The Expanding Concepts of "Peace and Security" in International and European Law: Protecting Sustainable Peace and Human Life in Dignity

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Abstract

On the UN as well as the European level, the concepts of peace and security have been broadened. Negative peace has been extended to positive peace and security from inter-State security against military and hybrid attacks to inter- and intra-State human security from numerous other threats. Security as a multidimensional concept includes democratic, rule of law and human rights, economic and environmental security as well as cybersecurity. Within the framework of the UN collective security system, a European Security Architecture has been established consisting of

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four complementary organisations: NATO, the Council of Europe, the EU and the OSCE. They jointly contribute to maintaining, promoting or building positive peace and human security in Europe and the wider world. With their different focusses, expertise and strengths – military, political, legal, economic, financial, moral – they strive together to prevent, repel and remove threats in any (including hybrid) form to sustainable peace and human life in dignity. In thus pooling their forces, the four organisations have come a long way, but have an even longer way to go. Especially the EU needs to transform itself into a supranational European Defence Union with its own defence forces.

Keywords: Positive Peace, Human Security, European Security Architecture, NATO, Council of Europe, European Union, OSCE, European Defence Union

A. Introduction: How to Define Peace and Security?

"We the peoples of the United Nations determined to save succeeding generations from the scourge of war." This is the first recital of the preamble of the United Nations Charter[1] that specifies the world organisation's primary goal. The principal means to realise that goal is addressed in the 5th recital: "to … live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security". This leads to the conclusion that peace means the absence of war, but only as an absolute minimum, and that individual peacefulness must go along with good neighbourliness and the pooling of forces of the peaceful to suppress the violent for definitely abolishing war and guaranteeing sustainable peace.

There is no commonly agreed definition of the term security in international law and international relations either.[2] Here it is used in a broad sense as denoting the state of an object where it is safe from negative change. This raises the question of how to circumscribe that 'object'. In a yet incomplete process, international practice on the global as well as the European regional level has gradually extended the 'object' and accordingly broadened the security concept from inter-State security against military and hybrid attacks to inter- and intra-State human security from numerous other threats. These threats are primarily directed at democratic, rule of law and human rights security, economic security, environmental security and cybersecurity. Security has become a multidimensional concept.

The new umbrella term "human security" stands for a comprehensive approach covering threats to important aspects of human life in dignity, as it is promised to all by the preambles of the UN Charter[3] and in more pronounced form in the Univer-

1 Of 26 June 1945, 1 UNTS XVI.

2 *McDonald/Brollowski*, margin notes 1 f. See the recent theorization of "security" by *Heath*, AJIL 2022/116, pp. 289 ff. that has led to a symposium with several contributions in AJIL Unbound 2022/116, pp. 225 ff.

3 Second recital: "We the peoples of the United Nations determined … to reaffirm faith in fundamental rights, in the dignity and worth of the human person …". See *Petersen*.

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sal Declaration of Human Rights (UDHR):[4] "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world …".[5] This recital, which has been adopted by the first recital of the preamble of both the International Covenant on Civil and Political Rights (ICCPR)[6] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[7] connects the protection of human dignity with the maintenance of world peace, as embodied in the narrower traditional concept of inter-State security. The broadening of the security concept corresponds to the shift from the classical State-centred international law to a modern world law centred on humans as the ultimate subjects of all law who unite into peoples and establish States for enhanced security.[8] The international legal order has definitely reached the era of anthropocentrism and is slowly moving further toward a holistic approach including the animate and inanimate nature of which humans are a part.[9] These developments regarding peace and security will be traced further at the global level of the UN, before elaborating on the European Security Architecture and its international and supranational components.

B. UN Perspective: From Negative to Positive Peace and from Inter-State Security to Human Security

I. "International Peace and Security" Formula

The UN Charter combines the terms security and peace in the formula "international peace and security" in Art. 1 no. 1, 11, 24 (1), 33 (1), 39, 52 (1) and 99. This indicates that international security is closely related to international peace, the latter term first and foremost denoting the absence of war ('negative peace'). Security apparently is the broader term denoting the absence of threats to the peace in the sense of Art. 39 UN Charter as well as lesser dangers to peace maintenance in the sense of Art. 33–35 UN Charter.

Art. 1 no. 1 UN Charter does not only turn the maintenance of international peace and security into the primary Purpose of the Organization,[10] but also determines the means to be used by it to achieve that Purpose: "to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might

4 A/RES/217(III) of 10 December 1948.
5 First recital of the preamble.
6 Of 16 December 1966, UNTS vol. 999, p. 171.
7 Of 16 December 1966, UNTS vol. 993, p. 3.
8 See *Lauterpacht*; *Peters*.
9 See *Chapaux/Mégret/Natarajan*.
10 See ICJ, *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, p. 168.

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lead to a breach of the peace". All these means are closely related with at least threats to the peace. It therefore seems that the UN Charter has military security between States in mind where it speaks of security in the context of international peace.

But developments at UN level, in particular after the end of the Cold War, have long gone beyond 'negative peace' (i.e., the absence of armed conflict conducted with military force) in the direction of 'positive peace' which encompasses the conditions necessary for or conducive to sustainable peace.[11] Positive peace requires in particular that equity and social justice are promoted and deprivation of rights and liberties, domination of peoples by other peoples, poverty, malnutrition as well as diseases prevented and terminated.[12] In parallel, the concept of security (= absence of threats to the peace and lesser dangers to peace maintenance) has also been broadened considerably. Beyond inter-State (or military) security, which is closely related with negative peace, it now also comprises protection of the political, economic, financial, social etc. status quo from non-military threats, in parallel with positive peace.[13] The complementary term to positive peace is human security.[14] This concept was developed in line with the shift from a State-centred to a people/humans-centred approach to international relations and international law in the wake of the human rights revolution,[15] whose beginning not by chance coincided with the foundation of the UN.[16]

II. UN Security Council Practice

The Security Council (SC) initiated these extensions with a 1992 meeting at the level of Heads of State and Government on "The responsibility of the Security Council in the maintenance of international peace and security". In the concluding statement the President said this on behalf of all the SC members: "The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."[17] UN Secretary-General Boutros-Ghali's "An Agenda for Peace" of 1992,[18] which was written upon request by the SC, included peace-building, and UN Secretary-General Kofi Annan's report "In larger freedom" of 2005 referred to threats to peace and security emanating from organised crime, poverty, disease and environmental degradation.[19]

11 See *Wolfrum*, in: Simma/Khan/Nolte/Paulus (eds.), Art. 1, margin notes 8 ff.
12 *Tehindrazanarivelo/Kolb*, margin note 12.
13 *McDonald/Brollowski*, margin notes 7 ff.
14 *Peters*; *McDonald/Brollowski*, margin notes 16 f.
15 See *Wählisch*.
16 See Art. 1 no. 3, 55, 56 UN Charter.
17 UN Doc. S/23500 of 31 January 1992. See *Peters,* in: Simma and others (eds.), Art. 24, margin note 34.
18 See *Neuhold*.
19 In larger freedom: toward development, security and human rights for all. Report of the Secretary-General of 21 March 2005 (UN Doc. A/59/2005), para. 78.

