# The Concept of Security in International Law Relating to Armed Conflicts

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Paper to be presented by Marco Sassòli, Professor of international law at the University of Geneva, Switzerland, and associate professor at the Universities of Quebec in Montreal and of Laval, Canada, at a conference on "Security: A Multidisciplinary Approach" to be held at the Institute for International and Public Law of the University of Oslo on 16-17 October 2008[*]

## I. INTRODUCTION

International law regulates the relations between States, to an increasing extent, the relations between States and individuals, and to a still limited and controversial extent, the behavior of individuals, even when it cannot be attributed to a State. Armed conflicts cause problems at all three of these levels. The notion of security appears on at least the first two of these levels.

On the first, inter-State level, armed conflicts are the most traditional and the most comprehensive threat to the security of a State. Security threats can justify an armed conflict and security reasons may justify a State taking action that would normally be incompatible with its obligations during armed conflicts.

On the second level, armed conflicts constitute the most extreme threat to the security of individuals. In an armed conflict, the security of the State may justify certain interferences with the rights of persons affected by said conflict, but States also have obligations to protect the security of such persons. It is therefore appropriate to analyze how the concept of security is used in the international law relating to armed conflicts.

Many treaties of the international law relating to armed conflicts use the term security, but interestingly enough (and as we will see, symptomatically) none of these treaties define the term.

War is regulated by two distinct and completely separate branches of international law: the *ius ad bellum*, prohibiting and exceptionally authorizing the use of force, and the *ius in bello*, regulating, mainly for humanitarian purposes, that use of force.

Today, the use of force, *i.e.* the launching of an armed conflict, is prohibited by a peremptory rule of international law.[1] The *ius ad bellum* has turned into a *ius contra bello*, which is today mainly codified in the UN Charter. There are two exceptions to the prohibition of the use of force between States: individual and collective self-defense, which is not the launching of an armed conflict but the reaction to an armed attack, and armed conflicts launched (according to the letter of the UN Charter[2]) - or rather (in international reality) authorized - by the UN Security Council "to maintain or restore international peace and *security*". As for non-international armed conflicts, it is inherent in the concept of the modern State that the government has the monopoly on the lawful use of force. Individuals are prohibited under the

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[1] See Art. 2 (4) of the UN Charter.

[2] See Art. 42 of the UN Charter.

domestic law of all States – although not by international law – from launching armed conflicts against their government.

As for *ius in bello*, or in more modern terminology, international humanitarian law (IHL), it applies independently of whether an armed conflict is lawful or unlawful under *ius ad bellum* (or launched in violation of the domestic law of the State affected by a non-international armed conflict) never mind what the causes claimed by or attributed to the parties to the conflict may be. The laws on how force may be used apply equally to all parties to a conflict, regardless of the legitimacy of the initial use of force.[3] The treaties of IHL distinguish between international and non-international armed conflicts, the latter being governed by less detailed and less protective rules. As for customary IHL, a recent comprehensive study undertaken under the auspices of the International Committee of the Red Cross (ICRC) found that there is a large body of customary rules, the majority of which purportedly apply to both international and non-international armed conflicts.[4]

## II. THE CONCEPT OF SECURITY IN GENERAL

As the concept of security is not defined in the relevant treaties (*i.e.*, the UN Charter and the Geneva Conventions[5] and Additional Protocols[6] which codify most of IHL) its meaning must be determined through the interpretation of every provision in which it appears. This must be done in accordance with the ordinary meaning of the term, taking into account the object and purpose, the context of the treaty and of the rest of international law, and subsequent practice of States.[7] Scholarly writings on this concept are very rare.[8] In order to determine the ordinary meaning of the term, which derives from the Latin "*se-cura*", "*sine cura*", i.e., without concern, referring to a dictionary definition may be useful. For "security", the "security of the nation's citizens" is mentioned and explained with the terms "safety, freedom from danger, protection, invulnerability,"[9] and the "security of the children/jewels", is explained by "safety,

[3] This distinction is re-affirmed in the fifth preambular paragraph of *Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 *UNTS* 3 – 434. See also Christopher Greenwood, "The Relationship Between *jus ad bellum* and *jus in bello*", 9 *Review of Int'l Studies* (1983) 221; Marco Sassòli "*Ius ad bellum* and *Ius in Bello* – The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?", in: Michael N. Schmitt *et al.* (eds.), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, Nijhoff, Leiden/Boston, 2007, pp. 242-264; Henry Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Pédone, Paris, 1970.

[4] Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005.

[5] *Convention [No.I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 *UNTS* 31-83; *Convention [No. II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 *UNTS* 85-133; *Convention [No. III] relative to the Treatment of Prisoners of War*, 12 August 1949, 75 *UNTS* 135-285; *Convention [No. IV] relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 *UNTS* 287–417.

[6] Protocol I, *supra* note 3; *Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts*, 8 June 1977, 1125 *UNTS* 609 - 699.

[7] See Art. 31 of the Vienna Convention on the Law of Treaties, general rule of interpretation.

