

PEACE SUPPORT OPERATIONS

Legal authorisation for the use of military force within the framework of chapter VI and VII of the UN Charter

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1. Introduction

The use of force by state organs is permissible in constitutional systems only on the basis of and under the limits of its legal basis. This applies not only to the perpetration of acts of violence to accomplish a mission by state bodies, but also to self-defense² by state organs. That rule limits the use of force by military forces to fulfill their mission in peace support operations (PSO) too.

In order to portray this problem it is necessary to describe the legal prerequisites upon which the assessments of this problem are based.

In addition to that it is also necessary to be aware of the ratio³ of legal systems within human society. Every legal system is above all one of several social systems of rules that exist together in social reality⁴. On the basis of its character as an abstract control device, a legal system is only existent in social reality when it is effective. That is the case if its rules are found in use regularly and violations as a whole retain their exemptional character. In order to comply with its function as a social system of rules, every legal system must meet the demands of the respective existing social reality of the period within the territory of its application. Thus it must be able to fulfil the tasks, whose accomplishment is essential for this social structure, to an adequate degree⁵. These demands of social reality are subject to the constant changes of time. This is taken into account through a constant adjustment of the provisions and their interpretation, otherwise a legal system loses its ability to solve problems and the application of the affected rules ceases. In this case rules lose their effectiveness and thereby at the same time their existence as part of the true existing legal system. This is of importance with regard to the changing character of conflicts which comprise PSO. Therefore this changing picture of conflicts and the resulting consequences will be dealt with in the following.

2. The concept of Peace Support Operations and its legal meaning

The Charter of the United Nations (UNC)⁶ allows for the employment of military forces in the framework of the system of collective security on the basis of its chapters VI and VII.

The concept of PSO is not used in legal and in political linguistic usage uniformly. It can include in its common usage not only military but also civil measures to avoid conflicts or to secure as well as to restore peace (in the sense of absence of violence). "Peace keeping", "peace making", "peace enforcement" and "peace building" are seen as subcategories of PSO⁷.

For the legal view of PSO the differentiation between missions on the basis of chapter VI and those on the basis of chapter VII are decisive, as the Security Council (SC) of the United Nations (UN) authorizes military forces on these basis

through resolutions to peacekeeping tasks and lays down the permitted extent of the use of force by those forces. Instead of using the term PSO a differentiation, therefore, will only be made between chapter VI missions and chapter VII missions in this article.

3. The monopoly of the use of military force of the United Nations

a. The universality of the prohibition of violence

According to the current⁸ prevailing opinion, the UN possesses the worldwide and all-encompassing monopoly of granting the authorization of the use of military force. In order for this monopoly of force to possess legal validity also for subjects of international law, which are not contractual parties of the UNC, it is imperative to view this as part of international customary law. The mere intention itself of enforcing such behavior, as it is standardized in art. 2 para. 6 UNC, would not be sufficient, as international treaty law basically has the power to bind only the parties of that respective contract. The legal opinion, that international customary law covers the rule of the prohibition of violence too, is supported by the fact that the mission of the North Atlantic Treaty Organization (NATO) in the year 1999 against the armed forces of the former Federal Republic of Yugoslavia (Kosovo intervention⁹), which is, according to common view, designated as a so called "humanitarian intervention", should, according to the view of those nations involved in the mission, not establish a new international customary law¹⁰, which the use of military force in an international armed conflict¹¹ on another basis than that of art. 42 or of art. 51 of the UNC would justify. The term humanitarian intervention found overall political acceptance for the first time for this mission. Because of the exceptional character of this conflict, whose settlement of the intervention¹² took place without a mandate of the SC, it is appropriate to acknowledge the humanitarian intervention as a legal institution of international law, which exceptionally causes such a measure not to be governed by any international sanction¹³, although it is illegal as it violates the universal validity of the prohibition of violence which was founded by the UNC and is an essential part of the international customary law. The acknowledgement of such a legal representation of international customary law therefore allows such a non-mandated mission not to be governed by any international sanction to be internationally legal.

Should the monopoly of force of the UN as such be universally and absolutely valid, it must be ascribed to the international "ius cogens". The term "ius cogens" means that international subjects of law cannot in a legal binding way agree upon the nonapplication of such legal rules through creation of particularist international law. A change is only possible through the creation of universal international law. Universal international treaty law as well as universal international customary law can bring about such a change. On the other hand because of the fact of the historical development of law, which is in constant change, it would be wrong to understand¹⁴ the term of "ius cogens" as a guarantee of eternal validity of such a rule, even if that were viewed as desirable in ethical terms. Even the monopoly of power of the UN is subservient to this fluctuation. Neither changes of the UNC nor its annulment, such as an eventual

dissolution of the UN, can be considered to be out of the question. The limited time of existence of all organizations created by mankind is an historical fact.

b. The legal as well as mere sanction-free use of military force (The system of collective security, the inherent right of individual or collective self-defense and the humanitarian intervention)

Through their membership in the UN nations relinquish a substantial part of their sovereignty. They acknowledge that, according to chapter VII UNC, military force can legally be used against them even against their will. Only in the framework of the inherent right of individual or collective self-defense according to art. 51 UNC are nations entitled to the right to the use of military force additional to the use of force within the UN's system of collective security. According to art. 2 para. 6 UNC the UN ensures that nations which are not members of the UN, so far as may be necessary for the maintenance of international peace and security, follow these principles. Under the prerequisite of the above expounded universal validity of these provisions as "ius cogens" as a rule of international customary law measures against all nations may therefore be enforced for the maintenance or restoration of international peace and security on the basis and in the framework of a mandate according to chapter VII of the UNC as well as toward member states of the UN as well as against those which are not members of the UN.

The monopoly of force of the UN has as a consequence therewith that the use of military force is solely legal for two purposes:

On the basis of a mandate of the SC according to art. 42 UNC military force may be applied as far as necessary to maintain or restore international peace and security.

According to art. 51 of the UNC all nations may apply military force in case of an armed attack on the basis of their inherent right of individual or collective self-defense until the SC has taken the necessary measures to preserve international peace and security.

One acknowledges that either international customary law exempts the humanitarian intervention from international legal sanctions or derives this legal consequence from the general principles of law, the deployment of military forces without the approval and also against the will of a nation in whose territory the hindrance or ending of a humanitarian catastrophe occurs, is not subject to international legal action, as long as the SC has not (yet) taken the necessary measures for the preservation of international peace and security. This validity can only be accepted, if on the basis of objective criteria¹⁵, a resolution of the SC according to art. 42 UNC for the removal of the cause, which is done in fact through humanitarian intervention, would be allowed but is not issued on the basis of circumstances, which are not forthcoming under the criteria which lie in art. 42 UNC¹⁶ itself.

c. The validity of issuing a mandate for the use of military force through other international organizations

The above-mentioned legal quality of the monopoly of force of the UN excludes the possibility of the legitimacy of bestowing a mandate of military force exclusively through other international organizations (IO)¹⁷ than the UN. Mandates of such IO can provide the use of military force legally only either on the basis of and within the framework of a mandate of the UN according to chapter VI or chapter VII or in the framework of the inherent right of individual or collective self-defence according to art. 51 UNC.

The granting of a mandate for humanitarian intervention through such IO is not intended to be legitimate but solely sanction-free as long as the objective requirements for such an intervention exist¹⁸.

The use of military force on the basis of a mandate of an IO, which does not meet these criteria, represents as a violation against the prohibition of force of art. 2 of the UNC a breach of international law and justifies sanctions within the framework of the system of collective security, but also measures according to art. 51 UNC.

4. The mandate according to chapter VI of the United Nations Charter

In a resolution according to chapter VI of the UNC the employment of military forces can be recommended provided that the concerned parties of conflict agree to such a mission and especially the tasks and any power of intervention of the assigned military forces within the framework of that mission. An authorization of coercive measures against the will of a party in a conflict is not possible in this case. Therefore coercive measures in such cases are limited to cases of self-defence as long as the parties of conflict do not agree to more extensive jurisdiction.

The legal doctrine of self-defence basically justifies essential and reasonable defence measures of the assigned forces. That includes individual measures of defence of the single members of these military forces. In addition to that according to the respective provisions of status, which are usually agreed upon in status of forces agreements (SOFA) with the host nation or also with several parties of conflict, personal legal justification of the members of these military forces derive from their domestic law or from the domestic law of the host nation.

The closer definition with regard to its substance of the meaning of self-defence as a measure of force protection is found not only in the legal systems of nations but in the Rules of Engagement (ROE) too. This will be looked at more closely later.

Parties to a conflict and host nations can agree to the use of military force by the armed forces, which are deployed according to chapter VI being permitted to fulfil their mission. They are free to agree upon such an intervention being and remaining permissible also in the case of a later revocation by the nation or party, which agreed to it. Every nation is free to renounce its rights of sovereignty to any degree and in all respects. In this case such an exercise of jurisdiction follows which is similar in content to an exercise of power on the basis of chapter VII UNC, in reality not directly on the basis of the resolution of SC on the basis of chapter VI UNC, but rather on the legal basis of the agreement with the conflicting parties.

With regard to the legal basis of authorizations of missions a differentiation can only be made between missions on the basis of chapter VI and those of chapter VII. So-called chapter VI+ or chapter VI ½ or VI ¾ missions are to be understood as political terms with which it is a legal question either about missions on the basis of chapter VI, by which wide-reaching powers were conceded through agreement at the conflicting parties or on chapter VII based missions in which the limits of authority were restricted by the SC in the resolution concerning it. The standardized framework of competence of chapter VI cannot be extended by the SC. But the SC can on the basis of chapter VII decide to grant not all of the necessary powers for the fulfilment of the task. This appears to be sensible if a resolution according to art. 2 of the UNC cannot otherwise be reached because of political reasons and at least a partial authorization on this legal basis is to be preferred to the complete renunciation of such a measure.

5. The mandate according to chapter VII United Nations Charter

a. The authorization and laying down of tasks

According to art. 39 UNC the SC shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with art.s 41 and 42, to maintain or restore international peace and security. It may only then grant the right to use military force to secure or restore international peace and security according to art. 42 UNC through a resolution, if, in its opinion, measures in accordance with art 41 UNC, namely those in which force of arms are not involved, do not suffice thereto.

The SC can delegate the authority for the engagement of military forces according to art. 42 UNC to fulfil the designated tasks¹⁹ laid down in this resolution. It can determine the mission also by referring to other documents²⁰ mentioning them in the resolution itself. By using that method it makes at least the content of these documents become part of the resolution.

b. The priority of measures of collective security over all other cases of the legal use of military force

The use of force is prohibited in the confrontation between subjects of international law according to art. 2 UNC. Only measures of the individual or collective self-defense²¹ of subjects of international law as well as measures of collective security on the basis of and within the framework of chapter VII are exempted from this prohibition. The right of individual or collective self-defence always terminates when, and to that extent according to Art. 51 if, and as far as possible, the necessary measures of collective security are taken on the part of the UN in the concerned conflict.

c. The limitation of the permitted military power of intervention

In no military mission can extended power for the use of military force be granted than the basically allowed authority in the framework of measures of collective security on the basis of art. 42 UNC. That is a consequence of the fact

that the use of military force is not justified in any other cases than in these, which are justified by the UNC, in combination with the precedence of measures of collective security over individual as well as collective self-defence by nations according to art. 51 UNC. For this reason the use of force in the framework of the so-called humanitarian intervention is to be seen not as justifiable but merely as sanction-free although illegal according to international law.

Settling conflicts through the use of military force against the prohibition of force of the UNC is illegal. The decision to carry out a conflict through armed force in spite of a prohibition against it, therefore creates an international offence²². The mere participation in the carrying out of such a conflict is not illegal as long as it takes place within the stipulations of the international humanitarian law²³ (IHL).

The stipulations of the IHL limit the violation of others' rights in international armed conflict. Not only in the legal practice of the inherent right of individual or collective self-defence of nations but also in the illegal wars of aggression are the powers of intervention of the military forces of the opponents only in the framework of the stipulations of the IHL permissible. In non-international armed conflict only portions of the IHL²⁴ apply and limit the admissible use of force. In conflicts, which do not even fulfil the legal qualification of a non-international armed conflict, the minimum guarantees of Martens Clause²⁵ limit the extent of the permissible use of force.

For the above-mentioned reasons IHL cannot grant more extensive power to carry out a conflict militarily than the admissible maximum allowed in the framework of measures of collective security. That is also valid for non-international armed conflicts and for conflicts to which only Martens Clause is applicable as a restraint. Otherwise there would be in the framework of conflicts, which in this composition are termed as internal conflicts, on the basis of the IHL a greater degree of use of force legally possible than by measures of the collective security according to chapter VII UNC. This would stand in contradiction to the precedence of the invested interest of international peace and security before all other legal interests. The character of this primacy will be discussed below. In internal conflicts the protection of the legal interest of the maintenance of internal order and security, which nevertheless does not take precedence over the protection of international peace and security, is the centre of gravity.

The obligatory human rights law (HRL) respective to the subjects of international law concerned is to be applied as long as rules of IHL are not applicable that supersede this. That will be dealt with more closely below. In internal conflicts the IHL does not come into use in non-international armed conflicts with the exception of the above mentioned applicable rules of the Martens Clause. In such missions the degree of permissible use of force is therefore above all limited by the regulations of the IHL. Its provisions of protection limit the admissible use of force of the state against its subjugation to a norm as well as for the case of the legal as for the illegal behaviour of the one subjected to the norm. The provisions of IHL on the other hand limit, according to the type and extent of the conflict, the legal exercise of force of the military forces

by international law as parties of conflict to qualifying opponents²⁶ in relationship to each other as well as the admissibility of collateral damages. The limited use of norms of IHL in internal conflicts is balanced through the use of HRL in as much it applies to each case. As a consequence of the above the admissible state use of force in such conflicts does not transcend those in missions on the basis of art.42 UNC. Also as long as the existence of the nation is not endangered at the same time by such internal conflicts, the permissible power of intervention may also not transcend in any case those according to the regulations of the IHL in the framework of the legal self-defence of state intervention.

According to art. 1 para. 3 UNC human rights are also to be taken into reasonable consideration in every mandate according to art. 42 UNC.