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In accordance with its 1992 approach, the SC has meanwhile qualified various "non-military sources of instability" such as large-scale human rights violations and the overthrow of democratic governments as threats to the peace, at least if such events triggered a serious crisis, as is often the case.[20] More recently, the Security Council stressed "that the HIV/AIDS pandemic, if unchecked, may pose a risk to stability and security",[21] implicitly qualified "the smuggling of migrants and trafficking of persons in the Mediterranean Sea off the coast of Libya" as a threat to the peace,[22] explicitly identified the Ebola outbreak in Africa as a threat to international peace and security[23] and more reservedly considered the unprecedented extent of the COVID-19 pandemic as "likely to endanger the maintenance of international peace and security".[24]

In 2016, the SC recognised "that development, peace and security, and human rights are interlinked and mutually reinforcing" and emphasized "the importance of a comprehensive approach to sustaining peace, particularly through the prevention of conflict and addressing its root causes, strengthening the rule of law at the international and national levels, and promoting sustained and sustainable economic growth, poverty eradication, social development, sustainable development, national reconciliation and unity including through inclusive dialogue and mediation, access to justice and transitional justice, accountability, good governance, democracy, accountable institutions, gender equality and respect for, and protection of, human rights and fundamental freedoms".[25] In 2021, a Russian veto prevented the SC from adopting a draft resolution based on Chapter VII "that would have integrated climate-related security risk as a central component of United Nations conflict-prevention strategies aiming to help counter the risk of conflict relapse."[26] In 2023, the SC condemned the violation of the human rights and fundamental freedoms of women and girls in Afghanistan by the Taliban. Implicitly referring to its seminal Resolution 1325 (2000) on the inclusion of the gender perspective in peace-building, it reaffirmed "the indispensable role of women in Afghan society, including … in peace-building," and stressed "the importance of their full, equal, meaningful, and safe participation for Afghanistan's future and long-term development, involvement in all efforts for the maintenance and promotion of peace and security, and the need

20 See *Krisch*, Art. 39, margin notes 25 ff. See additionally S/RES/1973 of 17 March 2011 regarding massive attacks against civilians by Libyan authorities; S/RES/2048 of 18 May 2012 regarding a military coup in Guinea-Bissau.

21 S/RES/1308 of 17 July 2000. That resolution primarily addressed the health threats for international peacekeeping personnel by HIV/AIDS.

22 S/RES/2240 of 9 October 2015.

23 S/RES/2177 of 18 September 2014.

24 S/RES/2532 of 1 July 2020. See *Giegerich*, Human Rights during the Pandemic: Enter the UN Security Council as Supporting Actor, Jean-Monnet-Saar, 10/9/21, available at: https://jean-monnet-saar.eu/?page_id=96624 (8/9/2023).

25 S/RES/2282 of 27 April 2016, preamble.

26 Press Release SC/14732 of 13 December 2021, https://press.un.org/en/2021/sc14732.doc.htm, (8/9/2023). For earlier discussions on climate change in the Security Council, see *Krisch*, Art. 39, margin note 33.

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to increase their role in decision-making with regard to conflict prevention and resolution".[27]

This survey shows that, since the end of the Cold War, the SC has taken on a greater responsibility regarding matters beyond inter-State security in strict military terms. But the Council members and the international community at large have not consistently and wholeheartedly adopted the expansive concepts of positive peace and human security and read them into the international peace and security formula in Art. 1 no. 1, Art. 24 and Art. 39 UN Charter. The reason is concern that the considerable powers of the Security Council in maintaining international peace and security pursuant to Art. 39 ff., read together with Art. 25 and Art. 103 UN Charter, should not become too great by overextending the maintenance object. The "securitisation" of non-military policy matters – their framing in terms of security – would approximate the SC's competence to the General Assembly's competence to address situations that only deem likely to impair the general welfare or friendly relations among nations (Art. 14 UNCh). While the General Assembly is limited to making recommendations, the SC can make decisions legally binding UN Member States and even overriding their other obligations under international law.[28]

Moreover, contrary to the impression given by Art. 24 (2) sentence 2 UNCh, the SC is not subject to any principle of conferred powers but has "general powers to discharge the responsibilities conferred in paragraph 1".[29] In a 1947 statement by the Secretary-General, cited by the ICJ, "the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter".[30] These sparse legal limitations can be judicially enforced only indirectly, if at all.[31] All this cautions against overextending the object of the SC's primary responsibility under Art. 24 (1) UNCh by "securitising" ever more policy matters. These concerns are mitigated by the significant obstacle that the veto power of the permanent members poses to effective SC action.[32] But they require constant vigilance on the part of all other UN Members that make up two-thirds of the SC membership and on whom the achievement of the necessary majority in the SC depends.[33]

27 S/RES/2681 of 27 April 2023. The quotation is from the preamble.
28 See, on the one hand, Art. 13, 14 UN Charter and on the other hand Art. 25, 103 UN Charter, read together with International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. US)*, Order of 14 April 1992, I.C.J. Reports 1992, p. 114, para. 42.
29 International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding S/RES/276 of 30 January 1970, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16, para. 110.
30 Id.
31 *Giegerich*, GLJ 2009/10, pp. 31, 52 ff.; *Richter*, PYIL 2012/32, pp. 271 ff.
32 See Art. 27 (3) UN Charter.
33 See Art. 23 (1), 27 (3) UN Charter.

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III. UN General Assembly Practice

1. UDHR and Friendly Relations Declaration

The General Assembly (GA) had actually taken the lead in the UN's movement toward positive peace and human security already in the UDHR. In the first recital of the preamble of this Declaration, the GA, as was already explained, determined that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world …".[34] In the second recital, the barbarous acts of the Nazis and the "four freedoms" proclaimed by the Allies[35] were juxtaposed, with the Second World War in between only implicitly included in the sense that disregard and contempt for human rights were a major cause of that war. The third recital reminds us that peace and security are put at risk by tyranny and oppression triggering rebellion and that to prevent that from happening "human rights should be protected by the rule of law".

In the preamble of the Friendly Relations Declaration, the GA expressed the conviction that international peace can only be maintained and strengthened, if "founded upon freedom, equality, justice and respect for fundamental rights".[36]

2. 2005 World Summit Outcome: Value-Based Concept of Peace and Security

a) Security and Human Rights, Rule of Law, Democracy

In the 2005 World Summit Outcome, the Heads of State and Government, meeting in the GA, reaffirmed "that our common fundamental values, including freedom, equality, solidarity, tolerance, respect for all human rights, respect for nature and shared responsibility, are essential to international relations"[37] and "our commitment to work towards a security consensus based on the recognition that many threats are interlinked, that development, peace, security and human rights are mutually reinforcing".[38] They recommitted themselves "to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are

34 See in the same sense the provision of Art. 1 (2) of the German Constitution (Basic Law) of 1949.

35 President Franklin D. Roosevelt's Address to Congress on January 6, 1941 ("Four Freedoms Speech"), available at: https://www.archives.gov/milestone-documents/president-franklin-roosevelts-annual-message-to-congress (8/9/2023). It was partly quoted in the Atlantic Charter of 14 August 1941, available at: https://avalon.law.yale.edu/wwii/atlantic.asp (8/9/2023) that was referred to by the Declaration by United Nations of 1 January 1942, available at: https://avalon.law.yale.edu/20th_century/decade03.asp (8/9/2023).

36 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV) of 24 October 1970.

37 A/RES/60/1 of 16 September 2005, para. 4.

38 Id., para. 72.

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interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations".[39] "Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels," they reaffirmed their commitment "to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States …".[40]

Finally, they reaffirmed that "democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination. We stress that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing."[41] This confirms adherents of the democratic peace thesis, according to which democracies are less likely to resort to war, at least against other democracies.[42]

b) R2P and Attempts to Limit Veto Power of Permanent SC Members

In para. 9 of the 2005 World Summit Outcome, the Heads of State and Government acknowledged "that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being. We recognize that development, peace and security and human rights are interlinked and mutually reinforcing."[43] In para. 138 f., they endorsed the "responsibility to protect" (R2P) populations from mass atrocities (genocide, war crimes, ethnic cleansing and crimes against humanity). This responsibility was first and foremost incumbent on each individual State with regard to its population. But the international community had a subsidiary responsibility, and, would, where necessary, take collective action through the SC based on Chapter VII of the Charter.[44] In para. 143, they also adopted the concept of "human security" comprising "the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential."