[8] I was only able to find Stephan Verosta, "Der Begriff 'Internationale Sicherheit' in der Satzung der Vereinten Nationen", in: René Marcic *et al.* (eds.), *Internationale Festschrift für Alfred Verdross zum 80. Geb*urtstag, Wilhelm Fink Verlag, München/Salzburg, 1971, pp. 533-547.

[9] "security, *n.*" *The Oxford Paperback Thesaurus*, edited by Maurice Waite, Oxford University Press, Oxford, 2006, *Oxford Reference Online*. Oxford University Press, online: <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t24.e11327>.

freedom from danger, invulnerability, protection, safekeeping, shielding".[10] In these definitions, the relationship between security and safety is apparent. "Safety" is defined as "the state of being safe; exemption from hurt or injury; freedom from danger".[11] In English, "security" seems to refer to threats by deliberate human behavior, while "safety" to threats from natural causes or human negligence. Such a distinction is however not very practical in view of new, e.g. biological, threats and we will see that it is not made in other official UN languages.

On the international level, during the cold war era, a UN Group of experts defined security (in the context of disarmament discussions) as:[12]

> "a condition in which States consider that there is no danger of military attack, political pressure or economic coercion, so that they are able to pursue freely their own development and progress. International security is thus the sum of the security of each and every State […] accordingly international security cannot be reached without full international co-operation. However, security is a relative rather than an absolute term. National and international security need to be viewed as matters of degree."

In discussions on international law, *e.g.* in the context of collective security, when defining what is meant by the security of the State, writers distinguish between an objective and a subjective element of security.[13] In my view, this distinction may equally be applied to the security of persons. Hans Kelsen writes: "Security is the condition of being protected against, or not exposed to a danger. It is an objective condition of man which, rightly or wrongly, man assumes to exist. The effect of this assumption is a certain state of mind which may be described as freedom from fear, the fear of a danger."[14] The objective element is the absence of, or protection against a threat. Some see it as being embodied in the mechanisms, procedures and instruments aiming at stable, peaceful, ordered and predictable relations.[15] Such security can only be guaranteed by the collective to which the State or the individual belongs.[16] The subjective dimension is the perception of the security situation, which may or may not correspond to the objective situation. Respect for international law is crucial to international security from both a subjective and an objective view point.[17] Depending on the absent, existing or perceived threat, international security, like peace (as we will discuss later), has economic and social aspects, thus going beyond military threats which have

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[10] "security, *n.*" *The Oxford Paperback Thesaurus*, complied by Betty Kirkpatrick, Oxford University Press, Oxford, 2000, p. 726; see also: "safety, *n.*" The Oxford Paperback Thesaurus, p. 713.

[11] "safety, *n.*" The Oxford English Dictionary, 2nd ed., Clarendon Press, Oxford, 1989, Volume XIV Rob-Sequyle, pp. 358-361; see also: "security, *n.*" The Oxford English Dictionary, Volume XIV Rob-Sequyle, pp. 853-855.

[12] See the report by a group of governmental experts set up to carry out a comprehensive study of concepts of security, requested by UN General Assembly Resolution 38/188 H of 20 December 1983, submitted by the UN Secretary-General as Report A/40/553 of 26 August 1985, *Study on Concepts of Security*, p. 10. This group distinguished the following concepts of security: balance of power; deterrence; equal security (between super-powers and the blocs of the cold war); collective security; neutrality; non-alignment; peaceful co-existence; common security (*Ibid*., pp. 12-22).

[13] Mirko Zambelli, *La constatation des situations de l'article 39 de la Charte des Nations Unies par le Conseil de Sécurité*, Helbing&Lichtenhahn, Genève, Bâle, Munich, 2002, pp. 161-162; Rüdiger Wolfrum, "Article 1", in : Simma (ed.) *The Charter of the United Nations, A Commentary*, Oxford University Press, New York, 1995, p. 51. See also *UN Study on Concepts of Security*, *supra* note 12, p. 11.

[14] Hans Kelsen, *Collective Security under International Law*, Government Printing Office, Washington D.C., 1957, p. 1.

[15] Serge Sur, *Relations internationales*, 4th ed., Montchrestien, Paris, 1995, pp. 439-441.

[16] Verosta, *supra* note 8, 536.

[17] See *UN Study on Concepts of Security*, *supra* note 12, pp. 58-60.

traditionally been the focus of international law.[18] As shown elsewhere in this volume, what Kelsen calls freedom from fear[19] is extended to freedom from want by certain adepts of the concept of "human security".

## III. SECURITY THREATS AS A JUSTIFICATION FOR THE USE OF FORCE UNDER THE UN CHARTER

The United Nations was created as a collective security organization. The organization's first purpose is peace,[20] i.e. to avoid international armed conflicts. The drafters of the UN Charter understood however that to achieve this aim, the absence of war was not sufficient. They therefore included economic and social development and the universal respect of human rights among the purposes of the organization.[21] One of the main organs of the UN is the Security Council. Apart from references to that organ, the term "security" is used 29 times in the UN Charter, but except for rules that have lost their practical importance,[22] security always appears together with peace in the phrase "international peace and security". Under the Charter, international peace and international security are today seen as equivalents.[23] Originally, it might have been that security was the narrower concept and it was widened to cover all aspects of peace, a development which has been confirmed by the emergence of the concept of "human security".[24] Others consider that peace was initially the narrower concept and security also covered positive aspects of peace.[25]