According to the current view the military forces, which are authorized to end a conflict in missions according to chapter VII UNC, are not subject to the IHL even during a still lasting international armed conflict. They may also therefore not be fought against as combatants according to the rules of IHL. This is herewith justified in that they cannot be a party in the conflict because of their mandate. That appears to be a regression according to current opinion to the antiquated teaching of righteous (just) war against unrighteous (“bellum iustum-concept”)²⁷. According to the teaching of righteous war there is no difference between the right to war (lat. “ius ad bellum”) and the right in war (lat. “ius in bello”). But this difference is the necessary basis altogether for the possibility of the IHL as a question of the right in war independent of the right to war. The abovementioned international forces are subject to the regulations of the IHL²⁸ in so far as they are not set aside according to Art. 103 UNC through a mandate of art. 42 UNC. This excludes neither the application of the IHL altogether nor the combatants’ legal status; the contents of the IHL can be modified for such military forces on the basis of the setting aside effect of the art. 103 UNC through the mandate of the SC according to art. 42. Powers can therefore be bestowed to such military forces on the basis of art. 42 UNC above the normally possible degree according to the IHL as long as that is proportional and reasonable for mission accomplishment²⁹. IHL also ensures legal security and a minimum standard of humanity in armed conflicts. In international armed conflicts therefore the binding of even such military forces to the otherwise valid stipulations of the IHL and their qualification as combatants also politically and legally appears to be proper.

That interventional authority in an actual mission on the basis of chapter VII UNC is less than the abstract possible maximum powers of intervention and thereby in the individual case are less than IHL would allow for, stands in no contradiction herewith, that in no military mission more extensive authority of the use of military force can be granted than by those within the framework of measures of collective security. Such a limitation must follow if less extensive power of intervention suffices to fulfil the SC appointed tasks when it issues a mandate and further authority is therefore not necessary. The SC has to take this into consideration when issuing its mandate; the authorized multinational armed force has to consider it with the use of the abstract empowering provisions of the

mandate of the SC applying the principles of necessity, compatibility and propriety. The SC may only allow the necessary amount of interventional power for the fulfilment of the mission; the military force may only use the necessary amount of force that at a definite time and place in every concrete incident in the framework of the authority of the SC is needed. What is viewed to be necessary is that amount of power with which the fulfilment of the mandated task can be expected with the utmost certainty. If in such a mission the entire amount of theoretically legally possible power is not allowed, there can be at the same time or before or after such a mission granted by the SC according to art. 42 UNC mandated missions in which legal more extensive powers of intervention are conceded than in this mission. Also in missions for the purpose of self-defence according to art. 51 of the UNC more extended powers of intervention than in a concrete mandated mission according to art. 42 can be granted if a lower amount of permissible powers of intervention were laid down than the potential maximum amount for missions according to art. 42 UNC. For military forces which are engaged on the basis of art. 51 UNC there still remains an extra range of application of art. 51 UNC if a mission mandated by the SC according to art. 42 of the UNC does not grant the necessary amount of jurisdiction to pacify the conflict. The laying down of the extent of power by the SC through resolution is not the constitutive clause of the necessary degree. That the SC is not always in the position to meet the necessary measures is seen in the existence of the legal term of human intervention. Since this would be incompatible with the monopoly of force of the UN, the necessary and sufficient issuing of mandates according to art. 42 UNC in the cases of chapter VII would permanently hold forth through the SC.

6. The relationship of resolutions of the Security Council on the basis of art. 42 of the United Nations Charter to other provisions of international law
a. General

Above all the customary international HRL, derived from Universal Declaration of Human Rights³⁰, the International Covenant on Civil and Political Rights³¹, as well as the Convention for the Protection of Human Rights³² (European Convention of Human Rights, ECHR) fundamentally limit the use of state force.

State force in armed conflicts is limited by the regulations of IHL as discussed above.

Power of intervention can be admitted legally through resolutions of the SC on the basis of art. 42 of the UNC as long as no higher standing legal provisions preclude it. Art. 103 UNC places such resolutions above all other provisions of international law with the exception of the *ius cogens* and the UNC itself³³. When other internationally legal provisions stand in contradiction to such resolutions, they are abrogated. This special status of such resolutions of the SC is by nature of the special importance of the protecting interest, namely international peace and security, essentially justified, as this legal interest possesses not only for all

subjects of international law but also for all individual persons particular importance³⁴. Its importance is universal.

The power of the SC to promulgate such resolutions is limited by the stipulations of the UNC to the necessary degree for the protection of the legal interest and by the commitment to consideration of human rights. The SC may only grant such missions according to art. 39 in combination with art. 42 UNC if in the case of a threat to international peace and security measures according to art. 41 UNC would not suffice or have not sufficed. It may do this only to the necessary degree to overcome the crisis in that region in which international peace and security are threatened and only as long as the threat ascertained by the SC according to art. 39 in combination with art. 42 UNC lasts. Because of that resolutions always relate to definite crises and are thereby defined by time and place in their use and thus limited.

According to art. 1 para. 3 UNC respect for and the guarantee of human rights are also to be considered in the decisions of the SC according to art. 42 UNC. The consideration of interests between the legal interest "international peace and security" and the legal interest "human rights" according to the principle of proportionality is incumbent on the SC in the framework of its passing a resolution³⁵. One is to proceed from the concrete situation that represents a threat to international peace and security. With regard to the danger of this situation a decision is to be made as to whether and how far a restriction of human rights through the granting and the practice of certain powers of intervention is necessary, proportional and adequate to be able to counteract this concrete threat to international peace and security effectively and reasonably. A complete abolition of basic human rights will not be able to be justified.

The resolution of the SC on the basis of art. 42 UNC represents the international legal basis for the classification and assignment of the tasks and the powers of intervention to fulfil the tasks of the military forces. If one were to assume that the SC given authority for the use of military force for lack of its above mentioned represented effect of the setting aside of its effectiveness or for the lack of accuracy³⁶ to forcible provisions of international law would stand in contradiction, one would allege unjust action by the SC, which is basically not to be proceeded from that.

b. Convention for the Protection of Human Rights

i. General

The principles shown in section 6.a. apply also to the relationship of resolutions of the SC on the basis of art. 42 UNC to the ECHR. According to art. 103 UNC the regulations of the ECHR as regional international treaty law are set aside by resolutions of the SC according to art. 42 UNC as long as regulations of the ECHR conflict with the regulations of such resolutions.

Also at all events and in the meantime international customary legal character of the single regulations of protection of the ECHR in regard to content cannot detract from them. This is the consequence of the above-mentioned considerations to the importance of the concerned interests and the

consideration of legal interests of the SC according to the principle of proportionality applying to the procedure of the defining of the mission and the powers of intervention stipulating norms of the resolution. The exclusive reference to time and place of the validity of such resolutions as well as the principle of proportionality, which limits the extent of the powers to be used, which according to this resolution the SC considers basically necessary for the fulfilment of the mission, limit this setting aside of time, place and content.

Further the ECHR itself contains limitations of the interests protected by it. Neither the right to life, nor the prohibition of forced labour, nor the right to freedom, nor procedural and penal laws of protection are absolutely valid³⁷.

ii. Use of force against humans with special consideration of deadly force

Necessary measures of defence to the averting of dangers that cannot without doubt be pinpointed solely to the individual aggressor on the basis of the individual case are basically allowed according to the wording of art. 2 para. 1 ECHR³⁸. Even if it basically requires, because of its principle of proportionality and compatibility, defence measures to be concentrated toward aggressors, a departure from it is legal under special circumstances. Then especially in the framework of revolts and insurrections in the sense of art. 2 para. 2 subpara. c ECHR the possibility to direct force solely against the aggressor finds a practical limit. But it is not allowed to allot a content to a provision, that limits its use to such an extent, that the fulfilment of its intended purpose is made impossible practically. It goes without saying that the aimed use of deadly force against persons who are not considered aggressors is not allowed.

It is just in the grey area when the recognition of single perpetrators in violent mobs as well as the realization of the danger that proceeds from this mob as a whole that narrow practical limits are set. This results, with the legal institution of self-defence alone, in the mission no longer being able to be fulfilled efficiently and satisfactorily.

In the judgement of proportionality the particular danger of perpetrators (e.g., snipers), who operate out of mobs and hereby assault either the powers of the mandated multinational forces or others body and soul, is to be taken into consideration as well as, on the other hand, the added particular difficulty of the precise identification of such sources of danger in difficult conditions. It goes without saying that here only extreme situations are meant and that in these cases the absolute use of the principle of proportionality holds true. Nevertheless proportionality is, because of the increased importance of the containment of violent riots in such situations to be judged differently than of one in an inherently peaceful surrounding in which a demonstration becomes violent by way of escalation.

The assignment of deadly force in the settings of revolt and insurrection is allowed according to art. 2 para. 1 subpara. c ECHR to the repression of the same and according to art. 2 para. 1 subpara. a ECHR to the defence of a human against illegal use of force. These rules of the ECHR permit in exceptional situations a use of weapons also against persons who themselves do

not commit armed acts of aggression as an exception. Based on a realistic view if such persons cause a particular and immediate substantial danger, in which they substantially contribute to, without themselves committing an immediate act of violence. This danger can be caused where persons committing the assault are protected by such persons in such a way that the necessary repulse of the attack without fighting these other persons is hindered, or the assailants are led by them, or they are spurred on by the demands of those present to acts of assault.

Also in the course of carrying out the arrest of persons³⁹ the possibility of the development of rebellious situations with spreading acts of violence is realistic. This can make the effective containment and hindrance of arising acts of violence in such situations necessary to the maintenance of civil order and security.

Also the special necessity of the hindrance of such dangers that result if order and security cannot be upheld is to be considered.

iii. Use of force to defend property

Art. 2 para. 1 subpara. c ECHR permits the defence of property against assaults through the life threatening use of armed force if in the scope of the suppression of a revolt or insurrection it is necessary as well. The issue of the defence of property with deadly force will be looked at more closely below.

iv. Suspension of regulations of the ECHR

The ECHR permits its partial suspension in time of war or other public emergency threatening the life of the nation. According to art. 15 ECHR measures can be taken by its contractual parties that suspend the duties found in the convention as long as the situation necessarily demands it. Art. 15 para. 1 ECHR refers herewith not only to the case of a war but also emphatically to situations of internal security therefore covering the entire range of modern conflicts.

The principles of necessity, proportionality and distinction are to be considered as absolute in every case.

Art. 15 para. 3 ECHR demands of every member state of the ECHR that claims an exemption according to art. 15 para. 1 and 2 ECHR that it notifies the General Secretary of the Council of Europe of this. If a mandate according to art. 42 UNC were not to already take precedence over the ECHR according to art. 103 UNC, its universality and publicity would negate the need of such a notification because of the following reasons: the resolution of the SC would assert such a state of emergency which would be so grave, that it endangered international peace and security. This would be combined with the public declaration of the member states of the ECHR to supply troops in order to prevent such a crisis within the framework of the assigned mandate. This would apply as the ECHR does not determine a definite form for this notification. The nations have to accept that the legal use of military force in their territory even against their will is valid in the case of a mission according to art. 42 UNC. This results from their renunciation of a part of their sovereignty, which is a consequence of their acceptance of the

system of collective security, resulting from their membership of the UN. Without doubt they would have to also accept that this replaced the need of a declaration by themselves to the General Secretary of the Council of Europe according to art. 15 ECHR if such a declaration would be required. Because of this legal effect even a separate declaration according to art. 15 ECHR by nations, which participate by contributing troops to the multinational armed force, would be superfluous.

v. Range of use of the ECHR

A differentiation must be made between the question of the binding of national contingents of contractual nations of the ECHR by that treaty in the framework of multinational military forces, which according to art. 42 UNC are mandated by resolutions of the SC, and the question of the binding of that nation and its organs in whose territory such a mission takes place.

The binding of a nation where the area of operation is concerned may not lead to a linking with the national contingents of the multinational military force. But troop contributing nations (TCN) can take over in the way of a status of force agreement (SOFA) in the ECHR standardized duties in substance. In this case their obligations do not ensue from the ECHR itself, but from the SOFA, through which the mechanisms of legal protection of the ECHR remain basically inapplicable in this case.

Basically the range of use of the ECHR is limited to the territorial domain, in which the nation holds authority⁴⁰. Member states of the ECHR are then also subject to the stipulations of the ECHR outside of their territory, if the nation in which they operate territorially is at the same time also a party to the convention. This also applies to military missions in foreign territory. The ECHR is only applicable outside of the scope of the convention as an exception to the special institutions⁴¹ operated by the troop contributing contractual states, as long as these institutions are subject to the jurisdiction of that nation.

In any case the ECHR binds contracting states, which are TCN in a mission on the basis of a mandate of the SC according to art. 42 UNC, irrespective of their fundamental scope only to the extent, that their stipulations are not set aside according to art. 103 UNC through a mandate of the SC.

c. The relationship of resolutions of the Security Council on the basis of art. 42 of the United Nations Charter to provisions of the European Union and the North Atlantic Treaty Organisation

The European Union (EU) and NATO because of the lack of their legal quality as subjects of international law themselves are not bearers of internationally legal rights and duties. Both IO can in the framework of their constituting international treaties enact international legal provisions of varying legal binding effects for their member states. The EU legal provisions cannot only entitle and obligate contractual states of the EU, but also those subjected to the provisions, partially also directly, without transformation by domestic law.

A NATO membership of an EU member state may not limit the application of EU norms.

Art. 103 UNC sets aside the norms of the EU und NATO when they stand in contradiction with a mandate according to art. 42 UNC. This applies to the basic principles of the EU in the framework of the European community of values⁴². Therefore nations do not violate their internationally legal duties through a measure on the basis of art. 42 UNC, which violate legal provisions of the EU or NATO. The members of multinational military forces led by the EU or NATO, that act according to such a mandate, are justified according to the applicable domestic law and by international law.

A violation of EU legislation, that ensues through a measure on the basis of such a mandate, does not only not represent a violation of international law, but is also no violation of domestic law, if the EU law is immediately effective within nations, without further transformation by the member states into domestic law, because the provision in this case retains its character as an EU norm and does not become a domestic norm, even if it is to be considered as such in its validity. Moreover domestic provisions contradicting the tasks and powers mandated according to art. 42 UNC would be set aside by the legal act of the interstate implementation⁴³ as well.

The nations are not obligated, in the framework of their participation, in art. 42 UNC mandated missions, to completely convey to their troops internationally legally mandated tasks and powers of intervention in their domestic law. Therefore members of such troops who disregard the directly binding legal regulations of the EU or NATO, without these being justified by a delegation of tasks and powers by the dispatching nation within its domestic law, are internally illegal, even if they are justified by international law. The illegality is to be judged according to the legal character of the violated provision. If it deals solely with the violation of orders in the framework of the existing power of command of the multinational military forces, the violation of such an order between nations is subject to disciplinary punishment. This also applies if, the use with regard to the contents of internationally legal or also of any other norms of this IO, which were set aside according to art. 103 UNC, is ordered⁴⁴.