39 Id., para. 119.
40 Id., para. 134.
41 Id., para. 135.
42 See *Fox*, margin note 34.
43 A/RES/60/1 of 16 September 2005. See also para. 12.
44 See *Vashakmadze*, in: Simma and others (eds.), pp. 1201 ff.; and *Hilpold*.

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In the R2P context, two initiatives to rein in the veto of the permanent members of the SC were launched in 2015 – the first one by France and Mexico,[45] the second one by Liechtenstein.[46] While these initiatives gained the support of numerous Member States, they proved ineffective in the cases of Syria and Ukraine. The Russian war of aggression on Ukraine recently prompted the GA to introduce a standing mandate for a GA debate when a veto is cast in the SC,[47] thus putting political pressure on permanent members of the SC to justify their use of veto before the world public.

3. 2012 Declaration on the Rule of Law at National and International Levels

Finally, the rule of law – which was already mentioned in the preamble of the UDHR[48] – should be included in the perspective. As a matter of fact, it is also indirectly addressed by the UN Charter, both in the preamble[49] and in Art. 1 no. 1 which refers to dispute settlement in conformity with the principles of justice and international law, as a means of maintaining international peace and security.

On that background, the Heads of State and Government of the UN Member States in 2012 adopted the "Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels".[50] In the preamble, they reaffirmed their commitment "to the rule of law and its fundamental importance for political dialogue and cooperation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development."

In the operative part of the 2012 Declaration, the following statements are most important in the current context: that an international order based on the rule of law is an indispensable foundation for a more peaceful world;[51] "that the advancement of the rule of law at the national and international levels is essential for … sustainable development … and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law".[52] The Heads of State and Government also reaffirmed "the principle of good governance" and committed "to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law".[53] They emphasis-

45 70th General Assembly of the United Nations – Political statement on the suspension of the veto in case of mass atrocities, available at: https://onu.delegfrance.org/IMG/pdf/2015_08_07_veto_political_declaration_en.pdf (8/9/2023).
46 Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes (A/70/621-S/2015/978, Annex I).
47 A/RES/76/262 of 26 April 2022.
48 3rd recital.
49 3rd recital: "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".
50 A/RES/67/1 of 24 September 2012.
51 Para. 1.
52 Para. 7.
53 Para. 12.

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ed "the importance of the rule of law as one of the key elements of conflict prevention, peacekeeping, conflict resolution and peacebuilding" and stressed "that justice, including transitional justice, is a fundamental building block of sustainable peace in countries in conflict and post-conflict situations".[54]

On the basis of this 2012 Declaration, the GA has since adopted a series of resolutions on "[t]he rule of law at the national and international levels", the most recent one being Resolution 77/110.[55] In the preamble, the GA reaffirmed two important aspects. The first one is "that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations".[56] The second one is "the need for universal adherence to and implementation of the rule of law at both the national and international levels and its [the GA's] solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States".[57] The identification of the rule of law as an essential component of peaceful and just international relations is not new.[58]

4. Definition of Human Security

The most authoritative and comprehensive definition of the notion of human security was given by the GA in Resolution 66/290 which was expressly identified as a follow-up to para. 143 on human security of the 2005 World Summit Outcome. In Resolution 66/290, the GA clarified that "human security is an approach to assist Member States in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of their people."[59] It emphasised that "[h]uman security recognizes the interlinkages between peace, development and human rights, and equally considers civil, political, economic, social and cultural rights".[60] The notion of human security also includes "[t]he right of people to live in freedom and dignity, free from poverty and despair. All individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential."[61]

Human security cannot provide a pretext for foreign interventions: "Human security does not entail the threat or the use of force or coercive measures. Human security does not replace State security."[62] It is based on national ownership and

54 Para. 18.
55 A/RES/77/110 of 7 December 2022.
56 3rd recital (quoting from para. 5 of the 2012 Declaration).
57 4th recital.
58 See e.g. *Sohn/Clark*. This book was dedicated to "All those who seek the rule of law in world affairs".
59 A/RES/66/290 of 10 September 2012, para. 3.
60 Id., para. 3 (c).
61 Id., para. 3 (a).
62 Id., para. 3 (e), (g).

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therefore favours national solutions.[63] The notions of R2P and human security are distinct from each other, the latter being much broader, but like the former, it is primarily incumbent on national governments, with only a subsidiary role of the international community.[64] The GA added that "development, peace and security and human rights are the pillars of the United Nations and are interlinked and mutually reinforcing".[65] Human security in that sense is unrelated to the individual right to security of person, as codified in various human rights treaties, which protects against arbitrary arrest and imprisonment.[66]

5. Agenda for Sustainable Development

The 2030 Agenda for Sustainable Development that the GA adopted in 2015 expressly mentioned the mutual dependency between peace and sustainable development: "There can be no sustainable development without peace and no peace without sustainable development."[67] One year later, in the Declaration on the Right to Peace, the GA recognized "that peace is not only the absence of conflict but also requires a positive, dynamic participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual understanding and cooperation, and socio-economic development is ensured …"[68]. It also called for the development of a culture of peace and a spirit of tolerance, dialogue, cooperation and solidarity. In another context, the GA reaffirmed "that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing" and identified the "right of all peoples to peace" as a constituent element of a democratic and equitable international order.[69]

IV. Value Basis of Expanded UN Security Concept – Positioning Human Rights against War

Despite the fact that "human rights, the rule of law and democracy" have been qualified by the GA as belonging to "the universal and indivisible core values and principles of the United Nations",[70] Art. 4 UNCh attaches practically no conditions to membership, except for the peace-loving character and acceptance as well as ability and willingness of aspirant States to carry out membership obligations. The Charter

63 Id., para. 3 (f).
64 Id., para. 3 (d), (h).
65 Id., para. 4.
66 See e.g. Art. 9 (1) of the International Covenant on Civil and Political Rights and Art. 5 (1) of the European Convention on Human Rights. The blueprint is in Art. 3 of the Universal Declaration of Human Rights. See *Scheinin*.
67 A/RES/70/1 of 25 September 2015, preamble (under 'peace').
68 A/RES/71/189 of 19 December 2016, Annex, preamble.
69 Promotion of a democratic and equitable international order, UN General Assembly Resolution 77/215 of 15 December 2022, preamble and para. 6 (d). See also *Tehindrazanarivelo/Kolb*.
70 See above note 39.

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rather tries to make the world organisation as inclusive as possible.[71] While Member States are subject to Charter-based human rights review mechanisms by the Human Rights Council, these are not very strict.[72]

However, based on the UDHR, the UN have developed an extensive network of human rights treaties covering almost all States around the globe, imposing on them intensive legal obligations to respect, protect and provide the human rights ingredients to human security. Various treaty bodies consisting of independent experts are charged with their implementation.[73] This network of global human rights treaties also pursues the objective of contributing to the maintenance of international peace and security. Thus, the International Convention on the Elimination of All Forms of Racial Discrimination[74] in the 7th recital of its preamble reaffirms "that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples...".[75] Human rights treaties continue to apply in situations of international and non-international armed conflicts, complementing international humanitarian law in limiting "[t]he right of belligerents to adopt means of injuring the enemy".[76] Art. 20 ICCPR requires States to prohibit by law propaganda for war as well as the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Most importantly, however, the human rights treaty network increasingly also complements Art. 2 no. 4 UN Charter in preventing States from using military force in the first place. This applies in particular to Art. 6 ICCPR which enshrines the right to life. Thus, the Human Rights Committee, the treaty body of the ICCPR, has expressly stated that "[w]ars and other acts of mass violence continue to be a scourge of humanity resulting in the loss of many thousands of lives every year. Efforts to avert the risks of war and any other armed conflict, and to strengthen international peace and security, are among the most important safeguards of the right to life. … States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant."[77]

71 See *Fastenrath*, in: Simma and others (eds.), Art. 4, margin notes 3 ff.
72 UN Human Rights Council Resolution 5/1: Institutions-Building of 18 June 2017 that establishes the universal periodic review mechanism, special procedures (thematic mandates and country mandates) and a confidential complaint procedure.
73 For an overview, see *Kälin/Künzli*, pp. 191 ff., pp. 203 ff.
74 Of 21 December 1965, UNTS vol. 660, p. 195.
75 See also the first recital of the preamble of both the ICCPR and the ICESCR.
76 See Art. 22 of the Regulations Respecting the Laws and Customs of War on Land in the annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907, 2 AJIL Supplement 90 (1908).
77 General comment no. 36 on Art. 6 ICCPR (right to life), UN Doc. CCPR/C/GC/36 of 3 September 2019, paras. 69 f. (footnotes omitted).