An armed attack constitutes a breach of international peace and security, which the Security Council must take measures against in order to restore the peace.[26] The State victim of an armed attack may however also, individually of collectively, use force in self-defense. Under the text of the Charter, all other instances of the use of force between States must be decided by the UN Security Council. Unlike individual States, the Security Council may decide – and in practice authorize – the use of force for a much wider variety of situations than armed attacks: to maintain or restore international peace and security. The use of the term "maintain" implies that the Council may and must also act preventively, including by authorizing the use of force before the State threatening international peace and security has used force. The Council determines, according to Article 39 of the Charter, the existence "of any threat to the peace, breach of the peace or act of aggression". The fact that here and only here the term peace is not accompanied by the term "security" is probably of no importance, because the article then goes on to direct the Council to "decide what measures shall be taken to maintain or restore international peace and security". In recent resolutions, the Security Council has

[18] See Kelsen, *supra* note 14, p. 1 and *UN Study on Concepts of Security*, *supra* note 12, pp. 23 and 28.
[19] The concept of freedom from fear first appeared in the Atlantic Charter, reproduced as Annex 2 in : Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations : commentary and documents*, 2nd ed., World Peace Foundation, Boston, 1949.
[20] Mohammed Bedjaoui, "Article 1 (Commentaire général)", in: Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds.), *La Charte des Nations Unies, Commentaire article par article*, 3rd ed., Economica, Paris, 2005, pp. 314-315.
[21] See Preamble and Art. 1 of the UN Charter.
[22] Art. 73 on non-self-governing territories and Arts. 76, 83 and 84 on the trusteeship system.
[23] In the index of Commentaries to the UN Charter, the entry "security " refers the reader to "peace" (see Cot/Pellet/Forteau, *supra* note 20, p. 2290.
[24] Dan Henk, "Human Security: Relevance and Implications", Parameters 35:2 (2005), pp. 92-106. See also already *UN Study on Concepts of Security*, *supra* note 12, pp. 4, 23, 28 and 55 (adopting a broad concept of security without yet using the term "human security").
[25] Verosta, *supra* note 8.
[26] Art. 39 of the UN Charter.

regularly classified situations as threats to international peace *and security*[27] and taken measures under Chapter VII, even though Art. 39 of the Charter does not use the term "security" in this context. In both its determination of the situation and its decision as to what measures should be taken, the Council has a wide discretion, however it is not above the law.[28] In practice however, there is no court or other organ capable of reviewing the legality of UN Security Council resolutions and Member States are under an obligation to comply with Security Council resolutions adopted under Chapter VII of the UN Charter.[29]

In its practice, the Security Council has increasingly extended the concept of threats to international peace and security. It is obvious that inter-State conflicts are the prime example of such a threat. The first non-international armed conflict to be classified as such a threat was the Congo crisis in 1961.[30] This practice has continued, with the internal armed conflicts in the former Yugoslavia, Iraq and Somalia as well as a great number of other conflicts right up to the current crisis in Sudan, being considered a threat to international peace and security. Often without making a clear distinction with the conflict itself, serious violations of IHL[31] committed in such armed conflicts have been considered as threatening international peace and security. The main evidence for the fact that the Security Council considered such violations as threats distinct from the conflict itself is the resolutions creating the international criminal tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), as the statutes of those tribunals only allowed them to prosecute war crimes and crimes against humanity, not crimes against peace.[32] Prosecutions could therefore not possibly prevent or put an end to the conflicts themselves, but only the violations of IHL committed during them. More recently, the Council has also classified serious violations of Human Rights[33] and, according to some interpreters even the (non-democratic) nature of some regimes[34] as being threats to international peace, without clarifying whether the violations or regime alone, or only their possible repercussions beyond the borders of the affected State constituted the threat. In the cases of South Africa and Rhodesia, the denial of a people's right to self-determination was considered as threatening international peace, although in those cases the threat was never clearly separated from the parallel risk of trans-border repercussions.[35] Despite the fact that general international law does not contain disarmament obligations and does not prohibit the possession of nuclear weapons, the Security Council has considered, in the case of several

[27] See *e.g.* SC Res. 1556 (2004), preambular para. 21 (on Sudan).
[28] ICTY, *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber, 2 October 1995, para. 39.
[29] Arts. 25 and 103 of the UN Charter. See International Court of Justice, *Order of 14 April 1992*, in the Case *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. US)*, ICJ Reports, 1992, p. 126.
[30] SC Res. 161 (1961).
[31] See for references Pierre d'Argent, Jean d'Aspremont Lynden, Frédéric Dopagne and Raphaël van Seenberghe, "Article 39", in: Cot/Pellet/Forteau (eds.), *supra* note 20, pp. 1155-1157, with references.
[32] See SC Res. 827 (1993) and 955 (1994) and their annexes.
[33] The Security Council first hinted at this in SC Res. 917 (1994) with regard to the situation in Haiti. The following resolutions expressly mention human rights considerations as among the reasons for taking action under Chapter VII of the UN Charter: SC Res. 1264 (1999), SC Res. 1272 (1999), SC Res. 1289 (2000), SC Res. 1341 (2001), SC Res. 1497 (2003), SC Res. 1509 (2003), SC Res. 1556 (2004), SC Res. 1577 (2004). See generally Zambelli, *supra* note 13, pp. 270-279 and also the suggestions in *UN Study on Concepts of Security*, *supra* note 12, pp. 37 and 38.
[34] Zambelli, *supra* note 13, pp. 279-280.
[35] See the very nuanced analysis by Zambelli, *supra* note 13, pp. 203-209. For a more blunt account, see: *UN Study on Concepts of Security*, *supra* note 12, p. 29.