7. The relationship of resolutions of the Security Council on the basis of art. 42 of the United Nations Charter to norms of domestic law

The international legal basis is the requirement and at the same time international legal limit for the domestic permissibility to grant the power of intervention outside of a nation's own territory. It effects the international justification of subjects of international law and individuals. The subject of international law receives the international legal authority for the domestic dispensation of the international legally defined missions and for the concession (implementation into domestic law) of international legally defined powers of intervention for its state institutions. These domestic powers may go beyond the limit of the international legal provisions of the mandate neither in regard to the mission nor in regard to the powers of intervention. Otherwise the international legal basis is missing, which cannot be replaced by domestic law for lack of its international legal validity.

Nations can for political or legal reasons refrain from implementing international legal provisions in their domestic law. They are not obliged, but only entitled to take part in such military missions, which are mandated according to art. 42 UNC. According to art. 103 UNC they have to refrain in any case from all behaviour that counteracts the accomplishment of the purpose of the mandate. It is the decision of the subject of international law to implement its international power totally or partially in its domestic law and create power for its state institutions in domestic law.

The implementation of a provision of international law, that empowers the safeguarding of tasks and the use of the power of intervention, can be inadmissible on the grounds of domestic provisions despite being internationally legal. In this case international law would not be violated by such an implementation, but the domestic law of the concerned nation would.

As long as the implementation is not put into effect, the international legal provisions do not affect those that are subject to the provisions of domestic law. The individual who acts in the framework of the international legal basis is justified by this before international tribunals using international law, but not before domestic courts or authorities using national law.

Powers of intervention in legal interests, whose violation is punishable by court under domestic law without legal grounds of justification, can either be justified domestically, in that the international legal basis of the mandate according to the domestic legal order is granted immediate as well as domestic effectiveness or in that the mandate is formally made a part of the domestic law by an act of domestic law.

8. Status of force agreements

The term SOFA holds no standardized legal meaning of its own. It is used in the practice by nations as a collective term for bi- or multilateral internationally legal treaties, in which the legal status of legal and natural persons of the TCN and other persons, who stand in a legal relationship to the TCN, or troop contributing IO, is to be regulated between the TCN, or IO⁴⁵ and the host nation⁴⁶.

As far as such treaties are concluded in the framework of the deployment of troops, they typically regulate the legal status of the members of the military forces of the TCN or the IO⁴⁷, the contractors, who supply services for such military forces and their employees, and of persons who stand in a legal employment connection to the TCN or the IO, as well as the legal status of the TCN or the IO themselves. In the SOFA different rules are typically arranged for persons who are citizens of the host nation⁴⁸ and for those with whom this is not the case⁴⁹.

For missions on the basis of chapter VII UNC, the mandate of the SC according to art. 42 UNC can regulate the legal status in that nation⁵⁰, for which this mission has the mandate⁵¹. A separate SOFA is in this case not mandatory but concrete or added details can be separately agreed upon as long as they do not stand in contradiction to the mandate⁵². A contradicting agreement to the

mandate is on the basis of art. 103 of the UNC inadmissible and on the ground of the setting aside effect of this specification void.

For missions on the basis of chapter VI of the UNC, a regulation of status with the host nation, in which the mission takes place, is necessary, as this mission is only permitted on the basis of and within the framework of agreement of the host nation.

In missions according to chapter VI as well as those according to chapter VII a regulation of status with nations⁵³, through which forces transit, is necessary. Indeed art. 103 UNC forbids an agreement which contradicts a mandate according to art. 42 UNC. This legal effect does not go as far as with a nation that is subjected to measures according to Chapter VII UNC and therefore has to comply with all provisions of the mandate. The UNC and especially its art. 103 do not obligate nations to participate in military missions in the framework of collective security or to their support but only give them the right to. A nation does not have to agree to transit regulations as long as it is not itself subject to measures according to chapter VII UNC.

Regulations of status typically grant the above-mentioned legal and natural persons defined privileges and immunity to varying degrees in the host nation. Above all in those nations in which the mission itself takes place, military forces are usually granted the necessary operational use of property indemnity-free. As far as indemnification is afforded for such encroachment, it is not considered the fulfillment of a legally binding obligation, but as a so-called "ex gratia payment"⁵⁴. Typically exemptions from court and administrative proceedings in the host nation as well as tax and customs procedures are granted. The use of domestic legal provisions of the host nation for entering and exiting is often excluded or simplified. As proof of identification a certificate of legitimation the so-called identity card (ID card) is usually standardized.

9. The changed nature of conflict

a. Basics

A threat to international peace or security can result as a consequence from the lack of external, but also from the lack of internal security, or from a combination of both. The status of missions and the range of military operations on the basis of chapter VI and those on the basis of chapter VII of the UNC have developed further since the enactment of the UNC on the grounds of the permanently changing continuum of modern conflicts and the problems resulting from them.

At the time when the UNC⁵⁵ took effect, a threat to international peace and security was anticipated to be in the scope of international armed conflicts by the contracting subjects of international law. In the meantime this is to be regularly expected in the grave threats to the internal security of subjects of international law in the course of the further development of the range of conflicts that truly threaten their existence. Threats to external and internal security often merge indistinctly; they are basically only the two opposing expressions of the total possible threat to the state order, and to the existence of an international subject of law, and threats to external and internal security are to be equated in many

cases. This is not only evident because of the emergence of the international legal term of the non-international armed conflict, but also because of the reality of the relevance of the threat to international peace and security from terrorism⁵⁶.

Art. 42 UNC makes reference not only to the threat to international peace, but also to the threat to international security in its wording.

The use of force to end international armed conflicts through the engagement of military force represents a classic military task in the legal as well as in the technical sense. Measures for the hindrance of the resumed flaring up of such conflicts under the use of military armed force are to be likewise classified as military measures.

The use of force to end non-international armed conflicts as well as such conflicts, which do not even fulfil the qualification of non-international armed conflicts, through the employment of military force is often perceived as a military task in the technical sense. Legally such tasks are often to be qualified as tasks of internal security, thus, as “police tasks” (“law enforcement”). In many such cases achieving an end to a conflict cannot be found quantitatively or qualitatively only with police forces alone; the engagement of militarily organized or military forces is necessary in technical respects to end a conflict. In such cases police powers of force, that are applicable in times of peace for the fulfilment of such tasks on the basis of domestic law, are often no longer sufficient; more wide-reaching powers are necessary⁵⁷. With less intensive threats it will be sufficient to use the provisions for a state of emergency of domestic law. The clearing up of conflicts of high intensity is also often then, if it does not deal with international armed conflicts, promising to have a chance of success, only on the legal basis of a mandate according to art. 42 UNC, which allows for a “robust” setting up of tasks and their powers of intervention. Therefore it seems to be reasonable to use a term of a “world state of emergency” or an “international state of emergency” for all powers of intervention which, on the basis of art. 42 UNC, are permissible in missions carried out with military forces and means according to chapter VII UNC, at the same time as a counterpart to the term of the internal state of emergency. This term should cover all powers to clear up a crisis in such a threat to external and/or internal security, which endangers international peace or security. Refer to the above-mentioned explanations for the maximum permissible powers in mandated missions according to art. 42 UNC.

b. Mission tasks after the ending of violent confrontations

Not all tasks in the framework of a mission of military forces and means portray classical military task positions on the basis of chapter VII UNC. The basic setting up of tasks according to art. 42 UNC, namely to meet a threat to international peace and security effectively, can then only be viewed as fulfilled overall, if after the ending of the violent confrontations their resumption is effectively and lastingly hindered. This aim cannot always be completely achieved through the mere deterrence of past as well as future possible parties of conflict by means of military presence. Measures of security and reconstruction after ending violent confrontations are often additionally necessary

in order to create a stabile situation in which international peace and security are not endangered. The setting up of tasks resulting from these demands are manifold. They generally cover the creation and strengthening of state structures as well as the maintenance of domestic order and security particularly, especially as long as the appropriate civil authorities and institutions with regard to the classical legal criteria do not yet exist to a sufficient quantity and quality and thereby cannot or do not want to make use of them sufficiently⁵⁸. That no new conflict arises from the region of the former conflict should be achieved through the cooperation in the creation of lasting political and administrative structures. The accomplishment of these tasks is necessary in order to replace such structures, which caused the conflict and those which did not prevent it, although this would have been their task, with those structures, from which it can be expected that they secure this task themselves on their own in the future. Herewith it does not suffice to install structures of organization legally and in reality. Such structures have to achieve a state in that they hold of their own existence and effectiveness. Only then can a PSO be viewed as completed.

Also classical police tasks (law enforcement) are fundamentally covered in this setting up of tasks. These are to be classified as part of the civil and not the military domain according to the modern understanding of the state.

The special character of situations after armed confrontations, which justify and result in a mission on the basis of a mandate according to art. 42 UNC, and the time limit of every such mandate, make the assignment of such tasks to a multinational military force employed through this mandate permissible. It also follows that the wording of art. 42 UNC does not presuppose the fulfilment of military tasks for a mandate, but only standardizes the prerequisite for the engagement of military means⁵⁹. This engagement of military means is necessary as long as a sufficient degree cannot (yet) be found by civil structures and methods. The question of the admissibility of tasks for such troops is therefore not to be measured on the formulation of the question as to whether it deals with military or civil tasks in the modern understanding of the state. The determining factor is, whether military means are necessary for the fulfilment of the mission in quantitative or qualitative regards, as far as the accomplishment of this task is necessary to secure international peace and security. It would therefore be a mistake to view this setting up of tasks in reference to their lack of setting up tasks militarily as not being able to be relegated to military forces through the mandate according to art. 42 UNC and therefore such a relegation as illegal. The international legal system has a task like every legal system on which it is to be judged. The legal system is to be organized in a way, either through interpretation within the framework of the methodological permissible or through the legal development of law, that its mission can be fulfilled in the best possible way at a definite point in time and in a definite place. The task of all legal systems consists basically in possessing a sufficient degree of effectiveness as a social system of order and shaping the coexistence of humans as well as possible. Refer to the above for the explanations concerning these. The development of modern conflicts away from classical wars between nations as well as from international armed conflicts between parties of conflict to non-

international armed conflicts, or also such internal conflicts, which do not even fulfil the qualification as non-international armed conflicts, makes the application of chapter VII UNC to such conflicts necessary, as far as these threaten international peace and security. This accords with the wording of art. 42 UNC, since this rule puts down the threat to international peace and security exclusively as the requirements for a mandate without taking into consideration the terminology of the international armed conflict, of the non-international armed conflict or such conflicts to which the last-named legal qualification does not apply. Through this every restriction of the application of chapter VII to definite conflict categories defined by these terms ceases.

This coincides with the practices of the UN as such and its SC as well as with the practices of nations. The most varied tasks of nation building in PSO are actually achieved to the purposes defined in chapter VII through military forces. The spectrum ranges from tasks of internal security⁶⁰ to humanitarian assistance⁶¹, from the fight against (international) organized crime⁶² to institution building⁶³.

10. Defense of Property

a. Domestic Law

The legal systems of nations regulate the question of the permissibility of the use of deadly force for the aims of the defence of property in various ways.

Basically one has to differentiate between the admissible measures of private persons and the permissible state acts of intervention. With state acts of intervention one has to differentiate between the resistance to internal and external dangers. The increasing lack of distinction between those areas has already been discussed in section 9.

The resistance to internal dangers is as a rule regulated differently, depending on whether it deals with situations of emergency, where the domestic structures of the nation are endangered in their existence (state of emergency), or a measure of the defence of danger in a basically overall peaceful situation.

The legal system of most nations allows the use of force for the defence of property in self-defence. This defence must as a rule be a proportionate measure against an illegal assault. The amount of admissible use of force is mostly not limited to the most moderate conceivable means; a quantitative and qualitative measure of force may as a rule be applied, from whose use the successful repulsion to the attack can be expected as probable. In some nations this includes the use of deadly force⁶⁴.

The permissibility for the use of force by the state for the defence of property in the framework of the defence against internal dangers is in some nations more restrictively possible than in the framework of self-defence. In particular in many nations the right to the use of deadly force does simply not exist. Also if this results from the rules of the ECHR, as long as the rules of exception of art. 2 para. 1 subpara. c or art. 15 para. 2 ECHR do not apply, this is legally questionable in a political sense. In the interest of the rule of law the state monopoly of force should secure the protection of the justified interests of those subject to the legal system in such a way that measures of self-help of those

subject to the legal system are not necessary in normal cases. Self-help should then be allowed as a last resort (lat. "ultima ratio") if the help of state institutions cannot follow in due time. It is fundamentally wrong to suppose that self-help should replace the state use of the power of intervention also because means are not admissible in the legal framework of the nation to its defence against dangers, which in the framework of self-help are allowed⁶⁵.

The legal system of many nations contains special rules for extended powers of intervention by the executive forces in the case of the existential threat to internal security. These situations of threat are often called a "state of emergency" and these special provisions as "state of emergency law". Such rules limit the fundamental protection of human rights by provisions of domestic law and also often permit the use of deadly force as an exception for the defence of property⁶⁶.

The legal system of nations contains various rules about the permissible state use of force to defend against external dangers. In this case the use of deadly force to defend property also according to domestic law is predominantly acceptable⁶⁷. As a rule the domestic application of the rules of the IHL induces different degrees as to the content through the technically legal varying measures. Hereby it is obvious to differentiate between the provisions of international law and the provisions of domestic law which can in content sound the same. The internationally legal provision may only justify itself to international institutions and courts; the domestic law is effective only domestically. A domestic authorization, that opposes internationally legal regulations, may not be judged before international institutions and courts. It is to be examined in each individual case as to how far such a violation of international law by a legal act according to domestic law, as an exception, remains sanction-free. This is of particular importance with regard to international crimes which are subject to punishment by international courts.

a. Convention for the Protection of Human Rights

The ECHR permits the defence of property by use of deadly force according to its art. 2 para. 2 subpara. c in the framework of the suppression of revolts and insurrections and according to art. 15 para. 2 in the framework of legal acts of war. The ECHR makes allowance for dangers to internal and external security in states of emergency therewith.

The limitations of the ECHR are applicable for their contractual states in the scope of the validity of the convention, as long as the convention is not set aside by the norms of international law⁶⁸. For the above explanations refer to section 6.b.v.

b. International Humanitarian Law

The IHL grants authority to damage to military forces in international armed conflicts. This allows for the defence against enemy combatants as well as also against persons who are not combatants⁶⁹ in the sense of the IHL as an exception.

The damage to property is in the framework of the application of this right to damage basically allowed. That also includes its destruction. The IHL limits the permissibility of the damage of property in double respect. Specially protected property⁷⁰ may not or only under special circumstances⁷¹ be damaged. Further every damage and therefore also the damage to property is tied to the prerequisite of the proportionality. Under that it is to be understood, that the employed methods have to be proportionate to the accomplishment of the admissible military aim according to the rules of the IHL. They must be fitting for the accomplishment of the goal and the effect of the damage may not be disproportionate in relationship to the expected damages. In particular no disproportionate collateral damages may be accepted.