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V. Conclusion: Human Security as an Umbrella Concept

In parallel with the transition to positive peace, the meaning of "security" has undergone an evolution from inter-State security *vis-à-vis* military threats to human security in a much broader sense. The new umbrella term 'human security' stands for a comprehensive approach covering threats to other important aspects of human life in dignity beyond military threats. This evolution is continuing and some aspects are still unclear or controversial. But one can already safely conclude that "human security" in the sense of safety from negative change now comprises democracy, all human rights (i.e. civil, political, economic, social and cultural rights as well as third-generation rights), the rule of law, the economy, the environment and sustainable development. It complements the traditional concept of inter-State security from military threats. Both concepts are mutually reinforcing. The accompanying extension of SC powers requires increased vigilance.

The three main pillars of the UN are international peace and security, human rights and development, and human rights are interlinked with and reinforced by the rule of law and democracy. The concept of "human security" covers all this and the peoples of the United Nations are now, 78 years after the founding of the organisation, united to save succeeding generations not only from war, but also from other negative changes to human security in the comprehensive sense. Unfortunately, the UN can only claim limited successes with regard to the maintenance of both inter-State security and human security. For this reason, Europe has established her own more effective security architecture.

C. European Security Architecture: Four Complementary Organisations

The institutional structure of the European world region is dominated by the Council of Europe (CoE) and the EU, but is completed with the North Atlantic Treaty Organization (NATO) and the Organization for Security and Co-operation in Europe (OSCE). These four organisations cooperate with and complement each other and together, constitute the European Security Architecture. While the larger CoE and the smaller EU are purely European organisations only at second glance concerned with security, NATO and the OSCE as genuine security organisations also include some non-European Members or Participating States, in particular Canada and the USA, but their primary focus is European security. All EU Member States are also members of the CoE and the OSCE, but not NATO. In historical sequence, according to the date of signing of the founding treaty, NATO was the first, the CoE the close second, the EU (with its predecessor European Economic Community) the third, and the OSCE the last actor appearing on the stage as contributors to European security. These four organisations and the UN constitute a complementary and interlocking set of wheels for the maintenance of international peace and security in a broad sense, in Europe and the wider world.

In 2022, after the Russian invasion of Ukraine, the French President initiated the European Political Community (EPC) as a new intergovernmental forum of politi-

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cal exchange and cooperation between the EU Member States and the other European States in the pan-European interest. The EPC is characterised by its informality and flexibility. It consists of regular meetings of the Heads of State or Government of currently 47 European States (except Belarus and Russia) and the EU's political leaders. The participants share the values of the EU. The EPC's general purpose is to enhance security, stability and prosperity in Europe.[78] Since the EPC's position in the European Security Architecture is still uncertain and little tangible,[79] it will not be considered further in this paper.

Germany is closely integrated in the UN and the European Security Architecture (including the EPC). In its National Security Strategy that was recently promulgated by the Federal Government,[80] it follows the expanded versions of security at the UN and European levels and expressly adopts the concept of human security. Accordingly, the strategy advocates a value-based "Integrated Security for Germany" that is to be implemented together with its EU partners and NATO allies within the framework of the UN Charter. The strategy distinguishes three security dimensions: the robust defence of peace and freedom against external threats and intimidations; the resilient safeguarding of democracy from extremism and illegitimate foreign interference (which includes cybersecurity and an active global human rights policy); and the sustainable safeguarding of natural resources (which includes energy, food and health security). The overall vanishing point of the strategy – positive peace and human security – is formulated as follows: "The Federal Government advocates the strengthening and further development of a free international order based on international law and the United Nations Charter. Such a rules-based order creates stability and the conditions for peace, security and human development. It also provides our open and interconnected country with protection and scope for development."[81]

78 *Bundesregierung*, Was ist die Europäische Politische Gemeinschaft?, available at: https://www.bundesregierung.de/breg-en/news/epc-background-2194218 (15/8/2023); *Greene/Lucas/Tenzer*, The Road to Chişinău: The European Political Community, CEPA, 23/5/2023, available at: https://cepa.org/comprehensive-reports/the-road-to-chisinau-the-european-political-community/ (15/8/2023).

79 See *Lippert,* integration 2023, pp. 180 ff.

80 *The Federal Government*, Integrated Security for Germany, available at: https://www.nationalesicherheitsstrategie.de/National-Security-Strategy-EN.pdf (17/8/2023).

81 Id., p. 48. For a critical assessment see *Talmon*, Germany's National Security Strategy and the Novel Concept of a 'Free International Order', GPIL, 26/6/2023, available at: https://gpil.jura.uni-bonn.de/2023/06/germanys-national-security-strategy-and-the-novel-concept-of-a-free-international-order/ (17/8/2023) and *Jorgensen*, The German National Security Strategy and International Legal Order's Contested Political Framing, EJIL:Talk!, 5/7/2023, available at: https://www.ejiltalk.org/international-legal-orders-contested-political-framing/ (8/9/2023).

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I. North Atlantic Treaty Organization (NATO): From Defence to Human Security

1. Defence and Security as Organisational Purposes

Based on the North Atlantic Treaty,[82] NATO as the foremost Western military alliance is primarily security-related and has not extended its activities into other political fields.[83] In the preamble of the NATO Treaty, the 31 States Parties declare their intention to "unite their efforts for collective defence and for the preservation of peace and security". NATO is firmly embedded in the UN Charter's collective security system[84] and counts three of the five permanent members of the Security Council among its Member States.[85] Whereas the UN collective security system is primarily geared towards preventing threats and attacks from within the system (i.e. by other Member States), while also keeping an eye on external threats and attacks,[86] NATO concentrates on threats and attacks coming from outside (i.e. by non-Member States), without completely disregarding armed conflicts between Member States.

The alliance's primary purpose is to deter and repel armed attacks on any Member State in the North Atlantic area, as precisely defined in Art. 6 of the Treaty. NATO is intended to make the exercise of the parties' inherent right to individual and collective self-defence against armed attacks (as codified in Art. 51 UN Charter) more effective, by ensuring the assistance of all Member States for the immediate victim(s) of the attack, in accordance with Art. 5 of the Treaty, in order "to restore and maintain the security of the North Atlantic area". Yet, Art. 5 leaves Member States free to decide what kind of assistance they provide, should such an attack occur; they are not automatically required to become involved militarily.[87]

If any of the Parties believes that its territorial integrity, political independence or security is threatened other than by an armed attack, the Parties will consult together pursuant to Art. 4 of the Treaty.

2. Value Basis of NATO's Peace and Security Concept

Since 1997, a considerable enlargement of NATO has occurred, many new members having formerly been Communist States and members of the defunct Warsaw Pact,

82 Of 4 April 1949, as amended, available at: https://www.nato.int/cps/en/natolive/official_texts_17120.htm (8/09/2023).
83 *Marauhn*, margin note 45.
84 Art. 7 of the NATO Treaty accepts the prevalence of obligations under the UN Charter, in accordance with Art. 103 of that Charter.
85 *Marauhn,* margin note 3.
86 This is made clear Art. 2 no. 6 UN Charter which, however, has become practically moot since all States have become UN Members.
87 *Marauhn*, margin note 16.