countries,[36] and on one occasion even generally,[37] that the proliferation of weapons of mass destruction constitutes a threat to international peace and security. International terrorism was initially only considered as threatening international peace and security when the acts or omissions could be attributed to a certain State.[38] It is only since the attacks of 11 September 2001 that terrorism has been seen as a threat to international peace and security independently of any State involvement.[39]

As early as in 1992, the Security Council meeting at the level of Heads of State and Government considered that: "The absence of war and military conflicts among States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security."[40] In 2004, the *High-level Panel on Threats, Challenges and Change* put the situation as follows:[41]

> "Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security. So defined, there are six clusters of threats with which the world must be concerned now and in the decades ahead:
>
> - Economic and social threats, including poverty, infectious diseases and environmental degradation
> - Inter-State conflict
> - Internal conflict, including civil war, genocide and other large-scale atrocities
> - Nuclear, radiological, chemical and biological weapons
> - Terrorism
> - Transnational organized crime"

Such a wide understanding of international security corresponds – or, as some would argue, constitutes a return[42] - to a positive and structural concept of peace. Following groundbreaking research by Johan Galtung, distinguishing between personal and structural violence, peace conceived as the absence of violence can be seen as a narrow concept of negative peace meaning the absence of personal violence. It can and should however also

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[36] See the practice summarized in Pierre d'Argent *et al*., *supra* note 31, pp. 1159-1162, and most recently SC Res. 1718 (2006) in relation to the Democratic People's Republic of Korea and SC Res. 1696 (2006), SC Res. 1737 (2006) and SC Res. 1747 (2007) in relation to Iran.

[37] The SC President's statement of 31 Jan 1992 (S/23500) refers to the proliferation of weapons of mass destruction as being a threat to international peace and security generally rather in relation to a particular country.

[38] See the practice summarized in Pierre d'Argent *et al*., *supra* note 31, pp. 1162-1163.

[39] SC Res. 1368 (2001); 1373 (2001); 1455 (2003); 1526 (2004); 1566 (2004); 1611 (2995); 1617 (2005); 1618 (2005); 1624 (2005); 1735 (2006); 1787 (2007).

[40] UN Doc. S/23500 of 31 January 1992, *Statement of the President of the SC made on behalf of the members of the Council*.

[41] *A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change*, UN doc. A/59/565, 2 December 2004, p. 12.

[42] Pierre d'Argent *et al*., *supra* note 31, p. 1155; Pierre-Marie Dupuy, "Sécurité collective et organisation de la paix", Revue générale de droit international public 97 (1993), p. 623; Marco Odello, "Commentary on the United Nations' High-Level Panel on Threats, Challenges and Change", Journal of Conflict and Security Law 10 (2005) 231, at 235.

have a wider meaning as the absence of structural violence, for which social justice is a positively defined condition.[43] The wide understanding suggested by the *High-Level Panel* also corresponds to the idea of "human security," brought to the forefront in recent years, which nevertheless remains highly controversial among UN member States.[44]

In the context of the UN Charter, a wide understanding of the notion also has significant structural and institutional implications, which demonstrate the inherent dangers. "[A] threat to international peace and security may be almost anything, as far as the [Security Council] reaches the required majority to pass a resolution."[45] The only body within the United Nations which is able to make decisions which are binding on States is the Security Council, and it may only do so under Chapter VII of the Charter, after classifying a threat as a threat to international peace and security. This is, in present-day general international law, the only vertical element in a fundamentally horizontal, self-applied international legal system. The Security Council acting under Chapter VII is the embryo of a law enforcement system of the international community. Admittedly it is still weak, dominated more by real power structures than by the rule of law, marked by inherent double standards and a crying absence of due process, but in existing international law there is no alternative when decisions binding all States have to be taken.[46] Because of its unique ability to take binding decisions and despite widespread criticism by scholars and some States, the Council has recently also taken legislative action.[47] It has adopted a small international criminal code on the fight against international terrorism, laying down new obligations of all States in the field of repression of international terrorism and judicial cooperation in this field.[48] It thus avoided the long treaty-making process needing the formal consent of all those to be bound or the long, mysterious and cumbersome customary process that is subject to manipulation and leads to vague results always subject to controversy. Those who criticize such action remained remarkably silent when the Council took another inherently legislative[49] action, creating the International Criminal Tribunals for the Former Yugoslavia and Rwanda.[50]

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[43] See in particular Johan Galtung, "Peace Research: Past Experiences and Future Perspectives", in: *Essays in Peace Research*, vol. I, Copenhagen, 1975, 244 at 251-253; Johan Galtung, "Violence, Peace and Peace Research", Journal of Peace Research (1969) 167, at 168 and 183. For international law, this was concretized by Bert V. Röling, *Einführung in die Wissenschaft von Krieg und Frieden*, Neukirchener Verl., Neukirchen, 1970, pp. 87-91.