IHL basically allows military force for the defence of property. IHL acknowledges here only the boundary of compatibility in the above-mentioned sense, different than from the damage of property as mentioned above. Also the use of deadly force to defend property is permissible as long as it constitutes a militarily appropriate measure for the accomplishment of a legal military aim according to the rules of the IHL and does not allow for disproportionate collateral damages.

c. Missions on the basis of a mandate according to art. 42 of the United Nations Charter

The authority to intervene by means of a mandate of the SC according to art. 42 UNC is based on this international law. Troops with such a mandate are fundamentally neither entitled⁷² nor obligated to use the provisions of the domestic law of the nation in which the mission takes place. Further such an entitlement can only be induced through acts of law in the framework of the legal system of the nation itself⁷³. That results in there being no obligation to apply the domestic provisions of the host nation on the multinational force without the agreement of the nation leading the mission, or the IO leading the mission respectively, and that of the TCN. Every limit contrary to the mandate effected by such an agreement is to be set aside on the basis of art. 103; such mandated international legal powers of intervention and their employment cannot therefore be limited by the domestic law in the area of the mission.

The mandate as well as all international legal agreements, as long as they do not stand in contradiction to the stipulations of the mandate, determine as to how far the engaged troops are subject to the domestic law, which applies in the area of operation (legal status of the engaged troops, SOFA)⁷⁴.

The accomplishment of tasks, which contribute to the restoration or the maintenance of internal order and security, therefore follows from the stated international legal basis of law. This does not occlude persons, other than members of the mandated military force, who are suspected of judicially punishable acts according to the valid domestic law applying within the area of operation from these troops delivering them to criminal prosecution courts and hereby to lead to domestic prosecution⁷⁵ by the host nation. The troops do not acquire therewith the legal status of executive institutions in that nation, but intervene solely on the basis of their internationally mandated authority.

The defence of property with deadly force is basically allowed in missions on the basis of art. 42 of the UNC according to the designated mandate as being internationally legal. This results from the above-mentioned considerations to art. 42 and art. 103 of the UNC and from the considerations of the question of the maximum admissible powers in such missions. Even if the defence of property by means of deadly force in the framework of self-defence is inadmissible in respect to the domestic legal system of a TCN, it is also internationally legal for this TCN in the framework of the mandate of the SC to the fulfilment of the mission.

Irrespective of the fundamental permissibility of the use of deadly force to defend property, this is only under the terms of the principles of necessity and proportionality and herewith only admissible in cases of exception.

Also with the seizure of armoured vehicles, of weapons or other instruments of war, as well as the burning down of buildings, it deals basically only then with such extreme situations, in which the use of deadly force is necessary and proportionate, if through it dangers to the life and soul of persons is created, which solely at the point in time of the act, and with regard to the truly threatened circle of persons, have not yet completely materialized. Also it cannot often be judged in concrete situations to a sufficient degree whether the destruction of property also endangers the life or the bodily integrity of persons concretely and directly. Particularly the burning down of houses represents then such an essential danger if the spread of the flames has to be expected beforehand in an area that cannot be contained. This is especially true in villages. The commander in the area seldom knows exactly in such situations whether persons are to be found in the threatened buildings or not and whether they are in the position of being able to leave the buildings in time.

Further such an escalation of the situation represents a creation of such a destabilization to public order and security that extremely endangers the internal security and therewith alone already creates an immediate and concrete danger to life and soul through it to a not yet individualized group of persons at this point in time, which represents an essential danger to persons in the concerned area.

Even to prevent the seizure of armoured vehicles or weapons or other instruments of war, a life-endangering use of weapons as the only means is not to be justified, if it is obvious, that this seizure creates no situation of danger, which also cannot be counteracted effectively by measures other than the life-endangering use of weapons, that a danger to the life and soul of persons by this seizure can be prevented and the acceptance of the multinational military force is not so hindered that the accomplishment of the mission is questionable.

A mission of military powers on the basis of art. 42 UNC is then basically authorized by the SC for the prevention of a danger to international peace and security if a region is viewed as extremely instable in regard to its internal or external security. In such an environment assaults like the above-mentioned cannot be accepted by the engaged multinational military force. On the contrary such an assault must be counteracted with all necessary means to successfully defend against such an attack with attention to the principles of necessity and proportionality. This is not only necessary in the more restricted sense for the fulfilment of the mission, but must also occur in order to secure the complete

necessary acceptance of the multinational military force for the accomplishment of the mission. The obtaining of this acceptance is an absolutely necessary condition for the fulfilment of the mission⁷⁶. In such destabilized regions the means will not be found sufficiently to fulfil the mission and therefore necessary acceptance of the multinational force, which normally would be sufficient in a stable constitutional state in order to fight against illegal threats.

In regions with intensive conflicts (this applies to periods too, in which rebellious or pogrom-like acts of violence can be prevented by the operation of the engaged multinational military force) historic monuments especially often hold very high political importance. This can result from the emotional religious or ethnical importance of the object. The destruction of such meaningful and symbolic objects represents not only the destruction of property, but is moreover likely to set off violent demonstrations or even civil war-like confrontations. Therefore another standard is to be applied in relationship to the proportionality of measures for the protection of such monuments than by the threatened destruction of property that does not possess such political importance. Finally the question of the proportionality of measures for the defence against attacks against such objects must be redressed, also in view of the danger that riots arise from such destruction.

Certainly also the prevention of the destruction of property in the setting of civil war-like insurrections is to be viewed at all events in a different proportional measurement than under peaceful conditions. In those civil war-like conditions the containment of violence receives a very high status. Violence directs itself indiscriminately against persons and property in such situations as a rule; it is often a question of chance as to whether persons or property fall victim to this violence. In this case the potential for violence represents a total attack against civil order and security and is to be fought against as such with suitable methods.

In the above-mentioned examples the employment of deadly force is then necessary if the assault can only be met effectively in such a way and the employment of deadly force is proportional and suitable. Herewith – additional to the above-mentioned considerations concerning the necessity of powers of intervention in missions according to art. 42 UNC – with mere self-defence it cannot be reached to a sufficient degree, because realistically it must be expected with high probability, that members of a multinational military force receive the mission to protect an object that is already under assault or for which an attack is already impending. In the case of such a development of the situation one can reckon with several such missions. If the forces in the case concerned are not already in the object to be protected, but have to free the way to it by force first in order to fulfil their mission of protection, this cannot be achieved sufficiently quickly and effectively with mere self-defence

11. Extrajudicial Detention

a. Domestic Law

The legal system of nations regulates in various ways the question as to the admissibility of measures limiting freedom (arrest and detention).

Most legal systems allow for a limitation of the freedom of movement of persons as a measure of self-help for the defence of some of their personal legal interests in the framework of the legal regulations of self-defence. As soon as the purpose of protection becomes inapplicable this limitation is to be lifted. A judicial participation itself is not mandatory for the admissibility of this limit of freedom; this is as a rule intended first as a requirement for a more encompassing limitation of the freedom of movement.

The legal system of most nations permits in addition everyone the short-term limitation of freedom of movement of persons, in order to prevent them from committing a judicially punishable act or their flight after such an act or attempted act. Such measures are only allowed within narrow limits. The action has to as a rule follow immediately (related to the point in time of the crime or attempted crime and the point in time of the prohibition of the freedom of movement). The methods of force, with which the limitation of freedom is carried out, must be necessary and proportionate. Although this action is not confined to state institutions, it contributes to the prevention of danger (internal dangers) and the criminal judicature. It is not mandatory for the allowance of this measure that the one intervening protects personal interests. No judicial assistance is obligatory for the admissibility to act; the arrested persons are as a rule to be handed over immediately to the executive institutions of public security or criminal prosecution authorities. If this is not possible, the limitation of the freedom of movement is to be immediately lifted.

The domestic legal systems provide for the withdrawal of freedom of persons through the use of the power of the state typically for the prevention of internal dangers and for the criminal justice system. The domestic legal systems allow such act as legally standardized exceptions of human rights, which domestically are protected above all by provisions of criminal law. The domestic legal validity of the international legal duties of the nation is hereby to be observed. In particular in many nations the ECHR receives in this respect special importance in its scope of application.

The legal systems of many nations contain special rules for extended state powers not only in the case of the essential threat to internal security, but also to the external security (which can, in legal terms, both constitute a state of emergency). Such rules enable also further limitations of protected human rights as an exception and also further measures for the revocation of freedom than in times of relative internal peace.

As a rule domestic legal system also determines further by means of domestic or implemented international legal provisions the extent of international legally permitted restrictions of freedom in missions on the basis of chapter VII UNC are legal according to domestic law⁷⁷.

b. Convention for the Protection of Human Rights

The ECHR allows for the restrictions of freedom by state force according to its art. 5 para. 1 only on the basis of legal provisions. Such measures restricting freedom do not all have to be based according to art. 5 para. 2 of the ECHR on a

rule or decision of a court, but have to be subject to the examination of it according to art. 5 para. 4.

Art. 15 para's. 1 and 2 allow for the suspension of the guarantees of art. 5 under the conditions standardized in art. 15 para. 1. Therewith the ECHR makes allowance for the necessities of situations of state of emergency dangers to internal and external security.

Refer to the above-mentioned explanations for the areas of application of the ECHR in section 6.b.v.

c. International Humanitarian Law

The right to damage in international armed conflict exists within the framework of the fight against enemy combatants as well as against persons who are not combatants⁷⁸ in the sense of the IHL, and includes the right to detain. The rules for the protection of prisoners of war⁷⁹ as well as for the protection of civilians⁸⁰ come into application.

Every damage and therefore also the withdrawal of the freedom of persons is tied to the condition of the military necessity. The restriction of freedom must be compatible to the adequate accomplishment of a permissible military aim according to the regulations of IHL. The effect of damage may not be unsuitable in its relationship to the expected damages

The confinement of prisoners of war does not serve criminal prosecution. It represents no criminally legal sanction of a violation of a legal provision, but is a measure of security through the application of military force (use of force) in an international armed conflict through which an impairment to its own military interests by enemy combatants should be prevented. Simultaneously through this imprisonment, which in comparison to a killing or wounding of enemy combatants represents a more moderate means to the accomplishment of an aim, as well as through the rules of protection of IHL for prisoners of war, the legal interests of prisoners of war must be protected as far as this is possible against the opposing military interests of the power of custody.

The confinement of prisoners of war is neither legally nor factually realized by a court decision but through the immediate application of military force itself. It is governed by the provisions of IHL. In case of doubt it is the responsibility of the court to check and decide if persons are prisoners of war in accordance to IHL.

Also the internment of civilians is basically permissible according to the stipulations of IHL and requires no court order. Also this measure represents no sanctioning of criminal prosecution for a violation of a provision of law, but is a measure of security through the application of force (use of force) through which an injury to state interests by alien civilians should be prevented in an international armed conflict. The principles of necessity and proportionality also find application herewith.

The criminal prosecution of all detained persons according to the rules of the IHL, because of committing criminal acts, is reserved to the courts. IHL does not exclude the jurisdiction of military courts.

d. Missions on the basis of a mandate according to art.42 of the United Nations Charter

The restriction of freedom of persons is not only factually indispensable practice⁸¹ in many missions on the basis of art. 42 of the UNC according to the mandate issued on this basis, but legally permissible in such cases too⁸². This results from the above-mentioned explanations concerning art. 42 and art. 103 UNC and out of the considerations there to the question of the maximum admissible powers in such missions.

The detention of persons through the use of military force is admissible in the framework of self-defence also according to the domestic legal system of many TCN. Refer to the explanation in section 11.a.

Further detention in the framework of the internationally legal mandate is permissible as a legal means of the use of military force for the purpose of fulfilling the mission. The aim of such a detention is composed of effectively counteracting a danger to the fulfilment of the mission by a person, in particular a danger to other persons, whose protection should be safeguarded in the accomplishment of the mission too. Detention is a more moderate means of military use of force than deadly force and most other forms of the use of armed force. It is permissible if the task cannot be effectively fulfilled through less injurious methods of force. In this regard it lies in accordance with its objective of the permissible detention of prisoners of war according to IHL and the internment of civilians. The detention is to be lifted as soon as it is no longer required because the danger arising from such persons has disappeared.

Not only are military forces empowered to detain on the basis of a mandate according to chapter VII of the UNC, civil bodies and executive authorities can be authorized too⁸³.

As far as the detainee is not suspected of committing a merely serious crime only, the surrendering of the person to the state authorities of criminal prosecution will be required for the prevention of further dangers arising from the person as well as for the purpose of the stabilization of internal security in the mission area (nation building, institution building, rule of law). In any case this has to follow when the detention of the person is no longer necessary by the military forces for reasons of the immediate fulfilment of the mission with inclusion of military security and the interests of criminal prosecution only warrant the further detention. That presupposes that state structures exist which exercise this task adequately and effectively. If this is not the case the detention by the military forces must continue on until such structures become effective⁸⁴. The allowance of freedom to especially dangerous criminals would severely influence the development of the internal security of a crisis region when no such state institutions are effective. This would completely contradict the justified need for security of the population of this region, wherein the mission according to chapter VII should render possible the peaceful coexistence in constitutional institutions and herewith also in the rule⁸⁵ of the mandate of the SC. Such military measures that restrict freedom in this case hold therefore the character of criminal prosecution. They are equivalent to either detention pending trial or a penal sentence. The decision of the military commander who orders the military

measure taking away freedom replaces in both cases a judicial decision. That is necessary and therefore justifiable because of the situation of the ineffectiveness of structures of criminal prosecution in the area of operations.

The engaged troops in such missions regularly receive stipulations about the authority to detain through the Rules of Engagement (ROE). Refer to the explanations in chapter 12 in particular for the not only de facto but also legal effect of ROE comparable to law, which applies to persons who are subject to the military force, which is legally based on a mandate according to art. 42 of the UNC.

12. Rules of engagement

a. Legal character of the rules of engagement for the military forces

The international basis of law is the basis and the limit for the permissible granting powers of action to military forces outside of their territory⁸⁶.

The authorization of tasks as well as of powers of action for the enabling of the safeguarding of these assigned tasks to the engaged military forces on the basis of chapter VII of the UNC follows by means of a resolution of the SC according to art. 42 UNC. For the carrying out of the mission subjects of international law or IO are empowered by means of this resolution⁸⁷. A further materializing of the mandated tasks and powers of action can follow through directives of the competent political bodies of such empowered subjects of international law or an IO⁸⁸. That can follow either through the creation of legal provisions or through directives with legal effect only within the intervening armed forces themselves. In both cases a transcending of the framework of the mandate is inadmissible.

Moreover IHL and HRL limit the possibility to legally assign powers of intervention Refer to the explanations above.