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NATO's opposite during the Cold War.[88] Sweden will accede later this year, and the Ukraine is on its path towards future membership.[89] Bosnia and Herzegovina and Georgia are also membership aspirants. NATO has always defined itself as an alliance based on common values, in an apparent attempt effectively to exclude internal armed conflicts, which Art. 1 NATO Treaty prohibits.[90] According to the preamble of the North Atlantic Treaty, the States Parties "are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law." Alluding to the concept of democratic peace, Art. 2 obliges the Parties to "contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being."

According to Art. 10 of the Treaty, only European States "in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area" are eligible for accession to NATO. Implicit membership criteria include a functioning democratic system, including democratic control of the military, a commitment to peaceful conflict resolution, a market economy and fair treatment of minority populations.[91] In order to give the organisation some democratic credibility of its own, the North Atlantic Assembly consisting of delegates of the Member State parliaments was established in 1954, but it has remained outside the Treaty.[92]

The 2022 Strategic Concept expressly sets forth and the Vilnius Summit Communiqué affirms that the NATO Member States "are bound together by common values: individual liberty, human rights, democracy and the rule of law".[93]

3. Broadening NATO's Approach to Positive Peace and Human Security

After the end of the Cold War, NATO adapted to the fundamental changes in the security environment by developing several new strategic concepts that broadened its tasks from defence and deterrence, which had become less important, to more international cooperation, including with former adversaries, and proactive engagement for promoting peace and stability through worldwide peace-keeping and peace-enforcement activities.[94] This reorientation was undertaken on the political

88 The pertinent Accession Protocols are available at: https://www.nato.int/cps/en/natolive/official_texts_17120.htm (8/9/2023).
89 NATO Vilnius Summit Communiqué of 11 July 2023, paras. 4, 11, available at: https://www.nato.int/cps/en/natohq/official_texts_217320.htm (8/9/2023).
90 Greece and Turkey have several times been on the brink of armed conflict which, however, never erupted. Turkey has kept the northern part of Cyprus (not a NATO Member State) under military occupation since 1974.
91 See *Marauhn*, margin note 29, who refers to a 1995 Study on NATO Enlargement that was produced in preparation of the accession of Central and Eastern European States.
92 *Marauhn*, margin notes 38 f.
93 Note 96, para. 2; note 106, para. 1.
94 Id., margin notes 6 ff., 51 ff.

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level without formally amending the NATO Treaty.[95] However, the most recent 2022 Strategic Concept, that was adopted on 29 June 2022 in reaction to Russia's war of aggression against Ukraine, underscores the need to significantly strengthen NATO Members' deterrence and defence posture, while also designating crisis prevention and management as well as cooperative security as the two other core tasks of the alliance.[96] It has refocussed NATO on its primary defensive purpose and reconfirmed that the transatlantic bond is indispensable to the security of the Member States.[97]

With its strategic reorientation in the 1990s, NATO also broadened its approach from deterrence of and defence against military threats emanating from non-Member States to include political, economic, social, and environmental factors. Accordingly, it began to consider post-Cold War risks arising from terrorism, ethnic conflict, human rights abuses, political instability, economic fragility and the spread of weapons of mass destruction.[98] In other words, following developments at UN level, NATO adopted the concepts of positive peace and human security which led to a mission creep. The new 2022 Strategic Concept continues along this path by expressing already in the preamble NATO's resolution not only to "defend our territory", but also to "safeguard our freedom and democracy", portraying NATO as "a bulwark of the rules-based international order" (which includes the international rule of law) and emphasising the importance of "integrating climate change, human security and the Women, Peace and Security agenda across all our core tasks."[99] It identifies "advancing authoritarianism" as a challenge to the Alliance's interests and values, besides pervasive instability and rising strategic competition. NATO's vision comprises "a world where sovereignty, territorial integrity, human rights and international law are respected and where each country can choose its own path, free from aggression, coercion or subversion." This is a world of positive peace and human security.

In the operative part of the 2022 Strategic Concept, NATO Members' Heads of State and Government promise to "promote good governance and integrate climate change, human security and the Women, Peace and Security agenda across all our tasks. We will continue to advance gender equality as a reflection of our values".[100] In delineating NATO's strategic environment, the Heads of State and Government accuse authoritarian actors and strategic competitors of interfering in NATO Members democratic processes and institutions and targeting the security of their citizens

95 In Germany, this resulted in a Federal Constitutional Court case concerning the limits of political evolution of treaties by governments without parliamentary approval (BVerfG, 2 BvE 6/99, ECLI:DE:BVerfG:2001:es20011122.2bve000699).

96 *NATO*, Nato 2022 Strategic Concept, 29/6/2022, available at: https://www.nato.int/nato_static_fl2014/assets/pdf/2022/6/pdf/290622-strategic-concept.pdf (8/9/2023), paras. 20 ff., 35 ff. and 40 ff.

97 Id., paras. 1 f.

98 *Marauhn*, margin note 11.

99 The Women, Peace and Security agenda is based on UN Security Council Resolution 1325 of 31 October 2000.

100 Id., para. 5.

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through hybrid tactics. "They conduct malicious activities in cyberspace and space, promote disinformation campaigns, instrumentalise migration, manipulate energy supplies and employ economic coercion. These actors are also at the forefront of a deliberate effort to undermine multilateral norms and institutions and promote authoritarian models of governance."[101] Terrorism (by non-state actors and state supported actors) is referred to as "the most direct asymmetric threat to the security of our citizens and to international peace and prosperity".[102] Regarding pervasive instability, the 2022 Strategic Concept specifically looks at Africa and the Middle East as immediate neighbours of NATO Member States and adds that the challenges of these regions "are aggravated by the impact of climate change, fragile institutions, health emergencies and food insecurity." Such instability creates violence and irregular migration and undermines "human and state security".[103]

The 2022 Strategic Concept enumerates the following harms to the Alliance's security emanating from the People's Republic of China as a strategic competitor, besides its military build-up: The PRC's malicious hybrid and cyber operations; its confrontational rhetoric and disinformation; its attempts to "control key technological and industrial sectors, critical infrastructure, and strategic materials and supply chains, … to create strategic dependencies" and (together with the Russian Federation) "to subvert the rules-based international order, including in the space, cyber and maritime domains".[104] The PRC is also accused of using "coercive tactics and efforts to divide the Alliance". Lastly, climate change is identified as "a defining challenge of our time, with a profound impact on Allied security".[105]

The most recent Vilnius Summit Communiqué[106] reaffirms and expands on NATO's broader security concept. The Communiqué indicates that "NATO safeguards the freedom and security of all its members using both political and military means. The evolving security environment increasingly requires that NATO will take a structured and tailored approach that uses non-military and military tools in a deliberate, coherent, and sustained manner, throughout the full spectrum of peace, crisis and conflict."[107] It also addresses "hybrid threats and challenges from state and non-state actors … who use hybrid activities … to target our political institutions, our critical infrastructure, our societies, our democratic systems, our economies, and the security of our citizens. We remain united in defending our open and democratic societies against these malign activities."[108] The Communiqué underlines the importance of cybersecurity, space security, energy security and climate change and makes a commitment "to integrating the Human Security and the Women, Peace and Security agendas across all our core tasks".[109]

101 Id., para. 7.
102 Id., para. 10.
103 Id., paras. 11 f.
104 Id., paras. 13 f.
105 Id., para. 19.
106 See note 89.
107 Id., para. 59.
108 Id., para. 64.
109 Id., paras. 66–70.