[44] See S. Neil MacFarlane and Yuen Foong-Khong, Human *Security and the UN: A Critical History*, (Bloomington: Indiana University Press, 2006), p. 10.

[45] Odello, *supra* note 42, at 237.

[46] On the advantages of Security Council action against "new" threats to international security, including a discussion of their legitimacy, see Allen S. Weiner, "The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?", Stanford Law Review 59 (2006) 415 at 482-495.

[47] See, for a discussion, Paul C. Szasz, "The Security Council Starts Legislating", American Journal of International Law 96 (2002), pp. 901-905; José E. Alvarez, "Hegemonic International Law Revisited", American Journal of International Law 97 (2003), pp. 874-878; Stefan Talmon, "The Security Council as World Legislature", American Journal of International Law 99 (2005), pp. 175-193; Axel Marschik, "The Security Council as World Legislator? Theory, Practice and Consequences of an Expansion of Power", *IILJ Working Paper 2005/18*, Institute for International Law and Justice, New York University School of Law, online: http://www.iilj.org/research/documents/2005.18Marschik.pdf, and the discussion by Jürg Lindenmann in Yves Sandoz (ed.), *Actes du Colloque international, Quel droit International pour le 21e siècle? Neuchâtel, 6-7 mai 2005*, Bruylant, Bruxelles, 2007, pp. 52-55.

[48] SC Res. 1373 (2001).

[49] Under International Human Rights Law, a tribunal must be "established by law" (see, *e.g.*, Art. 14 (1) of the International Covenant on Civil and Political Rights, 999 *UNTS* 171).

[50] SC Res. 827 (1993) and 955 (1994).

In addition, a wide understanding of international peace and security has institutional consequences. By classifying an economic, social, humanitarian or ecological problem as a threat to international peace and security, the Council moves it from the field of action of the more "democratic" UN General Assembly, to which it belongs under the UN Charter, to that of the Council.[51] However, only the use of force in the form of armed conflicts, genocide and widespread and serious human rights violations physically threatening persons need urgent action, which is the strength of the Security Council, while realization of comprehensive peace and human security need long-term action, based upon wide consultation and consensus.[52] In addition, such a shift of decisions on human security subjects them to the veto power of a permanent member of the Security Council,[53] bars in practice any legality control,[54] and moves the matter concerned out of the field of "matters falling essentially within the domestic jurisdiction of a State."[55] The High-Level Panel significantly does not clarify whether the Security Council would "be allowed to use its powers, including the use of force, to deal with all new threats."[56]

The most serious problem resulting from a wide understanding of security under the UN Charter is that a threat to international peace and security does not only authorize the Security Council to take binding decisions, but also to authorize the use of force, *i.e.* to confer the *ius ad bellum* and to initiate armed conflicts. Parallel to its extension of the concept of threats to international peace and security described above, the Security Council has indeed also extended the kind of threats for which it authorized, when no permanent member objected, the use of force.[57] This is probably a major reason for the reluctance of countries of the South, always afraid of outside interventions under new guises, towards the entire concept of "human security".[58] Many countries of the South, including some with a democratic regime, perceive Security Council authorized humanitarian intervention not as protecting "human security", but as a major threat to their own security.[59]

In my view, the use of force cannot be authorized against economic and social threats, poverty, infectious diseases and environmental degradation. It is however difficult to find a legal reason for such a limitation. Some authors write that the use of force to counter environmental threats would be disproportionate, contrary to the peaceful spirit of environmental law and counterproductive.[60] These are not very objective standards. How can one be confident, at the time of authorizing it, that the use of force to counter human rights

[51] Under Art. 24 of the UN Charter the Council has "primary responsibility for the maintainance of international peace and security", while the General Assembly discusses, under Art. 10, any question or matter within the scope of the Charter.
[52] Dupuy, *supra* note 42, pp. 623-624.
[53] Art. 27 (3) of the UN Charter.
[54] See *supra* note 29, and the nuanced and comprehensive discussion by Zambelli, *supra* note 13, at 333-413.
[55] Art. 2 (7) of the Charter reads: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll."
[56] Odello, *supra* note 42, at 245.
[57] For some statistics, see Charlotte Ku, "When can Nations go to War? Politics and Change in the UN Security System", Michigan Journal of International Law 24 (2003) 1077 at 1082-1087.
[58] See MacFarlane and Foong-Khong, *supra* note 44, p. 10.
[59] See e.g. Ramesh Thakur and Dipankar Banerjee, "India: democratic, Poor, Internationalist", in: Charlotte Ku and Harold Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law*, Cambridge University Press, Cambridge, 2003, p. 204.
[60] Alexandra Knight, "Global Environmental Threats: Can the Security Council Protect our Earth?", New York University Law Review 80 (2005) 1549 at 1563.

violations (as seen above a growing practice of the Security Council) will cause only suffering proportionate to the threat and not lead to even more serious human rights violations, taking the unpredictable and uncontrollable development of an armed conflict into account? Both International Humanitarian Law and International Human Rights Law, the violation of which has already led the Security Council to authorize the use of force, are they too not marked by a peaceful spirit? A limitation to violent threats could however be based upon the wording of Art. 42 which reads: "Should the Security Council consider that measures provided for in Article 41 [on non-military sanctions] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. […]" One could argue that the use of force is never necessary to maintain or restore this aspect of international peace and security, or the concept of security itself could be limited to violent threats. I would however not go so far to consider that the concept of "peace" (which is as seen above an equivalent to "security") is in the entire Chapter VII limited to the absence of organized use of force between States.[61] In conformity with the Security Council practice described above, not only violent threats against States should qualify, but also violent threats against persons.