A further concretization follows through acts of military power of command (plans of operation, ROE, other military orders). ROE are military orders that concretize the above-mentioned basis of international law of the mission for the military implementation. They themselves do not create the powers of action; therefore they cannot justify violations against internationally legal or other criminally legal provisions. Solely the disciplinary legal justification of the non-observance of orders can be effected through them according to the respective domestic provisions of collision relating to contradictory orders. The framework of the authority of the mandate may not be exceeded through the acts of the military power of command either.

NATO⁸⁹ and the EU⁹⁰ have laid down ROE in the sense of a “menu catalogue” for powers of action in fundamentally all conceivable missions. This catalogue is necessary on the basis of the wide variety of the judicial systems of the respective member states and was agreed politically. The ROE are constructed in a modular form in these provisions. Every module contains certain powers (e.g., detention) and puts the necessary conditions for their application in concrete terms. In addition to that it lays down the respective maximum amount of the use of force also qualitatively (e.g., minimum force⁹¹ “) that is permissible for the accomplishment of such a measure of force. But the ROE do not

themselves determine if and when certain tasks are to be carried out. They only lay down which means of force and in which way they may be instituted for the accomplishment of the legally designated missions according to the mandate. All or a part of these modules are selected in regards to political and military processes of decision for the concrete mission. Therewith such approved ROE are not military orders only, but the manifest of the political will of the lead nation or the commanding IO of the mission⁹². Each ROE has to be further concretized in this process of decision in content only then and to such a degree as it contains elements which are to be more closely defined in the concerned case at the outset according to the fundamental provision.

The political discussion of the question as to which powers should be accorded in the defined mission can be concentrated on the basis of the provisions accorded already before via the "menu catalogue". The discussion of a formulation of such powers acceptable to all TCN is already finalized through the creation of the catalogue of power in the respective provision. If one does not allege senseless handling by NATO and the EU in the drawing up of this menu catalogue, one is to thereby presume, that every single power of this catalogue can be legally granted by issuing an adequate internationally legal mandate, that therefore no rules of international law⁹³ that contradict such powers which cannot be set aside through an equivalent mandate. Basically ROE should only serve the coalescence of powers which go beyond the use of self-defence. They do not limit the right to and use of self-defence. But because of the different provisions of the domestic law of the various TCN even concerning self-defence, these regulations also contain so-called "confirmatory ROE", by means of which a unification of the position of power of the TCN in a multinational military force should be achieved in this respect too⁹⁴.

Also the powers conceded in the concrete ROE may only be applied under consideration of the principles of necessity and proportionality.

b. Legal character of the rules of engagement for those subject to military operations

Powers of operation by military forces for the use of military force are made concrete de facto almost completely by means of military orders (above all by the ROE). Hereby the effect of general abstract provisions falls to these de facto, which make a higher-standing legal base concrete. In practice nations view the putting into concrete form of almost completely indefinite provisions of international law through only such military orders as essentially legal⁹⁵. The permissibility of such indefinite authorizing provisions and its materialization through military orders can be viewed as appropriate because of its character as a provision of the international law for a state of emergency. Then on the one hand the required flexibility of missions and powers for the protection of international peace and security can be secured sufficiently in practice, on the other hand it can be expected that political agreements on the more defined and more detailed standardization of tasks and powers to achieve these aims would essentially be rendered more difficult. Further also domestic laws for a state of emergency contain power granting provisions that are fundamentally much more

indefinite than these applicable constitutional determinational requirements assign for a state of relative peace. Also such provisions for a state of emergency are often first made concrete through supplementary directives from executive authorities and institutions.

Further in missions on the basis of chapter VII UNC the mandate can be viewed on the basis of art. 42 UNC itself as the legal basis for the legal validity of such military orders as general abstract provision of their own kind, which through the international state of emergency that should be helped by this mission, is legally justified. Such orders receive in any case functionally the legal validity of general abstract provisions (laws, ordinances), which compared with those subject to the provision, namely the persons who are under the application of such authority of the military forces, possess legal claim to binding obligation. Such orders, which more closely define the prerequisite and the measure of the admissible use of force legally in the framework of the respective internationally legal basis, do not themselves represent the act of the use of military force, but they represent the general abstract provision, which determines binding conditions of this application of the military force on this basis of international law. The military measures themselves which implement the internationally mandated mission within the framework of these orders represent the direct measures of the use of force.

According to constitutional principles general abstract provisions must be accessible to those subject to the provisions in order to allow them standardized righteous behaviour. ROE does not make allowance for this requirement of the accessibility or to only a very limited degree⁹⁶. The element of surprise is basically an absolutely necessary condition for the success of military missions and action. The whole or also major amount of knowledge of the one subject to the provisions as to the type and the amount of the permissible use of force by the engaged troops would not only make the fulfilment of their mission more difficult, but often impossible. On top of that an added, legally unjustifiable danger to the employed soldiers would be caused, because their behaviour would be foreseen too precisely. Herewith the interest in the optimal achievement of the mandated mission justifies this limited publicity of such special generally abstract provisions as an exception.

d. The personal scope of application of the rules of engagement

The scope of application of powers, whose application is regulated in ROE, does not arise independently from ROE itself, but out of the legal basis determining the framework for and the limits of the ROE. This covers the laying down of the area of validity as to time and space and the determining of the circle of persons who are subject to the application of these powers. Basically domestic law as well as international law too come into question as the legal basis for ROE. The purpose of ROE consists in transposing the legal basis of law, which grants powers of intervention to military forces, so that the legally correct use of these powers by the members of the military forces can be expected.

So-called “standing ROE” typically regulate powers of intervention by military forces outside of missions (“peace”). As far as ROE only find application in the

territory of a nation for its military forces, the domestic law of this nation represents the primary legal basis for this ROE. In addition international law applies as far as the domestic law thereby is defined and formed. Outside of the territory of nations such "standing ROE" are also possible for military forces of a nation, above all at high sea. In the territory of other nations the use of powers of intervention by military forces is only admissible on the basis of international law.

In chapter VII missions the issued mandate of the SC according to art. 42 UNC is the internationally legal basis for the use of military force for the fulfilment of the mission. As a rule the period of time and the geographical area of operation ("mission area") of the authorized powers of intervention are laid down. If the general abstract laying down of the group of persons against whom the application of the force is basically permissible is not forthcoming, the use of force in the space of time laid down and territory is admissible against everyone as far as the legal prerequisites for the use of power exist. According to this the use of force is also permissible against other members of a multinational military force (also against those who belong to another TCN) on this basis, as long as that is not effectively barred by other legal norms. 103 UNC limits the possibility of such legally effective limitations.

Regulations of status standardize as a rule the immunity of members of the multinational military forces from judicial and disciplinary prosecution by other bodies than of those of the TCN. The range of application of the authority of use through the multinational military forces can in this way be taken away also from members of other organizations, who are set up through a mandate of the SC on the basis of chapter VII UNC⁹⁷. On top of that other legal bodies possess rights of immunity on the basis of provisions of international law. These are valid as long as they are not set aside by art. 103 UNC.

e. Caveats

On an international level art. 103 UNC effects the setting aside of a mandate according to art. 42 UNC of opposing provisions of international law. The implementation of this rule or rather its legal effect on domestic law remains reserved to the national legislation. If this is not forthcoming the military forces in such a mission on the basis of domestic law hold fewer powers of application than the internationally legal mandate would allow. Refer to the above-mentioned explanations. Limitations to the tasks and powers of a mission given by a mandate by the SC on the basis of art. 42 UNC follow from political reasons above all. Either the nation sending in troops refrains from the implementation, although this would lie in its right of authority to change the domestic law, or the nation forbids (at least partially) the application of force also without having any domestic legal basis which contradict such powers. The latter would result out of political evaluations and decisions of this nation only.

The lead nation or IO decreed rules for the participation of troops of various nations within the framework of a multinational military force typically designate that TCNs, which do not grant all powers of action to their contingents of troops, have to inform the lead nation/IO of these limitations as so-called "caveats". This

indeed follows for political reasons often incompletely and not clearly, whereby the command of the mission in situations of crisis is greatly impeded.

13. Concluding remarks

Even if particular thoughts of this portrayal in the course of the academical discussion might prove to be as not sufficiently consistent or permanent, this does not detract from the necessity of the academic work of the treated theme. The more comprehensive one succeeds in developing legally productive solutions hereby, which bear weight on the sociological setting up of tasks of legal orders discussed above, the better this will prove successful as a system of order for the coexistence of mankind. It should not be underestimated either, that not only legal orders as such, but also the theoretically legal penetrations of the same undergo a permanent change.

Today the mastering of crises in situations of emergency is of decisive importance worldwide. There are extensive crises to master, that refer to the internal and external security equally, in order to advance the peaceful coexistence of humans as far as possible in any way. These crises should be able to be met with encompassing and suitable methods of “nation building“. Missions according to chapter VII, but also such according to chapter VI UNC, represent an essential contribution thereto. The sense of this work should be to contribute to the development of fundamental theoretically legal thoughts and ideas which highlight solutions to the discussed problems in conformity with law now and in the future.

Remarks

¹ Legal adviser in the Austrian Armed Forces;

employment abroad as legal adviser in Kosovo (KFOR) and as Chief Legal Adviser in the Headquarters of EUFOR in Bosnia and Herzegovina (EUFOR); Legal Officer European Union Military Staff;

former publications: Peace Support Operations & Their Legal Implications, Geert-Jan Alexander Knoop, Roberta Arnold, 67 ff: Military and Legal Aspects of PSO – the Example of Austria’s Deployment with KFOR;

² In most legal systems the legal instrument of self-defence includes the defence of another person. In the following that expression therefore will always be used in this sense.

The NATO and EU use of force concepts refer to the legal instrument of self-defence:

Part II of the NATO Rules of Engagement (ROE), NATO Council (NAC), MC 362/1, 22 dated 22 July 2003, defines self-defence to include extended self-defence. Self-defence is defined as the universally recognized right of individuals and units to defend themselves against attack or an imminent attack. Extended self-defence is the right of NATO/NATO-led forces and personnel to take appropriate measures, including the use of necessary and proportional force to defend other NATO/NATO-led forces and personnel from attack or imminent attack.

Part III para. G of the EU ROE, Council of the European Union, Military Committee, Use of Force Concept for EU-led Military Crisis Management Operations-1st Revision, 6877-06, dated 28 February 2006, defines self-defence to be a universally recognized inherent right of individuals to defend themselves using necessary and proportionate force against attack or imminent attack.

According to both concepts, the ROE does not limit the individual's right to apply self-defence according to his or her domestic law.

³ An all-encompassing handling of the question of the setting up of tasks of legal systems cannot be covered here. Only certain sociological aspects of established law at all events as well as the validity of provisions in particular should be considered.

⁴ Society as a whole as well as the individual subjected to a provision should be designated here with the term of social reality. Social reality proves whether an abstract rule as a part of a legal system truly exists in a society or whether this is not the case.

⁵ It is not mistaken to believe in deciding this question that it deals with a judgement concerning values, which as such cannot be objectively substantiated in the end, as far as one does not assume absolute values as existent as a prerequisite and further as objectively perceptible (recognizable). Finally such judgements of values like all such measurements of values are anchored metaphysically and therewith inadequate to being objectified. See also footnote 32 for this. For the evaluation of the quality of a legal system, a measurement can be set down whose absolute validity by means of (and herewith under the condition of) an act of the direct recognition of reality is accepted as truly existing or in that such a measurement is laid down by the one making the judgement consciously as his or her human will of decision. In the former case the one making the judgement accepts the respective measurement of values as reference of absolute values recognized by him; in the latter case the motives of the one judging are indispensable for the determining the measurement of values. It depends solely upon his being conscious that his will is the authority to the determining of the measurement and not his recognition outside of himself and independent of his existing values.

⁶ San Francisco 26 June 1945, entered in force 24 October 1945.

⁷ In the declaration of the Western European Union on the role of the Western European Union and to its relations to the European Union and to the Atlantic Alliance of 22 July 1997, which as Annex 7 was adopted in the Treaty of Amsterdam to the alteration of the treaty of the European Union, the treaties to the foundation of the European Communities as well as several connected legal acts including closing acts (Treaty of Amsterdam), and now in art. 17 para. 2 EU Treaty the tasks named as "Petersbergaufgaben" that in the framework of chapter VII UNC possible tasks in the English draft of the treaty are termed "peacemaking".

On the other hand the term "peace enforcement", which defines the character of such missions more precisely, is used in the Agenda For Peace (UN Doc A/47/277-S/24111 from 17 June 1992, which repeatedly uses the title "peacemaking", but in this connection, where military force should come into employment by "peace-enforcement units" says; compare to the footnotes 63-65).

⁸ See European Court of Human Rights (ECHR), No. 71412/01 Agim BEHRAMI and Bekir BEHRAMI against France and No. 78166/01 Ruzhdi SARAMATI against France, Germany and Norway.

This could be questioned through the newer practices of nations. Not only the military strike by the North Atlantic Treaty Organization (NATO) against the former Federal Republic of Yugoslavia in the Kosovo War in the year 1999 but also the Iraq War of the United States of America (USA) in the year 2003 could support an interpretation that a new international customary law is contradictory or is now in the process of arising.

de.wikipedia.org/wiki/Kosovo-Krieg - 58k: (Translation from German by the author) "The Kosovo War was a military confrontation between the UÇK ("Army of Liberation of Kosovo"), several NATO states (the USA, Great Britain, France, Germany, Denmark, Norway, Italy, the Netherlands, Belgium, Canada, Portugal, and Spain) on the one side and the Federal Republic of Yugoslavia on the other side. It took place in the period from 24 March 1999 until 10 June 1999 almost completely in the territory of the former Federal Republic of Yugoslavia (Serbia, including the provinces of Kosovo, Montenegro)."

de.wikipedia.org/wiki/Irak-Krieg - 143k: (Translation from German by the author) "The Iraq War was a war of aggression of the USA and allied states against the rule of Saddam Hussein in the year 2003. It is also termed with reference to the Second Gulf War caused by the Iraqi invasion of Kuwait 1990 as the Second Iraq War or under consideration of the First Gulf War between Iraq and Iran as the Third Gulf War called (compare Gulf War).

The attack, in which 48 other states joined the USA at the beginning (occasionally called "Coalition of the Willing") began on 20 March 2003.

Most members of the UN Security Council and the UN Assembly spoke out against this war before it began and for a continuation of the inspections of weapons.