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4. Conclusion: Similarities and Differences between the Comprehensive Peace and Security Concepts of the UN and NATO

The security concepts of both the UN and NATO have been considerably expanded along similar lines beyond military security toward human security in the broad sense, comprising energy, environmental, cyber-, democratic, human rights and rule of law security. In difference to the UN collective security system, the security concept of NATO is geared towards threats coming from outside the alliance. It is also more firmly value-based because the NATO membership more credibly constitutes a community of values than the UN membership.

There is another important difference between the UN and NATO as regards the legal consequences of that expansion: In the UN system, broadening the security concept entails an expansion of the far-reaching Chapter VII powers of the SC whose democratic credentials and legal constraints are dubious.[110] In NATO, this is not the case. Art. 5 NATO Treaty does not cover threats to human security other than armed attacks. The only statutory organ of NATO, the Council, which was established by Art. 9 of the Treaty "to consider matters concerning the implementation of this Treaty", does not have significant powers and can decide only by common accord. Broadening the NATO security concept therefore only extends the possibility of Member States to request consultations in accordance with Art. 4 NATO Treaty and the scope of the Council's authority to discuss matters and issue statements concerning treaty implementation. The "securitisation" of non-military policy matters will therefore not lead to more powers for NATO so that its mission creep has not gone along with any power grab.

All in all, NATO has remained a defensive alliance specialising on military security against external threats. But it has broadened its horizon towards maintaining positive peace and human security as an essential condition and foundation of negative peace and military security. Non-military issues are, however, only a matter of observation, discussion and coordination in NATO, and not of the alliance's integrated decision-making and operations machinery.

II. The Security Orientation of the Council of Europe

1. Europe's Specialised Agency for "Democratic Security"

Art. 1 lit. a of the Statute[111] determines that the aim of the CoE "is to achieve a greater unity between its members for the purpose of *safeguarding* and realising the ideals and principles which are their common heritage and facilitating their economic and social progress." What these ideals and principles are, is explained in the second recital of that Statute's preamble: "individual freedom, political liberty and

110 See *Giegerich,* GLJ 2009/10, pp. 49 ff.

111 Statute of the Council of Europe of 5 May 1949 (ETS No. 1), available at: https://rm.coe.int/1680935bd0 (8/9/2023).

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the rule of law, principles which form the basis of all genuine democracy". According to the third recital, "for the *maintenance* and further realisation of these ideals and in the interests of economic and social progress, there is a need of a closer unity between all like-minded countries of Europe". The highlighting of the terms 'safeguarding' and 'maintenance' in the quotations refers to the CoE's purpose of preventing negative change to these ideals and principles, i.e. of making them more secure, while the terms 'realising' and 'further realisation' refer to further development that is envisaged in their regard. The CoE thus is both a security-oriented and a progress-oriented international organisation.

The CoE, however, is not defence-oriented – it is not designed to protect its members against armed attacks from the outside or from within. According to Art. 1 lit. d of its Statute, "[m]atters relating to national defence do not fall within the scope of the Council of Europe." Yet, the first recital of the preamble mentions the conviction of the contracting parties "that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation". 'Peace based upon justice' is a synonym for 'positive peace'. While the maintenance of negative peace and military security is beyond its competence, the CoE is the European regional specialised agency regarding the maintenance and progressive development of the indispensable prerequisites of positive peace – security regarding human rights, the rule of law and democracy (i.e. the essential components of human security). This security trias can be and has meanwhile been summarised in the term "democratic security". In that sense, the CoE is an important part of the European Security Architecture, concentrating on human security.

Politically and judicially (through the ECtHR), the CoE is trying to uphold human security also in armed conflicts between Member States, in particular by enforcing the human rights obligations of all the parties, as possible. This has become particularly clear regarding Russia's war of aggression against Ukraine. In addition to all the other measures taken, that will be discussed forthwith, the Committee of Ministers adopted the Council of Europe Action Plan for Ukraine "Resilience, Recovery and Reconstruction" 2023–2026.[112] The Plan addresses "immediate and medium-term needs of the country in areas where the Council of Europe has expertise," i.e. human rights, rule of law and democracy.

It is the objective of the CoE to maintain and develop positive peace through human security among its Member States and thereby indirectly contribute to maintaining negative peace. This basic approach is best paraphrased in the Reykjavík Declaration of 17 May 2023[113] as follows: "When we created the Council of Europe in 1949, it was against the backdrop of war in Europe. Those that came before us had the resolve to create the Council of Europe to unite European countries in the com-

112 *Council of Europe*, Council of Europe Action Plan for Ukraine "Resilience, Recovery and Reconstruction" 2023–2026, 14/12/2022, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a96440 (8/9/2023).

113 *Council of Europe*, Reykjavík Declaration – United around our values, June 2023, available at: https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1%20 (31/7/2023).

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mon belief that true democracies that uphold the rule of law and ensure respect for human rights were the best defence against authoritarianism, totalitarianism and war on our continent."

This negative peace objective of the CoE has not been fully achieved: Türkiye invaded Cyprus in 1974 and has ever since kept the northern part of Cyprus under military occupation; an at times frozen international armed conflict has been taking place for many years between Armenia and Azerbaijan regarding Nagorny-Karabakh,[114] between Russia and Georgia on South Ossetia[115] and Abkhazia[116] as well as in the context of the secession of Transnistria from Moldova with Russian military assistance.[117] There is a full-scale war of aggression by Russia against Ukraine since 2022 which had in fact already started in 2014 with Russia's annexation of Crimea as well as instigation of and military involvement in armed uprisings in the Donbas region of Ukraine. The parties to these conflicts have more or less problematic records regarding human rights, the rule of law and democracy. In other words, they have not adequately implemented the CoE value basis and that has *prima facie* played a role in the outbreak of the armed conflicts: Without positive peace in the sense of human security/democratic security, the maintenance of negative peace in the sense of military security becomes precarious.

Art. 1 lit. c CoE Statute recognises the primacy of Member States' participation in the UN system of collective security, in accordance with Art. 103 UN Charter. However, a definite decision on possible conflicts between the maintenance of human rights security under the ECHR as part of the CoE system[118] and the maintenance of international peace and security by the SC under the UN Charter has not yet been made.[119]

2. Value Bedrock of the CoE: Definition and Enforcement

The human rights, rule of law and democracy bedrock of the CoE, which the preamble of the Statute indicates, is further elaborated in Art. 3 CoE Statute. According to this provision "[e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms". It must also accept pluralist democracy as the mandatory consequence of political freedom, individual liberty and

114 See *Melnyk;* See *Council of Europe*, Memorandum on the humanitarium and human rights consequences following the 2020 outbreak of hostilities between Armenia and Azerbaijan over Nagorno-Karabakh, 8/11/2021, available at: https://rm.coe.int/commdh-2021-29-memorandum-on-the-humanitarian-and-human-rights-consequ/1680a46e1c (8/9/2023).

115 *Nussberger* (South Ossetia).

116 *Nussberger* (Abkhazia).

117 *Belitser,* in: Bebler (ed.), pp. 45 ff.

118 See below under 2.

119 See ECtHR (GC), Appl. no. 5809/08, *Al-Dulimi v. Switzerland*, paras. 134 ff., where the Court interpreted the conflict between UN law and the ECHR away and thus avoided taking a clear position on how it should be solved.