## IV. THE CONCEPT OF SECURITY IN INTERNATIONAL HUMANITARIAN LAW

The treaties of International Humanitarian Law (IHL) use the term "security" 40 times. The term is however not defined in the treaties, nor is it defined in the Commentaries published by the ICRC to the Geneva Conventions and the Additional Protocols.[62] As explained below, these Commentaries nevertheless provide some examples which may help to understand the outer limits of the concept. The term "security" serves two completely different purposes in IHL.

Most often, the term relates to the security of the State and is used in provisions allowing a State to restrict certain rights of people affected by armed conflicts or of international control mechanisms, or to take certain measures. The ICRC Commentaries mention that the term gives the State concerned a wide discretion,[63] but should be invoked only in exceptional cases[64] and only in good faith.[65] The broadest case is Article 5 of Convention IV, which

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[61] Jochen Abr. Frowein, "Article 39", in: Bruno Simma (ed.) *The Charter of the United Nations, A Commentary*, Oxford University Press, New York, 1995, p. 608.

[62] Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, IV, Geneva Convention relative to the Protection of Civilians in Time of War*, ICRC, Geneva, 1958 [hereafter: *ICRC Commentary, Convention IV*], p. 56, explains: "The idea of activities prejudicial or hostile to the security of the State, is very hard to define." *Ibid*., p. 257 he states: "It did not seem possible to define the expression 'security of the State' [in Art. 42 of Convention IV, *supra* note 5] in a more concrete fashion." Astonishingly, in one instance the ICRC Commentaries consider that "[t]he expression 'for reasons of security' should […] be considered to be self-explanatory" (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff Publishers, Geneva/Dordrecht, 1987, p. 754).

[63] Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, III, Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960 [hereafter: *ICRC Commentary, Convention III*], p. 478 (on "interests of national security" used in Art. 103 of Convention III, *supra* note 5); *ICRC Commentary, Convention IV*, *supra* note 62, p. 207 (on "measures of security in regard to protected persons as may be necessary as a result of the war" used in Art. 27 (4) of Convention IV, *supra* note 5); *Ibid.*, p. 257 (on when the "security of the Detaining power makes [an internment of an enemy national] absolutely necessary" under Art. 42 (1) of Convention IV, *supra* note 5).

[64] *ICRC Commentary, Convention III*, *supra* note 63, p. 492 (on "interest of State security" used in Art. 105 (5) of Convention II, *supra* note 5); *ICRC Commentary, Convention IV*, *supra* note 62, p. 218 (on "security considerations" used in Art. 30 (2) of Convention IV, *supra* note 5); *Ibid.*, p. 367 (on when "imperative reasons

allows general derogations from rights protected by that Convention. Those are however circumscribed in that civilians suspected of activities hostile to the State may be deprived of substantive rights (on a belligerent's own territory) or communication rights (in occupied territories), but only if the exercise of such rights by the individual would be prejudicial to the security of the State.[66]

In five instances the term "security" refers to the security of persons, which belligerents must protect. For this purpose, the treaties more frequently use the term "safety". The latter term must however be an equivalent to security, as treaties drawn up in several authentic languages – such as the Geneva Conventions and the Additional Protocols - must be presumed to have the same meaning in each of those texts.[67] The equally authentic French and – concerning the Additional Protocols - Spanish versions use indifferently the terms "sécurité" or "seguridad" for "security" and for "safety" in the English version. Those two terms can therefore not have a different meaning. There are however exceptions to these uniform translations, which lack objective explanation. On the one hand, terms other than "sécurité" or "seguridad" are sometimes used for safety[68] and "safety" is twice used for the security of belligerents, once translated by "sécurité"[69] and once by "sureté".[70]

As for customary international law, it does not, by definition, use terms but prescribes conduct. State practice and *opinio juris* show however that certain conduct normally prohibited is exceptionally admissible for reasons related to certain interests of the State. States also have certain obligations to protect victims of war from certain threats and if such a threat does materialize, a State may be allowed not to comply with certain general prohibitions. In the recent ICRC study attempting to define the rules of customary IHL and to put them into writing after ten years of analyzing State practice (mainly in the form of official declarations and statements), the term "security" is only used in one rule. It appears in the provision on the prohibition of forcible transfers of civilians: "unless the security of the civilians involved […] so demand."[71] In the same context, if displacements are admissible, measures to protect *inter alia* the "safety" of the civilians concerned must be taken[72] and such persons have a right to return in "safety."[73] Beyond that, one may confidently assume that where universally ratified treaties such as the Geneva Conventions or widely ratified treaties such as the Additional Protocols foresee security as a limit to certain obligations or a responsibility towards certain persons, this must also be valid for the corresponding customary obligations.