The resistance of the Iraqi military ended in April 2003. This nevertheless did in no way bring peace to the land. In parts of the land conditions of civil war prevail. According to the latest estimates ca. 650,000 people have died as a result of the war. The Iraqi population often becomes the victim of terrorist attacks, acts of war and violent criminality, so that the situation of security is viewed generally as precarious. Resistance groups act against the occupation troops and the newly formed Iraqi security forces. The rebels are divided up into different groups and fight against one another too. Former members of Saddam Hussein's regime and followers of the Iraqi Baath party, Sunnite Arabs and nationalists, Shiite supporters of the spiritual leader Muqtada as-Sadr and national as well as immigrant Islamic extremists, who have joined the terrorist network of Al-Qaida partially."

⁹ See also www.isg-iags.org/oldsite/newsletters/26/kosovo.html - 22k: International Commission Evaluates Intervention in Kosovo;

¹⁰ Whether international customary law of "humanitarian intervention" develops, remains to be seen. Above all the Judicature of the International Court of Justice (article 7 and 92 to 96 UNC), but also other international courts as e.g. the International Criminal Court (UN.Doc. A/CONF.183/9) is to be observed.

¹¹ Herewith the conflict between the intervening alliance and the former Federal Republic of Yugoslavia is meant. The question as to the definition of the legal classification of the previous conflict between the armed forces of the Federal Republic of Yugoslavia and the Kosovo Albanian forces will not be discussed further here.

¹² Because such employed military forces in any case do not act on the basis of chapter VII UNC, the International Human Law (IHL) finds application in the armed confrontation between such military forces and those of the nation against whom the intervention follows.

¹³ Such an internationally legal judicial institution is in regard to its effectiveness in content similar to such domestic judicial institutions of criminal law, by which in fact the punishability of criminal behaviour is cancelled, but not its illegality (e.g., "reasons of excusability" according to Austrian criminal law).

¹⁴ Refer to the explanations in footnote 33 for a more detailed account of that.

¹⁵ It would be mistaken to grant this legal effectiveness without the existence of such recognizable objective criteria. Conscientious decisions cannot be standardized by and are not accessible to provisions of positive law. After all they are not founded on positive standards, but on the individual ethnic basic attitude of the individual. If one wants to relegate to the conscience of the individual the function of a last resort, which unrestrictedly justifies the violation against positive provisions, the need for an examination of conscientious decisions is to be taken away on hand of positive standards/provisions. A limited control would be only possible under the supposition of binding general ethics, in whose framework such decisions of conscience would have to move, should they accrue such justifiable effectiveness. Therewith the positive legal system as the last instance in the end would be replaced purely by such general ethics. Such ethics arise, but not through the use of positive legal mechanisms for the creation of law and is therefore removed from the bounds of their controls. That applies in particular to the question of the (in liberal states democratic) legitimation as well as to the definition of legal provisions. The price for it, also decisions of conscience that namely allow for legal effectiveness, would be legal insecurity and the total loss of the monopoly of power of the UN. International armed conflict would again be de facto a permissible means of politics. That is why handling on a purely subjective basis, which is not open to an objective basis (see also footnotes 5 and 40 for that) in the above-mentioned sense, irrespective of all its ethical or any other metaphysical justification, is not accessible to the justification, but also the pure effect of the non-punishment (non-prosecution) of such behaviour by the legal system as a positive social system of order. The positively legal consequences of such behaviour, namely that ethical as well as metaphysically justified behaviour is subject to positively legal prosecution, has to be therefore accepted. The security of justice always stands in discrepancy to the ethical idea of justice in the individual case.

¹⁶ That cannot be excluded as a consequence of the non-agreement of the members of the SC for political reasons and corresponds to historical experience.

¹⁷ E.g. Organization for Security and Co-operation in Europe (OSCE), European Union (EU), North Atlantic Treaty Organization (NATO);

¹⁸ Also refer to the explanations in footnote 33 for that.

¹⁹ The mission of the Kosovo Force (KFOR) follows according to UNSCR 1244 (1999) from 10 June 1999 on the basis of chapter VII UNC. The mission and powers of intervention are laid down by means of this UNSCR. According to this resolution the KFOR is empowered to all measures that are necessary to the accomplishment of the tasks laid down in this resolution.

The "Military Technical Agreement between the International Security Force (KFOR) and the Government of the Federal Republic of Yugoslavia and the Republic of Serbia" was signed by KFOR and representatives of the Yugoslavian Army and police and regulates the immediate cessation of hostilities and the withdrawal of the Yugoslavian forces from Kosovo. It does not create independent powers of intervention, but represents an agreement to implement UNSCR 1244 (1999). In the case of an infringement of the stipulations of this agreement by the Yugoslavian as well as Serbian institutions UNSCR 1244 (1999) justifies the use of the mandated military force by KFOR through UNSCR 1244 (1999).

²⁰ This applies to the missions of the Implementation Force (IFOR), the Stabilisation Force (SFOR) and to European Union Force (EUFOR) in Bosnia and Herzegovina (BiH):

After the conclusion of the "General Framework Agreement for Peace in Bosnia and Herzegovina" (GFAP, Dayton Peace Treaty) signed in Paris on 14 December 1995 IFOR had the task of creating a secure environment in BiH with a force of 60,000 soldiers. The command lay with NATO, which had received the mandate thereto from the UN by means of the UNSCR 1031 (1995) of 15 December 1995. At the end of 1996 according to UNSCR 1088 (1996) the SFOR that likewise was commanded by the NATO superseded IFOR as its legal successor.

EUFOR superseded SFOR as the legal successor according to UNSCR 1575 (2004). The mission began in November 2004 with a presence of troops of around 7000 soldiers.

The mission of IFOR, SFOR and EUFOR was according to these resolutions the assistance in the implementation of the rules of the Annex 1-A and Annex 2 of the GFAP. The missions of IFOR, SFOR and EUFOR follow according to the above-mentioned UNSCR on the basis of chapter VII UNC. For the accomplishment of the mission all measures are authorized which are necessary for the enforcement of the implementation of Annex 1-A und Annex 2 of the GFAP.

These mandated tasks were more closely defined by means of a resolution of the Council of the EU "Joint Action Althea, Council Joint Action 2004/570/CFSP of 12 July on the European Union military operation in Bosnia and Herzegovina" for EUFOR. Hereby the limitations of the mandate of the SC were to be heeded.

²¹ From that there is to be basically a distinction concerning the non-intervention in the internal affairs of a nation. The distinction between internal affairs and conflicts, which endanger international peace and security, becomes more and more difficult because of the changing picture of conflicts. Refer to para. 9 concerning that topic.

²² The International Military Tribunal in Nuremberg (court hearings from 20 November 1945 until 31 August 1946) dealt among other things with the "plot against world peace" and the "planning, unleashing and carrying out of a war of aggression" as internationally legal crimes which were subject to criminal prosecution.

The "Rome Statute of the International Criminal Court" from 17 July 1998 designates in art. 5 para. 1 subpara. d "the crime of aggression" as a crime of international criminal law. This crime is not further defined in content, as are other crimes of international law standardized in this statute.

²³ Also "Law of Armed Conflict";

²⁴ The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, only finds application in the contractual states of this additional protocol. Many states (in particular the USA) have not yet acceded to this protocol.

²⁵ Laws and Customs of War on Land (II Hague): 29 July 1899; this document, that in its essence and wording is the basis of modern international law of war and also created the basis for the foundation of the League of Nations and the UN, consists of 2 parts:

Convention with Respect to the Laws and Customs of War on Land, and

Annex to the Convention "Regulations Respecting the Laws and Customs of War on Land"

to which the 44 states signing the treaty have agreed.

The Preamble of the Convention with Respect to the Laws and Customs of War on Land contains the so-called Martens Clause:

“Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience;”

They declare that it is in this sense especially that art.s 1 and 2 of the regulations adopted must be understood.

These articles run:

Art. 1 The High Contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the "Regulations respecting the Laws and Customs of War on Land" annexed to the present Convention.

Art. 2 The provisions contained in the Regulations mentioned in article 1 are only binding on the Contracting Powers, in case of war between two or more of them.

These provisions shall cease to be binding from the time when, in a war between Contracting Powers, a non-Contracting Power joins one of the belligerents.

²⁶ As a rule these are not only states, but also insurgents (secession movements, decolonization), as far as these fulfil certain requirements.

²⁷ That military forces possess basically a different legal quality, depending upon whether they are engaged under a breach of the VR, or according to art. 51 UNC on the basis of the inherent right of individual or collective self-defence, or by measures taken by the SC in the framework of the system of collective security according to chapter VII UNC, namely as combatants on the one hand, who may fight and be fought against under adherence to the stipulations of the IHL, and on the other hand the not more closely defined legal status as members of a multinational military force, which should possess no status of combating, is in accordance with at least implicitly the principles of the for good reasons antiquated “bellum iustum- concept“, that allows for the annihilation of the (evil) opponent as fundamentally permissible without any commitment to rules. If a subject of international law attacks another one with armed force and the one attacked defends itself by the use of its military forces against this attack, an international armed conflict without doubt exists. That this conflict should attain another legal quality (namely that it should not be treated as an international armed conflict anymore), if a multinational military force empowered by resolutions of the SC according to art. 42 UNC enters this conflict (the military forces of the one attacked can therewith either within the framework of this multinational military force or outside of the same further participate in the fighting or abstain from both), is only inferable when taking the principles of the “bellum iustum- concept“ as a basis. That the nature of such an altered quality of such a conflict according to the current situation of international law would be uncertain and therefore the applicable provisions in such a conflict would be equally disputed, would represent for law politically a substantial step backward in the endeavours of the demands for humanity in armed conflicts. A fundamental non-application of the IHL, also for such situations and military forces, is becoming less and less legitimate because of the changing picture of modern conflicts since missions on the basis of art. 42 UNC are increasing. They do not serve military practices either. In plans of operation by peace-keeping military forces the use of the principles or altogether of the rules of the IHL are often ordered in conflicts of high intensity. Nevertheless it also occurs that the rules of the IHL alone are becoming less and less sufficient to meet the needs of modern conflicts. In these conflicts the borders between international and non-international armed conflicts and those, which do not meet the latter legal qualification either, are becoming more and more indistinct; the external and the internal security are increasingly melting together. Peace-keeping military forces are not only engaged in the immediate phase of conflict, but as a rule also thereafter over a longer period of time within the framework of nation-building as well as institution-building. They hereby often ensure the internal security comprehensively and hinder the flaming up of the armed conflict.

In an international armed conflict members of an empowered and in this conflict intervening multinational military force according to art. 42 UNC are only not bound to the rules of the IHL in

so far as the mandate of the SC has priority over the stipulations of the IHL according to art. 103 UNC. The mandate sets aside the rules of the IHL with the exception of the *ius cogens*. The internationally legal *ius cogens* as well as the IHL, in its form modified through the mandate according to art. 42 UNC, limit the admissible power of intervention of such military forces in international armed conflict. In the case of the infringement of authority by such military forces the legal use of self-defence can be exercised. According to art. 2 UNC the political decision of a party of conflict to apply military engagement against the multinational military force empowered by the mandate of the SC is illegal. The participation of members of this party of conflict in military action against this multinational military force under observance of the stipulations of the IHL and under consideration of the modified regulations in this confrontation is on the other hand not illegal and thus represents as such neither a war crime nor does it establish to them a criminally legal accountability according to other rules of criminal law.

As long as the accomplishment of tasks through use of military force, whose fulfilment is not empowered by the mandate of the SC, violates the prohibition of force, measures against it are permissible according to art. 51. In this case the rules of the IHL limit the admissible use of force of the opponents without modification through the mandate as this does not relate to this case.

The Secretary-General's Bulletin of the UN Secretary General, dated on the 6th of August 1999, which entered in force on the 12 August 1999, 99-23042 (E) 090899, can be understood to the effect that herewith the legal conception of the UN Secretary General is expressed that the military forces led by the UN in international armed conflicts, including missions according to Chapter VII UNC, should possess the status of combatants and the principles of the IHL are to be applied to them in such missions. Whether herewith international law should be created, according to the opinion of the UN Secretary General, or should merely be brought to expression that the content of the bulletin describes valid international law, remains open. The effect of internal service instructions for the military forces led by the UN is to be accorded to the document irrespective of its controversial internationally legal validity. Herewith a disciplinary responsibility by members of such UN led troops for violations is founded. An additional criminally legal responsibility can be brought about through such a violation only (irrespective of any accountability to criminal law according to national law) in the case of the infringement of the mandate of the SC being caused simultaneously by that violation. A modification of the mandate through the bulletin would require its binding effect in view of the mandate though, for which no legal basis exists. The bulletin refers explicitly only to the military forces led by the UN according to its section 1. It is therefore already for this reason irrespective of the question as to the internationally legal importance not applicable to the multinational military forces, which in any case are empowered by a mandate according to art. 42 UNC, but not by the UN but by a "lead nation" or an IO led one.

²⁸ As to the question of the application of the treaty law of the IHL it is relevant, whether contingents of troops retain their identity as national military forces also in a mission mandated according to art.42 of the UNC or whether they attain the status of UN military forces. As long as the UN is not a party to the contract of the treaties of the IHL, the direct application relating to this law of contract is excluded if contingents of troops are direct military forces of the UN. While for that reason the use of those provisions of the IHL, which already have international customary legal character, as for instance the mutual art. 3 of the Geneva Conventions, 12 August 1949, is to be acknowledged, the analogous application of the law of contract is controversial. Refer to footnote 27 for the explanations.

Military forces which retain their national identity also in a mission on the basis of art. 42 UNC have to observe the binding IHL for the state sending in troops in the mandate in its modified form in any case. This covers the law of contract as well as the VGR too.

²⁹ The judgement of proportionality and compatibility has to focus in any case on the importance of the fulfilment of the task to be fulfilled according to chapter VII in relationship to other legal interests in which intervention should be applied for the accomplishment of this task.

³⁰ The Universal Declaration of Human Rights was approved and proclaimed on 10 December 1948 by the General Assembly (GA) of the UN. The result of the votes ran 48:0 in favour of the declaration with 8 abstentions by states including the Soviet Union, Saudi Arabia and South Africa.

Although it does not possess any internationally legal character as a mere declaration of the GA it is viewed by the majority as a part of the customary international law.

Many regulations of the declaration are also found in the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights and possess internationally legal obligation as part of this treaty.

³¹ New York, 19 December 1966

³² Council of Europe, Rome 4 November 1950

³³ So also Kolb, ZaöRV HJIL 64/1, 21 ff and Schilling, ZaöRV HJIL 64/2, 343 ff; Schilling does not accept in any case the derogating effect of the UNSCR for those states, which as members of the SC vote for resolutions, which are incompatible with their contractual internationally legal obligations (prohibition of thwarting). It is not taken into consideration that changes in the legal status in international law (as it applies to national established law) by means of the mechanisms for creating law valid at the time concerned (in international law that includes basically the acknowledged principles of law too) are continually and unlimitedly possible. This could only be argued under the acceptance of unalterable compelling international legal provisions. At all events such a matter would imply that provisions on the basis of their inherent character, namely one of unalterability, would possess validity forever.