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the rule of law.[120] The primary obligation of CoE Member States thus is the maintenance of human security. Pursuant to Art. 4 CoE Statute, the ability and willingness to fulfil the requirements of Art. 3 CoE Statute is a condition of membership.[121] Any member that seriously violates Art. 3 CoE Statute may be suspended from its rights of representation and ultimately excluded from the CoE, in conformity with Art. 8 CoE Statute. The democratic credibility of the CoE itself has always been enhanced by the fact that it was the first intergovernmental organisation with a parliamentary component in its institutional set-up – the Parliamentary Assembly consisting of representatives elected or appointed by the national parliaments of the Member States from among their members.[122]

Immediately after the end of the Cold War, the "European Commission for Democracy through Law (Venice Commission)" was established by 18 CoE Member States as an independent consultative body on constitutional matters in order to promote the rule of law and democracy.[123] It now has 61 Member States and several observers, extending far beyond Europe into Africa, the Americas and Asia. Its function is to provide legal advice and assist Member States "wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law".[124]

The value bedrock of the CoE is reconfirmed, further specified and made judicially enforceable in national courts and (subsidiarily) the European Court of Human Rights (ECtHR) with regard to civil and political rights by the European Convention on Human Rights (ECHR),[125] to which all CoE Member States have meanwhile acceded.[126] Further human rights have been added by the Additional Protocol and Protocols No. 4, 6, 7, 12 and 13 to the ECHR, to which most, but not all, CoE Member States have become parties. The European Social Charter (revised)[127] that binds most CoE Member States contains a supplementary catalogue of economic and social rights, but these are judicially enforceable only to a limited extent and only in national courts because the ESC does not establish any international court in parallel with the ECtHR, but just a treaty body of experts.

The ECHR system protects not only civil and political rights, but also the rule of law and democracy. Effective political democracy as the best prerequisite for maintaining fundamental freedoms, which are the foundation of justice and peace in the

120 See the 2nd recital of the preamble of the CoE Statute.
121 See *Klein*, in: Schmahl/Breuer (eds.), margin notes 3.11 ff.
122 Art. 22 ff. CoE Statute.
123 See the Commission's revised Statute adopted by the Committee of Ministers in Res (2002) 3 of 21 February 2002, available at: https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL(2002)027-e (1/8/2023).
124 Id.
125 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, as amended (ETS No. 5).
126 The ECHR and Protocols are "closed conventions" that are open to signature and ratification only by CoE Member States and the EU as an organisation of only CoE Member States (Art. 59 ECHR).
127 Of 3 May 1996 (ETS No. 163).

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world, and the rule of law as common heritage of European countries are not only mentioned in the ECHR preamble. They are also co-guaranteed by the communication freedoms (Art. 10–11 ECHR), the right to vote (Art. 3 Additional Protocol), the right to a fair trial before an independent and impartial tribunal established by law (Art. 6 ECHR) and the right to an effective remedy (Art. 13 ECHR). Democratic and rule of law principles also narrow the Convention States' power to restrict Convention rights: These are only permitted in so far as "necessary in a democratic society";[128] restrictions must in other words be proportionate and compatible with a pluralist system. The Convention system has rightly been characterised as "a mechanism to promote peace and stability in Europe and the Council of Europe's core values of human rights, democracy and the rule of law".[129]

The Convention system establishes a collective enforcement mechanism regarding human rights enshrined in the ECHR and Protocols that centres on the ECtHR. The ECtHR is vested with compulsory jurisdiction regarding inter-State cases (Art. 33 ECHR) and individual applications (Art. 34 ECHR) where violations of the ECHR or Protocols thereto by a State Party are alleged. The Convention system, represented by the ECtHR, has for years counteracted human rights violations in armed conflicts in both inter-State and individual cases which place a heavy burden on the Court.[130] By enforcing human rights and at the same time also the parallel international humanitarian law limits on warfare *vis-à-vis* Convention States, the Court has indirectly made participation in armed conflicts more costly and thus created a further incentive to keep negative peace.

The Court renders binding judgments that convicted States are obliged to abide by (Art. 46 (1) ECHR) and whose execution is supervised by the Committee of Ministers (CM) of the CoE (Art. 46 (2), (3) ECHR).[131] Art. 46 (4) ECHR sets forth that, if the CM considers that a convicted State refuses to abide by a judgment, it may by a two-thirds majority refer to the ECtHR the question whether that State has failed to fulfil its obligation under Art. 46 (1) ECHR. If the Court agrees, it shall, pursuant to Art. 46 (5) ECHR, refer the case back to the CM "for consideration of the measures to be taken". In such a case, the only measure remaining in the arsenal of the CM will be the initiation of the expulsion procedure in accordance with Art. 8 CoE Statute.

128 See Art. 8 (2), 9 (2), 10 (2), 11 (2) ECHR.

129 Reykjavík Declaration (note 113), Appendix IV.

130 See the overview in the Factsheet – Armed conflicts (August 2022) by the *Press Unit of the ECtHR*, available at: https://www.echr.coe.int/documents/d/echr/FS_Armed_conflicts_ENG (02/08/2023). See also *European Court of Human Rights*, Memorandum of the European Court of Human Rights, available at: https://www.echr.coe.int/documents/d/echr/memorandum_summit_reykjavik_2023_eng (11/8/2023)

131 In the Reykjavík Declaration, Appendix IV, the CoE Member States recommit "to ensure the full, effective and prompt execution of the final judgments of the Court" in order to secure "the long-term sustainability, integrity and credibility of the Convention system." See *Council of Europe*, Strategy paper regarding the supervision of the execution of cases pending against the Russian Federation, 8/12/2022, available at: https://search.coe.int/cm/pages/result_details.aspx?ObjectId=0900001680a91beb (17/8/2023).

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While Art. 46 (4), (5) ECHR has been applied twice resulting in convictions of the respondent States,[132] it has so far not led to expulsion. Nor has the generally bad human rights situation ever been used as an occasion to trigger the expulsion procedure of Art. 8 CoE Statute. When it was about to be initiated in 1969 against Greece, where gross and systematic human rights violations were taking place after the military coup of 1967, Greece pre-empted the vote in the CM by its own withdrawal pursuant to Art. 7 CoE Statute.[133]

Art. 8 CoE Statute has been used only once in the more than 70-year history of the organisation, when the Russian Federation was expelled on 16 March 2022 because the CM qualified its aggression against Ukraine as a serious violation of its obligations under Art. 3 CoE Statute.[134] It thus was an armed attack against another Member State – a crime against negative peace that has led to thousands of deaths and continues to kill and maim humans every day – which prompted the CM to exclude Russia from the European specialised agency for positive peace. This reconfirms that the CoE is a component of the European Security Architecture also in the sense that it contributes to the maintenance of negative peace among its Member States.

3. Reykjavík Declaration of 2023: The Future of Democratic Security

The title of the Declaration that was adopted by the (fourth) Reykjavík Summit of Heads of State and Government of the CoE is "United around our values".[135] In its very first paragraph, the authors underline that the CoE is a peace project that was founded in the wake of the Second World War to oust war from Europe once and for all. This is why they "have come together to state our resolve to unite around our values and against Russia's war of aggression against Ukraine, a flagrant violation of international law and everything we stand for." But it is more – "an attack on our democracies". Russia's invasion of Ukraine has highlighted the security orientation of the CoE more clearly than Russia's previous aggression against Georgia and illegal maintenance of armed forces in Moldova which the Declaration also condemns. It has also served to bind the remaining Member States more closely together and prompted them to confirm the following: "We have a common responsibility to fight autocratic tendencies and growing threats to human rights, democracy and the rule of law. Those core values are the bedrock of our continued freedom, peace, prosperity and security for Europe." This draws a connecting line between Russia's autocracy and abandoning of the CoE values on the one hand and its attack on Ukraine that threatens pan-European peace and security on the other.

132 ECtHR (GC), Appl. no. 15172/13, *Proceedings under Article 46 § 4 in the Case of Ilgar Mammadov v. Azerbaijan*; Appl. no. 28749/18, *Proceedings under Article 46 § 4 in the Case of Kavala v. Türkiye*.

133 *Klein*, in: Schmahl/Breuer (eds.), para. 3.59; *Benedek*, ALJ 2020, pp. 1 ff.