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of security" allow an occupying power to intern protected persons under Art. 78 (1) of Convention IV, *supra* note 5).

[65] *ICRC Commentary, Convention III*, *supra* note 63, p. 596 (on "measures which the Detaining Powers may consider essential to ensure their security" used in Art. 125 (1) of Convention III, *supra* note 5).

[66] In any case, Art. 5 (3) of Convention IV, *supra* note 5, prescribes an underogable right to humane treatment and a fair and regular trial.

[67] Art. 33 (3) of the Vienna Convention on the Law of Treaties.

[68] Art. 19 (2) of Convention I, *supra* note 5, and Art. 12 (4) of Protocol I, *supra* note 3, formulate the obligation to situate medical establishments so that attacks on military objectives cannot imperil their "safety" with the terms "mettre ces établissements … en danger" and "las pongan en peligro".

[69] Art. 15 (4) of Protocol I, *supra* note 3, concerning limitations of movement for medical personnel.

[70] Art. 78 of Convention IV, *supra* note 5, (concerning safety measures taken by an occupying power).

[71] Henckaerts and Doswald-Beck, *supra* note 4, Rule 129 (A) and (B), which correspond to Art. 49 of Convention IV, *supra* note 5, and Art. 17 of Protocol II, *supra* note 6.

[72] Henckaerts and Doswald-Beck, *supra* note 4, Rule 131.

[73] *Ibid*., Rule 132.

With regard to the security or safety of persons[74], establishments or installations,[75] or aircraft[76], which must be respected and/or protected by belligerents, or which absolves them from certain obligations or prohibitions,[77] such terms are never qualified by additions. Even in peace-time, such individual security can never be absolutely guaranteed.[78] This is even more difficult in wartime and it can therefore only imply an obligation of means, not an obligation of result.

Conversely, when the security of the State is referred to as a reason permitting a State to derogate from normal IHL obligations,[79] qualifying terms are often added to restrict such exceptions. Sometimes a measure must be necessary for (and not only justified by) security reasons[80] or "a grave emergency involving an *organized* threat to the security of the Occupying power" must exist.[81] A belligerent may intern on its own territory "protected" (i.e. mainly enemy) civilians only when its security "makes it absolutely necessary"[82] and an occupying power may do so only for "imperative reasons of security."[83] The first term seems to be more restrictive, but according to the logic of IHL, a State has more leeway on its own territory than on territory it occupies and therefore the two wordings are probably equivalent. The obligation on Protecting Powers to take into account "imperative necessities of security"[84] or the possibility to refuse individual relief consignments for "imperative reasons of security"[85] falls, in my view, into the same category, as in all those cases it is not sufficient for security reasons to merely exist, the elements of necessity or imperativeness indicate that they can only be taken into account if there is no alternative solution. When provisions allow States to subject the activities of relief societies to measures they "consider essential to ensure their security", the State has more room to maneuver, as the judgment is clearly for them to make. This is equally and perhaps even more so the case where the provision adds: "or to meet any other reasonable need."[86]

Sometimes only some aspects of security may be taken into account. Pre-trial confinement of prisoners of war in cases where a soldier of the detaining power would not be confined is only admissible "if it is essential to do so in the interests of national security."[87] "National security" restricts the exception in the sense that the mere security of the camp or the guards is not sufficient. Where IHL refers to "military security", only the security of the armed forces

[74] Art. 26 of Convention II, *supra* note 5,; Arts. 20 (2), 46 (3), 47 (1) and (2) and 51 (2) of Convention III, *supra* note 5; Arts. 14, 36 (1), 49 (2) and (3), 51 (2) and 127 (2), (3) and (4) of Convention IV, *supra* note 5; Arts. 12 (4), 41 (3) and 78 (1) of Protocol I, *supra* note 3; Arts. 4 (3)(e), 5 (2)(c) and (4), and 17 (1) of Protocol II, *supra* note 6.
[75] Art. 19 (2) of Convention I, *supra* note 5, and Art. 51 (2) of Convention IV, *supra* note 5.
[76] Arts. 25, 27 (2) and 31 (2) of Protocol I, *supra* note 3.
[77] Art. 49 (5) of Convention IV, *supra* note 5, and Art. 17 (1) of Protocol II, *supra* note 6.
[78] Verosta, *supra* note 8, 537.
[79] Art. 8 of Conventions I and II, *supra* note 5; Arts. 8, 18, 37, 103, 105 and 125 of Convention III, *supra* note 5, Arts. 5, 9, 26, 27, 30, 39, 42, 62, 63, 64, 75, 78, 93, 142 of Convention IV, *supra* note 5; Arts. 15 (4), 45, 63, 64, 71 and 74 of Protocol I, *supra* note 3.
[80] Art. 27 of Convention IV, *supra* note 5.
[81] *Ibid*., Art. 75 (my highlighting).
[82] *Ibid*., Art. 42.
[83] *Ibid*., Art. 78.
[84] Art. 8/8/8 and 9, respectively, of Conventions I-IV, *supra* note 5.
[85] Art. 62 of Convention IV, *supra* note 5.
[86] Art. 125 of Convention III and Art. 142 of Convention IV, *supra* note 5.
[87] Art. 103 of Convention III, *supra* note 5.

may be taken into account, which is logical in occupied territories,[88] where an occupying power may only be present with armed forces and take measures only for their security.