As long as legal provisions are entirely based on human decisions of will, they do not possess any inherent quality, each attribute is assigned to them only on the basis of a human decision of will through the use of linguistic means. Doubtless such an opinion about the character of provisions through the inability of language to grasp the reality wholly, to express and to relate would go beyond its borders too. We also know that we cannot solve the question as to whether language is capable of expressing reality, without solving the prior theoretical question of knowing what reality is in order effectively to express reality. The possibility of being able to perceive reality cognitively is the precondition for being able to recognize it. The possibility of the recognition of reality is the precondition for the potential possibility of being able to express it through language. Still this neither means, that under the precondition of the recognizability of reality, this can also be expressed and related truly through language, nor to get assurance, whether or as to how far that is the case. To gain assurance for that requires being able to check, whether it is perceived what the case is (this should suffice as a definition of reality), and whether this is expressed through language in such a way that the one receiving the message recognizes on its basis what the case is. This would demand an observer who is himself enable to perceive reality and who possesses on top of this skill also conscientiousness.

The acceptance of an inherent character of the unalterability of *ius cogens* stands in contradiction to the historical legal reality too. The creation of new law, which derogates other provisions, is basically always possible in the framework of valid mechanisms for creating law. That applies to all sources of law, in international law not only to the law of treaty but also customary law and the acknowledged principles of law. Every universal internationally legal provision can basically be modified by every newer universal internationally legal provision. It is hereby unimportant to which of the three above-mentioned internationally legal sources of law the altered or altering provisions belong; an identity is not mandatory in this sense. In this way universal international customary law can be altered by universal treaty law and vice-versa.

The assumption of internationally legal obligations is also then possible for a state if domestic provisions oppose it and this irrespective of the circumstances as to whether this leads to a harmonizing of the legal basis of the concerned nation by that nation or not. Further the creation of provisions is also possible for domestic law-forming bodies that intervene in standing treaty connections (as well as in such treaty connections of subjects of international law, and of natural or juristic persons) without the occlusion of the legal validity for persons who participate in the creation of law in their positions in state institutions, even if these persons themselves were to be subject to the treaty commitments affected by these laws. It remains to be considered what effect the creation of contradictory provisions at the same time and of equal rank within the hierarchy of norms, which because of their equal standing there is no derogating effect in their relationship to each other, under which view-point of a prohibition of thwarting is to be afforded to them.

³⁴ Even if precedence is to be admitted to the legal interests of international peace and security before all other legal interests, because these collective legal interests only then make

reasonably possible the protection of human rights and therewith of individual legal interests, the decision must always be based on the consideration of proportionality between this legal interest and individual human rights in each case.

The arguments over the German air security law (law for the new regulation of air security tasks from 11/1/2005, dBGBI I 2005/78) shows clearly the increasing consciousness for this problem and at the same time also for the reality of the indistinction of the borders between internal and external security. Admittedly the German Constitutional Court with the decision BVerfG, 1 BvR 357/05 from 15/2/2006, para.-no (1 – 156), http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html, § 14 para. 3 of the air security law as with art. 2 para. 2 clause 1 in connection with art. 87a para. 2 and art. 35 para. 2 and 3 as well as in connection with art. 1 para. 1 of the German Constitutional Law (GG) judged to be inconsistent and invalid. The authorization of the military forces, according to § 14 para. 3 of the air security law, through immediate effect to shoot down an aircraft with armed force, that should be deployed against the life of humans, is according to this decision with the right to life according to art. 2 para. 2 clause 1 GG in connection with the guarantee of human dignity of art. 1 para 1 GG not compatible, as long as persons not involved in the action are aboard the aircraft who could be struck. The decision leaves open as to how far such an intervention would, in the legal interest of the life of persons not involved in an action according to the rules of German established law as a side effect regarding the use of self-defence or extended self defence against an unlawful assailant, be legal. Further this judgement does not decide either whether such a rule contradicts universal or (for Germany binding) regional international law, especially the rules of the IHL.

Austrian established law contains different legal institutions for such measures in the framework of the individual defence of danger. According to § 10 of the Austrian penal code (öStGB, öBGBI No 60/1974, last altered through öBGBI I No 56/2006) the one is excused and therefore not punishable, who commits an act where punishment be due, in order to prevent a directly threatening grave disadvantage from occurring to themselves or another, if the threatening damages from the act do not weigh disproportionately more heavily than the disadvantage that they should deter, and in the situation of the perpetrator no other behaviour was to be expected by a person bound by legally protected values. Herewith one is to proceed from the equality of the legal interests of the life of all persons. This rule excuses therefore for the protection of the lives of persons also the intervention in the legal interests of the lives of other persons. It is irrelevant whether the number of persons who should be protected by such a measure is fewer than the number of persons in whose right to life such a measure impairs. An assaulted person is not obligated to accept his or her murder if he or she can achieve his or her salvation only through causing the death of other persons, especially of a large number of persons. Further the prevailing Austrian legal conception recognizes also as grounds of justification the so-called emergency beyond law, which as an exception under certain circumstances, also justifies the intervention in the legal interests of uninvolved persons for the protection of the legal interests of others in accordance with the rules of § 3 of the öStGB (self-defence und extended self-defence).

³⁵ If one were to suppose for example, that the consideration of human rights were not sufficiently forthcoming in UNSCR 1575 (2004) (EUFOR mandate) or in UNSCR 1244(1999) (KFOR mandate), one would purport to the SC in these cases as dealing contrary to the UNC and therewith illegally. It is not to be proceeded from that fundamentally.

³⁶ In this way e.g. the scope of the granted powers of intervention in UNSCR 1244 (1999) itself is not more closely defined by means of the formulation “all necessary means“ to the fulfilment of its tasks of the KFOR. This laying down possesses a normative content only then when one supposes that it has priority over all provisions, with the exception of compelling provisions of the international law, and therewith empowers the use of all necessary and adequate means, which are not forbidden by certain compelling provisions of the international law. If one were to suppose that not only *ius cogens*, but also all other opposing provisions in content of the universal and of the regional international law were to limit this authorization, no powers at all were granted by means of this resolution, the provision would therefore be completely empty of content. In this case KFOR would only then possess any powers of intervention on the basis of other applicable

provisions of KFOR or of the national contingents of troops deployed in the framework of this multinational military force. It could only principally deal with justifiable grounds like self-defence (the legal institute of self-defence allows not only for measures of force protection but also for the hindrance of criminal acts not to the disadvantage of members belonging to the international military force). That this was the case contradicts not only the prevailing legal conception, but the practice. That applies to IFOR, SFOR and EUFOR in view of these multinational military forces as well as of these applicable rules.

³⁷ That applies to the right to life too. Protocol No. 13 to the Convention for the Protection of Human Rights and fundamental Freedoms concerning the abolition of the death penalty in all circumstances, Vilnius, 3.V.2002, excludes no doubt the killing of humans as a criminally punishable sanction; the rules of art. 2 para. 2 ECHR remain completely applicable in the future.

³⁸ **Austria:**

Austria has been a member of the European Council since 16 April 1956 and signed the ECHR on 13 December 1957, together with the first added protocol. The Convention took effect domestically on 3 September 1958.

The use of armed force against a violent mob is not unknown to Austrian established law either. § 33 para. 8 of the ordinance of the Federal Government from 9 January 1979 about the general regulations of duty for the army (Allgemeine Dienstvorschrift, ADV, öBGBI No 43/1979, last altered by öBGBI II No 310/2002; this ordinance transforms the legal regulations of the law of defence 2001 „Wehrgesetz“, – WG 2001, öBGBI I No 146/2001 last altered by öBGBI I No 116/2006) provides for among other things the use of weapons by troops in military formation then, when armed force is necessary as a result of violence, particularly then, when a previous command for the restoration of the legal state has remained unsuccessful. According to § 7 of the federal law from 27 March 1969 about the use of weapons by institutions of the Federal Police, of the Federal Gendarmerie and of the community bodies of surveillance (law for the use of armed weapons 1969 „Waffengebrauchsgesetz“ - WaffGebrG, öBGBI No 149/1969 last altered by öBGBI I No 146/1999) the use of a weapon related to endangering life against persons is permissible for the suppression of a revolt or an insurrection etc. According to §§ 11 to 14 WaffGebrG the use of weapons in a military unit to the aim designated in § 7 is then admissible when the continued command to restore legal order and the repeated threat of the use of armed force remains unsuccessful. Further not only the Federal Law concerning provisions for tasks and powers within the framework of the military defence of the state (law of military powers „Militaerbefugnisgesetz“ – MBG, öBGBI I No 86/2000, last altered by öBGBI I No 115/2006) in § 19, especially in its rules for missions regarding these, but also the IHL (regarding combatants) as part of Austrian established law has such powers. According to art. 9 of the Federal Constitutional Law in the Constitution of 1929, öBGBI No 1/1930 (repeated issue), last altered by öBGBI No 50/1995 (B-VG), the general accepted rules of international law are valid as a part of Austrian Federal Law. By law or by a state treaty, ratified according to art. 50 para. 1 B-VG, single rights of authority of the Federal Government can be granted to bilateral institutions and their bodies and the activities of institutions of foreign states in the country as well as the activities of Austrian institutions abroad in the framework of international law can be regulated. In the former case they receive that status in the hierarchy of Austrian established law which is required to derogate opposing provisions therewith.

³⁹ Among other things on grounds of their indictment to international criminal courts, as e.g., by means of the UNSCR 808(1993) established International Criminal Tribunal for the Former Yugoslavia (ICTY) with the mission to prosecute those persons who were responsible for serious violations of the IHL in the territories of the former Yugoslavia as of 1991;

⁴⁰ The term “jurisdiction” is to be understood basically territorially. Refer to the decisions in footnote 41. Only as an exception do the rules of the Convention find application outside the territorial areas of a nation. Further art. 51 provides special rules for areas, wherewith it does not directly deal with the territory of the contractual nation.

⁴¹ See European Court of Human Rights (ECHR), No. 71412/01 Agim BEHRAMI and Bekir BEHRAMI against France and No. 78166/01 Ruzhdi SARAMATI against France, Germany and Norway.

See further EWHC 2911 (Admin), Al Skeini v Defence, 14 December 2004, Summary:

3. The judgement first decides, on the basis of a consideration of Strasbourg jurisprudence, that a state party's jurisdiction within Art. I of the Convention ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this convention") is essential territorial; that exceptionally such jurisdiction extends to outposts of the state's authority abroad such as embassies and consulates; that this exception can apply to a prison operated by a state party in the territory of another state with consent of that state; but that it does not apply to the total territory of another state which is not itself a party to the convention, even if that territory is in the effective control of the first state; and that therefore only the case of the sixth complaint, in respect of his son's death in a British prison in Iraq, was within the United Kingdom's jurisdiction and thus within the scope of the Convention. It follows that, in the opinion of the court, the claims of the first claimants must fail.

See also ECHR 25781/94, *Cyprus v. Turkey* 2001, 10 May 2001, ECHR 25781/94, *Cyprus v. Turkey* 2001, 28 Juni 1996; ECHR 46221/99, *Öcalan v. Turkey*, 12 May 2005, ECHR 15318/89, *Loizidou v. Turkey*, 18 December 1996, ECHR 15318/89, *Loizidou v. Turkey*, 23 March 1995, ECHR 15299/89; 15300/89; 15318/89; *Chrysostomides; Dimitriades; Loizidou v. Turkey*, 04 March 1991, ECHR 31821/96, *Issa and others v. Turkey*, 16 November 2004, ECHR 48787/99, *Ilascu and others v. Moldavia and Russia*, 08 July 2004, ECHR 52207/99, *Bancovic and others v. Belgium and others*, 12 December 2001.

⁴² Draft Charter of Fundamental Rights of the European Union, 4258/00, 02 May 2000, 4230/00, 18 April 2000, 4224/00, 12 April 2000, 4213/00, 07 April 2000, 4138/00 28 March 2000, 4126/00, 09 February 2000;

⁴³ The implementation of provisions of international law into domestic law is regulated by nations differently in technical terms. It can basically either be effected by a domestic provision setting down the direct application of all or certain international provisions binding to this nation. In this case these international legal provisions receive their character as provisions of international law and are further domestically applicable. The national regulations of some nations demand the publication of an international legal provision in the official gazette of that nation. The international legal provision can also become part of domestic law by taking on the content of the internationally legal provision in a special national provision.

States break their international legal obligations if an international provision does not become effective according to the domestic legal status for lack of the implementation of the content. The form of the domestic implementation is irrelevant thereto.

⁴⁴ E.g., rule of the use in content of the regulations of the ECHR in the plan of operations which are set aside by the mandate according to art. 103 UNC;

⁴⁵ The UN itself, but also e.g. NATO and the EU;

⁴⁶ Hereby it is to be basically differentiated between nations in which the mission takes place and mere transit nations.

⁴⁷ In UN led missions the members of the military forces deployed by TCN basically receive the status of members (employees) of the UN.

⁴⁸ So-called Local Hired Personnel, Local Employed Civilians

⁴⁹ So-called International Contracted Personnel

⁵⁰ That can affect the whole or only a part of the territory of the nations to which this mandate is applicable (e.g., exclusively the surveillance of a "buffer zone" within one or among several nations);

⁵¹ For EUFOR and Nato Headquarters Sarajevo (NHQSa) this occurred in regards to Bosnia and Herzegovina (BiH) by means of Appendix B to Annex 1.A of the GFAP. The GFAP is an international legal treaty between the parties in the Bosnia conflict, which became part of these resolutions through the IFOR, SFOR and EUFOR empowering UNSCR. As long as the GFAP as content of the UNSCR is applicable, the original contracting parties cannot independently come to an agreement to a legally effective change of these rules.

⁵² For BiH these rules were more closely defined by means of the "Technical Arrangement between the Government of the Republic of Bosnia and Herzegovina and Implementation Force", 23 December 1995. This arrangement covers the so called "Facilities Annex", the "Legal Annex", the "Medical Annex", the "Labour Annex", the "Claims Annex", the "Purchasing and Contracting Annex", and the "Customs and Border Crossing Annex".

⁵³ The resulting regulations of status in Croatia and in the former Federal Republic of Yugoslavia in the Status of Forces Agreement (SOFA), dated 21 November 1995, that in the Appendix B to Annex 1.A were incorporated in the GFAP, were for Croatia in the Memorandum, signed on 23 November 1995 by the Acting Secretary General of the North Atlantic Treaty Organisation, which accompanied the SOFA, and the Technical Arrangement between the Government of the Republic of Croatia and the North Atlantic Treaty Organisation (NATO) on Behalf of the Implementation Force, dated 1 March 1996, more closely defined. For Serbia the more defined provisions followed by means of the Technical Arrangement between the European Union Force (EUFOR) and the Council of Ministers of Serbia and Montenegro concerning Transit Arrangements, dated 23 January 2006.

