utility of Human Security: Sovereignty and Humanitarian Intervention' (2002) 33 *Security Dialogue* 177

Thym D and Bornemann J, 'Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics' (2020) 5 *European Papers* 1143

Thym D, 'Legal framework for entry and border controls', in Kay Hailbronner and Daniel Thym (eds), *EU immigration and asylum law – a commentary* (C.H. Beck/Hart/Nomos 2016)

Thym D, 'The Schengen Law: A Challenge for Legal Accountability in the European Union' (2008) 8 *European Law Journal* 218

Tiimonen H and Nikander M, *Interdependence of Internal and External Security Will the operational culture change with the operational environment?* (Ministry of the Interior publication 2016)

Tsagourias N and White N D, *Collective Security: Theory, Law and Practice* (Cambridge University Press 2013)

Tsagourias N, 'The Prohibition of Threats of Force' in Nigel White and Christian Henderson (eds) *Research Handbook on International Conflict and Security Law* (Elgar 2012)

United States Border Patrol Strategy 2020

United Nations Security Council Report website <<https://www.securitycouncilreport.org/un-security-council-working-methods/annual-report-to-the-general-assembly.php>> accessed 12 February 2021

United Nations Meetings Coverage and Press Releases website <<https://www.un.org/press/en/2019/sc13721.doc.htm>> accessed 10 March 2021

United Nations website <<https://www.un.org/counterterrorism/about>> accessed 14 March 2021

United Nations General Assembly Res 71/291 UN Doc A/RES/71/291 (19 June 2017)

van der Woude M, 'The Patchwork that is Schengen' (Border Criminologies blog, 3 Apr 2020) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/04/patchwork>> accessed 15 March 2021

van Rossem J W, 'Interaction Between EU Law and International Law in the Light of Intertanko and Kadi: The Dilemma of Norms Binding the Member States but not the Community' in Ige F Dekker and Ellen Hey (eds) *Netherlands Yearbook of International Law* (Asser Press 2009) 208

Verdirame G, 'Sovereignty' in Jean d'Aspremont and Sahib Singh (eds) *Concepts for International Law. Contributions to Disciplinary Thought* (Edward Elgar 2019)

Visser S, 'The costs of EU's policy on external border security: Revealing the financial consequences for the bordering industry and undocumented migrants' (Bachelor thesis, Radboud University Nijmegen 2018)

- Vranken J, 'Exciting Times for Legal Scholarship' (2012) 2 Law and Method 42
- Wæver O and others, *Identity, Migration and the New Security Agenda in Europe* (Pinter Publishers Ltd. 1993)
- Wæver O, 'Societal Security: The Concept' in Ole Wæver and others (eds) *Identity, Migration and the New Security Agenda in Europe* (Pinter Publishers 1993)
- Wæver O, 'Concepts of Security' (dissertation, Department of Political Science, University of Copenhagen, 1997)
- Walt S M, 'The Renaissance of Security Studies' (1991) 35 International Studies Quarterly 211
- Wellens K, 'The UN Security Council and New Threats to the Peace: Back to the Future' (2003) 8 Journal of Conflict and Security Law 15
- White N D, 'Security Agendas and International Law' in Mary E Footer and others (eds) *Security in International Law* (Hart Publishing 2016)
- White N D, *Advanced Introduction to International Conflict and Security Law* (Edward Elgar 2014)
- Wolfers A, 'National Security' as an Ambiguous Symbol', (1952) 67 Political Science Quarterly 481
- Wolff S, *EU Integrated Border Management Beyond Lisbon: Contrasting Policies and Practice* (Clingendael European Studies Programme 2009)
- Wolfrum R, 'Chapter I Purposes and Principles' in Bruno Simma and others (eds) *The Charter of the United Nations: A Commentary vol. I, 3d ed* (Oxford University Press 2012)
- World Customs Organization (WCO) website <<http://www.wcoomd.org/en/topics/enforcement-and-compliance/activities-and-programmes/security-programme.asp>> accessed 14 February 2021
- World Health Organization (WHO) website <https://www.who.int/health-topics/health-security/#tab=tab_1> accessed 12 February 2021
- World Water Council, *Global Water Security: Lessons Learnt and Long-Term Implications* (2018)

Åsa Gustafsson

Security in the Baltic Sea Region from a Legal Perspective with a Focus on Border Security

The concept of border security is explored from a legal perspective. First, inter-state threats and deterrence in a Baltic Sea region context are analysed, above all for the purpose of examining whether border security is used in connection with the use of force and threats between states. The conclusion is drawn that as a rule the term border security is not used in these contexts.

'Border security' is now found in legal documents in the EU, and in UN Security Council resolutions. The objectives of EU border security rules and the UN Security Council application of border control and border security are examined. *Inter alia* the security contexts are different, but border control and the goal of border security at both EU and global levels in the end entail processes of similar character, concerning individuals crossing borders. It is argued that the use of 'border security' in the practice of the UN Security Council has changed over the years. It now concerns individuals (and goods) crossing international borders.

The EU is an example of an advanced border security system, based on supranational rules. A number of circumstances can be seen as alleviating EU member states' concerns over having relinquished sovereignty in this regard to the EU.

It is highlighted that a lasting definition of security, or of security dimensions, is not achievable, since the political and scientific concepts of security changes when the political contexts change.

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