In other instances, exceptions can be justified by reasons larger than security, such as "national interest."[89]

Exceptions for military reasons, "imperative military reasons",[90] military necessity, action which is "absolutely necessary for military operations,"[91] imperative military necessity or even "unavoidable military necessity"[92] are in my view related to a consideration different from security. On the one hand, military operations are not always related, justified by or necessary for the security of the State or of individuals, on the other hand such exceptions only cover threats consisting of hostilities against persons or objects belonging to the armed forces.

All of the above still does not clarify the limits and meaning of "security". In my view, the object and purpose of the treaties in which the term appears and the context of the provisions indicate that the meaning must be limited to the defense against physical threats to persons or property. Such threats may however also result indirectly from the individual conduct against which security is invoked. The ICRC Commentaries to the Conventions may be used to further the discussion on this necessary link to acts of physical violence. Article 5 of Convention IV allows for derogations in cases where individuals are engaged in activities hostile to the security of the State, including, according to the ICRC Commentary, espionage and intelligence.[93] However, in my opinion, this is only the case if the latter relates to military action or military objectives, not to peace-time activities e.g. industrial espionage. Similarly, cases in which the "security of the Detaining power makes [an internment of an enemy national] absolutely necessary" under Article 42 (1) of Convention IV include, according to the ICRC Commentary, "subversive activity carried out inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power", including membership "of organizations whose object is to cause disturbances, or […] by other means such as sabotage or espionage."[94] However I believe that the final intended result in all such cases must be the facilitation of acts of violence. Finally, Article 18 (5) of Convention III, permits a detaining power to withdraw articles of value from POWs "only for reasons of security" and the ICRC Commentary explains that this concerns articles of value which might be used to bribe guards.[95] Such bribing involves neither violence against those bribed or other guards nor against the Detaining Power. At worst, it would allow POWs to escape and then rejoin the fighting, which constitutes a threat of violence. Such an indirect and rather remote threat is however difficult to accept as a threat of violence. Otherwise, even providing shoes, chocolate reserves or language training could be prohibited for security reasons and an individual engaged in political propaganda could be covered by derogations.[96]

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[88] E.g. in para. 2 of the aforementioned Art. 5 of Convention IV, *supra* note 5, which allows for derogations from communication rights in occupied territories only when "absolute military security so requires."
[89] *Ibid.,* Art. 35 allowing belligerents to prohibit the departure of enemy nationals, which includes economic reasons (*ICRC Commentary, Convention IV, supra* note 62, p. 236).
[90] *Ibid.,* Art. 49 (5).
[91] Justifying under *ibid*., Art. 53, destruction of property.
[92] Art. 11 (2) of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* of 14 May 1954, 249 U.N.T.S. 240-357.
[93] *ICRC Commentary, Convention IV, supra* note 62, p. 56.
[94] *Ibid.*, p. 258.
[95] *ICRC Commentary, Convention III, supra* note 63, p. 170.
[96] Which is excluded by *ICRC Commentary, Convention IV, supra* note 62, p. 56.

A limitation to physical threats would also explain why safety and security are equivalents in IHL, as evidenced by authentic texts of the treaties in languages other than English. If economic, political, social and environmental threats were included in the security reasons which allow a State to derogate from its obligations concerning war victims, which were adopted precisely for situations of armed conflict, such derogations would become the rule rather than the exception. Provisions such as Article 35 of Convention IV allowing belligerents to prohibit the departure of enemy nationals for reasons of "national interest", which includes economic and manpower problems,[97] would be unnecessary.

As for the security or safety of persons which must be guaranteed by belligerents, if it encompassed all aspects of human security, the detailed provisions on means of existence, employment, hygiene and public health, relief, food, clothing, respect of property, public welfare and procedures and reasons admissible for depriving a person from his or her freedom would not have been necessary.

## V. CONCLUSION

Leaving aside larger discussions about "human security" and the need for a wider concept of "security", the term must be limited to violent physical threats for both *ius ad bellum* and for *ius in bello*. In law, definitions do not exist to confirm philosophical truths or to prove that all problems are interlinked, they are used for a normative purpose, *i.e.* to determine when certain rules apply, which has specific legal effects. The terminology used in law is therefore often different from that used in social sciences, the media, or political discussions. In both *ius ad bellum* and *ius in bello*, the term "security" makes rules applicable which are only adequate to meet threats involving physical violence against persons or property, while in both branches other terms are used in rules dealing with other threats to human security in the widest sense, which set out more appropriate consequences and procedures. In *ius ad bellum* this limited understanding is also necessary because of important institutional implications a wider understanding would have. The UN Security Council is not qualified to become the World government and World legislator (unchecked by any judiciary), which deals with all the problems of the World.

[97] *Ibid.*, p. 236.