⁵⁴ Often a so-called claims procedure is laid down by the multinational military force or also agreed upon with the host nations. For EUFOR and NHQSa this followed by means of the treaty described in the footnotes 52 and 53. An out of court arbitration procedure is typically agreed upon as a claims procedure. If the internationally legal duty of the TCN in the framework of a multinational military force is not brought about by means of an agreement, it is up to the TCN to decide whether it voluntarily submits to this arbitration.

⁵⁵ As also at the point in time of the taking effect of the ECHR.

⁵⁶ The terrorist actions in Italy and Germany in the second half of the 20 century were already milestones in this development. As a result of the incidents of 11 September 2001 supervening development, this new picture of conflicts is in the meantime acknowledged reality worldwide.

⁵⁷ Art. 2 para. 2 subpara. c ECHR relates explicitly to situations threatening internal security. The rule of exception of art. 15 para. 1 ECHR considers not only times of war, but further also any other public emergency threatening the life of the nation and allows for the suspension of rights protected by the Convention to a certain degree under each of these conditions.

⁵⁸ As e.g., the explicit setting up of tasks of KFOR according to paragraph 9. d. of UNSCR 1244 (1999):

„Ensuring public safety and order until the international civil presence can take responsibility for this task;“

⁵⁹ Those measures provided for in Art. 41 would be inadequate or have proved to be inadequate, to maintain or restore international peace and security;

⁶⁰ According to UNSCR 1244 (1999) the maintenance of internal security and order in Kosovo is the task of KFOR as long as it is not (yet) ensured by (international or local) civil institutions and authorities.

⁶¹ Chiefly within the framework of the Civil Military Cooperation (CIMIC);

⁶² Above all in the year 2005 EUFOR took up the fight against internationally organized crime in BiH like a boxer. This followed to increasingly closer cooperation with the appropriate civil BiH authorities as well as with the European Union Police Mission (EUPM).

⁶³ The main task of the NHQSa, which according to UNSCR 1575 (2004) together with EUFOR is the legal successor of SFOR, is the reform of defence of the BiH Armed Forces.

⁶⁴ Austria: The use of deadly force to defend property is not unknown to Austrian established law. Self-defence and extended self-defence according to § 3 of the Criminal Code „Strafgesetzbuch“ (StGB), öBGBI No 60/1974/60, last change öBGBI I No 56/2006, justifies the use of the necessary force to defend against illegal attacks against the legal interests of property. The use of deadly force to this purpose is in the framework of this regulation not excluded, but is under the consideration of the principles of necessity and proportionality as well as for the defence against nuisance basically admissible.

France: (Ingrid Vigier, Legal Adviser French Army) Basically Art. 122-5 of the French Penal Code authorizes the use of force in case of self-defence against an attack, if necessary and proportionate. The use of deadly force in order to defend property is not authorized.

United Kingdom: For UK military personnel the use of deadly force in the case of self-defence is only authorized to defend against a threat or danger that threatens human life and only if there is no other way to prevent the threat or danger. The use of deadly force in order to solely defend property is not permitted except in such situations that threaten human life. However, it should be noted that in all situations personnel should use no more force than is absolutely necessary.

These provisions apply in all situations except an international armed conflict where IHL and LOAC principles apply.

The basic principles of self-defence in UK domestic law are set out in (*Palmer v R*, [1971] A.C 814); see also (Archbold 19-41);

Remark: The derogating effect according to art. 103 UNC on the basis of art. 42 UNC issued UNSCR justifies the use of deadly force to defend property on the internationally legal level. Herewith such behaviour is removed from the jurisdiction of international tribunals. Nevertheless such behaviour can be subject to prosecution according to national criminal law if the nation concerned does not implement this internationally legal provision regarding this in domestic law and no justifying effect can unfold therewith in the national criminal law.

⁶⁵ It is e.g. hardly imaginable that it should be reasonable to the so-called righteous person that it is forbidden to state institutions the use of life endangering armed force in order to hinder the immediate threat of the destruction of a building through arson or blasting in the case of necessity too.

⁶⁶ France: (Ingrid Vigier, Legal Adviser French Army) Art. L2131-1 of the law No 55-385 of the 3 April 1955 on the state of emergency in connection with art. 16 of the constitution of the 4 October 1958 and art. L2121-1 to L2121-8 of the Defence Code, which cover the transition of the powers of the civil authorities concerning the public order and security to the military authorities, do not allow the use of deadly force to defend property.

United Kingdom: as in footnote 64.

⁶⁷ Austria: Austrian established law fundamentally allows for the defence of property by using deadly force not only in the framework of the participation in measures of collective self-defence, but also in the use of the inherent right of individual or collective self-defence. According to para. 19 subpara. 5 MBG such measures in missions for the military defence of the country according to para. 2 subpara. 1. a WG 2001 are permissible in extreme situations. Only the applicable provisions of authority of the MBG, except missions of the Austrian Armed Forces for the military defence of the country, exclude the engagement of deadly force for the protection of property from illegal attacks in peacetime. The MBG is not applicable in foreign missions for the fulfilment of tasks on the basis of a mandate according to chapters VI and VII UNC; therefore these limitations do not subsist in such missions. The use of deadly force to defend property is in such missions herewith admissible as long as they do not stand in contradiction to the rules of the ECHR. The regulations of the ECHR are applicable in missions abroad in so far as they are not set aside by art. 103 of the UNC.

France: (Ingrid Vigier, Legal Adviser French Army) According to art. 17 para. 2 of the law No 2005-270 of the 24 March on the general status of military staff in case of international armed conflict the use of deadly force in order to defend property is authorized for mission accomplishment outside of French territory. This applies to missions based on a Chapter VII UNC mandate too.

United Kingdom:

The use of deadly force is authorized according to the provisions of the IHL. Therefore, in an international armed conflict, military needs justify the use of deadly force in order to defend property. E.g. during the "Falkland War" UK was party of an international armed conflict.

⁶⁸ The setting aside effect according to art. 103 UNC of a UNSCR issued on the basis of art 42 UNC justifies the use of deadly force to defend property on an internationally legal level. Herewith the prosecution by international tribunals of such behavior is taken away. Notwithstanding such behaviour can be subject to prosecution according to domestic criminal law, if the nation does not implement these internationally legal provisions in the national law and these herewith hold no justifying effect in the national criminal law.

⁶⁹ Above all civilians as well as certain members of military forces (military chaplains, military medical personnel); basically such persons can be fought against if they participate illegally in military action.

⁷⁰ Above all medical facilities, cultural assets as well as structures from which particular dangers emanate.

⁷¹ Namely in the case of the abuse of protected objects as well as in the case of the particular military necessity that vastly goes beyond the normal measure.

⁷² While in missions according to chapter VII UNC the use of the right of intervention of the nation, in which the mission takes place, is as a rule unimportant, such a concession of power in missions according to chapter VI UNC can represent an essential condition for the possibility of fulfilling the mission.

⁷³ Thus by acts of law of the state itself, or by acts of law of an IO or its empowered international institutions, which within the framework of the legal order of this nation are in the position of creating law (e.g., the United Nations Special Representative according to UNSCR 1244 (1999) in Kosovo, the [UN] High Representative according to UNSCR 1031 [1995] in combination with the “General Framework Agreement for Peace in Bosnia and Herzegovina” [Dayton Peace Treaty] in BiH).

⁷⁴ As a rule the troops have to observe the law, which applies in the nation in which the mission takes place, as far as this does not oppose the internationally legal mission. But they are regularly exempted from all legal prosecution and state measures of force (immunity). In transit states they are subject to the local legal system as a rule, but are also there exempted from all legal prosecution and state measures of force (immunity). They possess certain privileges in transit states regularly, as in particular the right to bear arms, to wear uniforms, to carry flags, are freed from import and export duties as well as from taxes and are subject to a simplified crossing of borders and customs clearance.

⁷⁵ The observation of the contents of the provisions of domestic law (without these herewith being applied in the legal sense), as well as the earliest possible cooperation with not merely local courts and authorities of prosecution, but also with local police forces, promotes the utilization of evidence in the framework of criminal prosecution by the local competent courts and authorities, also if these are without legal importance as to the question of the permissibility of the act of intervention of the internationally legally empowered troops.

⁷⁶ That is clear e.g. by the failure of the UNPROFOR Mission in BiH.

⁷⁷ Austria: The Federal Constitutional Law from 29 November 1988 over the protection of personal freedom, öBGBI No 684/1988, finds according to art. 3 of the B-VG no application in foreign missions. At the time that the Republic of Austria obliged itself to participation in the KFOR mission and laid down the legal conditions for its participation, it had already belonged to Austrian law for 10 years. No kind of reservation against the use of more closely defining powers of intervention in the framework of KFOR were explained to NATO by Austria regarding these directives laid down in the ROE and in other military orders.

The rules of the ECHR only find application in foreign missions for Austrian troops as long as they are not derogated by an issued mandate of the SC on the basis of art. 42 UNC according to art. 103 UNC.

⁷⁸ See footnote 69.

⁷⁹ Convention (III) relative to the Treatment of Prisoners of War; Geneva, 12 August 1949
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977;

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977;

⁸⁰ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949;

⁸¹ Especially at the beginning of the mission of KFOR in Kosovo to no inconsiderable degree;

⁸² The legitimacy of restrictive measures of freedom by KFOR was until then neither in view of international law nor in the concerned national law put into question, including the so-called “extrajudicial detention”, for the rest by TCN in the framework of KFOR (e.g., Austria, France, Germany, Italy, the UK, the USA, Turkey).

⁸³ Also the international civil presence „United Nations Mission in Kosovo“ (UNMIK) provides for the imposing of the so-called “extrajudicial detention“ (based on executive orders) as legally possible. Refer to the UNMIK regulation no. 2001/18 (published in the internet), which in Kosovo receives the status of law, and in which in the year 2001 regulations were provided for the otherwise not more closely regulated administrative arrest.

⁸⁴ This was necessary at the start of the mission by KFOR.

⁸⁵ In mandates according to chapter VII a limitation opposing it, that results from the lack of authority in the mission, is hardly to be expected, different from in the case of mandates according to chapter VII.

⁸⁶ In missions within one's own territory international provisions of the HRL as well as those of the IHL in any case limit the concession of power, but are regularly not the legal basis for the mission itself.

⁸⁷ The leadership of missions until now has followed through the UN, NATO (e.g., IFOR and SFOR in BiH, KFOR in Kosovo), the EU (e.g., EUFOR in BiH), but also through states empowered to that (e.g., in the First Iraq War by the USA).

⁸⁸ The tasks of EUFOR are more closely defined in the decision of the Council of the EU "Joint Action Althea, Council Joint Action 2004/570/CFSP of 12 July on the European Union military operation in Bosnia and Herzegovina".

⁸⁹ Nato Council (NAC), MC 362/1-NATO Rules of Engagement, 22 July 2003;

⁹⁰ Council of the European Union, Military Committee, Use of Force Concept for EU-led Military Crisis Management Operations – 1st Revision, 6877-06, dated 28 February 2006;

⁹¹ Minimum force includes deadly force (Annex F to MC 362/1 and Appendix 6 to Annex A to EU Use of Force Concept).

⁹² NATO or EU;

⁹³ Therefore only stipulations of the *ius cogens* would come into question, as all other regulations according to art. 103 UNC through the issuing of a mandate according to chapter VII UNC can be set aside.

⁹⁴ In many situations of danger the use of self-defence can suffice to defend against threats. The meaning in content of the term "self-defence" is not only defined by NATO but also by the EU in their ROE regulations. No independent justification is granted with these definitions themselves, but they find application in provisions of domestic law concerning them for the concerned contingent of troops. This is also clearly stated in the ROE rules. Refer to footnote 2.

As a compromise to different meanings in content of self-defence in the concerned legal order of states, which send troops as part of a multinational military force, they make use of these rules for their own so-called confirmatory ROE, namely that of "hostile act" and "hostile intent". As long as national rules of a TCN about self-defence do not justify measures, which according to the rules of the ROE about hostile act or hostile intent are permissible in a definite mission, such measures for the troops of these TCN do not represent measures of self-defence, but justified mission accomplishment by the mandate of the SC according to art.42 UNC.

Incidents which according to these rules are termed as "hostile intent" possess a recognizable high potential of danger, but it is unclear, where might be the target or objective and when the attack will start. That sometimes the situation is not yet completely recognizable does not make it less dangerous and does not release the engaged commanders from doing the utmost within reason for the accomplishment of the mission on the basis of the incoming information and in the framework legally admissible at the time. The granting of the possibility of fighting against persons who present a potential of danger qualitatively and quantitatively, for the qualification as "hostile intent" in the sense of this rule to be fulfilled, is therefore essential for the accomplishment of the mission in missions on the basis of chapter VII UNC.

If one were to claim that the granting of such ROE according to the rules of international law applicable to NATO and the EU member states were illegal at all, then one would claim that the creation of these ROE were senseless. But this is indeed necessary, not least because of the above reasons.

Thus, e.g., every theft of a weapon or a tool of war is potentially suited to fulfil at least the qualification as "hostile intent" in the sense of these provisions.

Also making available or the setting up of high-trajectory weapons and their ammunition basically fulfils this qualification. If persons who commit such illegal measures, do not give up such weapons without resistance (and further resist their arrest), this can make the use of "deadly force" necessary to prevent the danger arising from these acts.

If one were to reject such measures because an assault were not yet ongoing or were at least imminent, one would accept to only be able to react. Therewith one would not only accept a potentially lower efficiency of one's fulfilment of the mission, but also higher victims of one's own

and victims of third parties (the civilian population to be protected). Such reservations and limitations are in conditions of relative peace in developed and strengthened constitutional societies basically adequate in order to therewith sufficiently account for the protection of legal interests of potential criminals. In a situation which requires a mission on the basis of chapter VII UNC, this is not appropriate in regard to the primacy of the legal interests of international peace and security as well as the exceptional character of such situations of emergency.

⁹⁵ See above all the mandate of the KFOR by means of UNSCR 1244 (1999), which no doubt basically describes the tasks of KFOR regarding the admissible powers of intervention, but finds sufficiency in the rule of allowance by "all necessary means".

⁹⁶ Plans of operation as a rule contain a section in which is laid down which ROE may be published.

⁹⁷ For that also Peter Dreist, Legal Aspects of the KFOR Mission, NZWehrr 2001 Volume 1. UNMIK and KFOR have to basically accept their mutual immunity from each other.