134 See in detail *Giegerich*, ZEuS 2022/3, pp. 545 ff.

135 See note 113.

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As concerns Ukraine, the Declaration announces concrete support measures regarding compensation for the damage caused by the Russian aggression to both individual victims and the State of Ukraine, because "[w]ithout accountability, there can be no lasting peace" – another aspect of positive peace. Appendix I comprises a "Declaration in support of the Enlarged Partial Agreement on the Register of Damage" caused by the Russian aggression against Ukraine within the institutional framework of the CoE.[136] All member and observer States of the CoE and the EU, as well as any other State that is eligible according to the Register's Statute, are invited to join. The Register, which is based on a recommendation by the UN General Assembly,[137] is intended to constitute the first component of a future international comprehensive compensation mechanism. The fact that the form of enlarged partial agreement was used shows, however, that not all CoE Member States, in contrast to some third States, are ready to participate in the efforts to ensure reparation for the damage caused by the Russian aggression.[138] Currently, there are 38 members and associate members to that Agreement, including the EU.[139] The Reykjavík Declaration's Appendix II consists of a "Declaration on the situation of the children of Ukraine".

In view of democratic backsliding, external threats and new challenges, the Heads of State and Government made the following promise: "We will work together to protect and promote the three fundamental, interdependent and inalienable principles of democracy, rule of law and human rights, as enshrined in the Statute of the Council of Europe and in the European Convention on Human Rights." They also adopted the "Reykjavík Principles for Democracy" in Appendix III where they "committed to securing and strengthening democracy and good governance at all levels throughout Europe." They further emphasised in the Declaration that "[s]ocial justice is crucial for democratic stability and security and in this regard we reaffirm our full commitment to the protection and implementation of social rights as guaranteed by the European Social Charter system."

The Reykjavík Declaration devotes a separate paragraph and Appendix V to environmental security without using that term explicitly. The Heads of State and Government promise to make additional efforts "to counter the impact of the triple planetary crisis of pollution, climate change and loss of biodiversity on human rights, democracy and the rule of law." They mention "the political recognition of the right to a clean, healthy and sustainable environment as a human right, in line with United Nations General Assembly Resolution 76/30".

The Declaration also looks beyond Europe at the positive peace and human security in the wider world on which European peace and security depend: "We remain

136 *Mężykowska*, ESIL Reflections 2023/12.
137 UN Doc. A/ES-11/L.6 of 7 November 2022, para. 4.
138 See *Walter*, in: Schmahl/Breuer (eds.), margin notes 2.31 f.
139 *Council of Europe*, List of Partial Agreements, of Enlarged Partial Agreements and of Enlarged Agreements, available at: https://www.coe.int/en/web/conventions/full-list1?module=partial-agreement-members&numeroAp=17 (3/10/2023). *Bettauer*, ASIL Insights 2023/7.

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determined to strengthen the free and open international order based on the rule of law, respect for the UN Charter, the sovereignty, and territorial integrity, within internationally recognised borders, of all States, and respect for human rights and fundamental freedoms." Ultimately, the CoE hopes to join forces with non-European democratic powers in order to achieve "better global governance".[140]

As regards the CoE's future, the Heads of State and Government "see democratic security as key for member States to address current and future challenges together and to secure peace and prosperity in Europe. We consider that the Council of Europe …, symbol of peace and reconciliation, is uniquely placed to bring together, on an equal footing, all countries of Europe to protect democratic security in Europe and to counter the undermining of human rights, democracy and the rule of law."

4. Conclusion: CoE Guards Value Basis of Peace and Security in Europe

Within the European Security Architecture, the CoE has always been the specialised agency for democratic security. It fends off both external and internal threats to the "three fundamental, interdependent and inalienable principles of democracy, rule of law and human rights", thereby guarding the value basis of peace and security in Europe. Democratic security is synonymous with the effective exercise of the right of peoples to internal and external self-determination – a right that is enshrined in common Art. 1 of the ICCPR and ICESCR and at the same time constitutes a peremptory norm of general international law.[141] This marks the CoE as a regional organisation that contributes to achieving two of the purposes of the UN: the principle of equal rights and self-determination of peoples (Art. 1 no. 2 UNCh) and the promotion of human rights (Art. 1 no. 3 UNCh). Both purposes are essential elements of positive peace and human security and therefore serve the primary purpose of the UN – "[t]o maintain international peace and security" (Art. 1 no. 1 UNCh).

In this sense, one may qualify the CoE as a regional arrangement in the sense of Chapter VIII (Art. 52 ff.) of the UN Charter. Art. 52 (2) UNCh requires the UN Member entering into such arrangements to strive for the pacific settlement of local disputes. While the CoE Statute does not expressly deal with the pacific settlement of disputes between its Member States, it was concluded based on the conviction that "that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation".[142] Pursuant to Art. 1 lit. a of the Statute, "[t]he aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals

140 Appendix III, last line.

141 See Conclusion 23 (with annex) of the Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens) by the International Law Commission (United Nations, Report of the International Law Commission, Seventy-third session (18 April-3 June and 4 July-5 August 2022), General Assembly Official Records, Seventy-seventh Session, Supplement No. 10 (A/77/10).

142 First recital of the preamble.

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and principles which are their common heritage". This implicitly includes the pacific settlement of disputes between them. Accordingly, the CoE opened the European Convention for the Peaceful Settlement of Disputes for signature by its Member States.[143] Moreover, Art. 33 ECHR contains a compulsory inter-State application procedure in which the ECtHR is competent to settle disputes concerning alleged breaches of ECHR provisions. Ultimately, however, it is a shame that the CoE has in more than 70 years been unable to establish any general compulsory judicial procedure for the settlement of disputes between its Members.

The CoE's purpose of democratic security partly, but not completely overlaps with human security in the UN sense, the latter being the broader concept that encompasses democratic security. The CoE concentrates on safeguarding the value basis of peace and security in Europe. Its security concept has not been extended since it was founded so that there has been no extension of its area of competence (no mission creep) either. The powers of the CoE are limited anyway – the Committee of Minister can draft agreements that bind only those Member States that ratify them and otherwise adopt common policies and make recommendations.[144] So we are not confronted with a potentially worrying power accumulation in the CoE as a consequence of any extension of the organisation's underlying security concept.

III. The EU: Maintenance and Promotion of Positive Peace and Human Security in Europe and Beyond

1. European Integration: Inward- and Outward-Looking Peace Project since 1950

European integration was initiated by the Schuman Declaration[145] which started as follows: "World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations." French Foreign Minister Schuman proposed "that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe." This would make war between France and Germany materially impossible and at the same time be "a first step in the federation of Europe". He believed that "this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace."

143 Of 29 April 1957, ETS No. 23. More than 65 years later, the Convention has only 14 parties.

144 Art. 15 CoE Statute. See also Art. 16 CoE Statute (CM can make binding decisions regarding the internal organisation of the CoE).

145 Of 9 May 1950, *European Union*, Schuman declaration May 1950, available at: https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en (2/8/2023).

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The Schuman Plan was rapidly transformed into the European Coal and Steel Community (ECSC).[146]

European integration thus began as a peace project that initially looked inward to the maintenance of peace between the Member States – primarily at least: Because from the very beginning, the military and political threat for the democratic systems of Western Europe emanating from the Stalinist Soviet Union was constantly present. It was the reason for drafting the abortive Treaty establishing the European Defence Community (EDC)[147] in reaction to the Korean War. The initiative had come from French Prime Minister René Pleven in 1950, more than six months before the ECSC Treaty was signed. Even after the EDC project – and the European (Political) Community[148] with which the ECSC and the EDC were to be merged – had been abandoned, the goal of maintaining peace and security against external threats has always remained present in the integration process. It is implicitly addressed in the 8th recital of the preamble of the Treaty establishing the European Economic Community:[149] "RESOLVED to strengthen the safeguards of peace and liberty by establishing this combination of resources, and calling upon the other peoples of Europe who share their ideal to join in their efforts". The intention to safeguard "peace and liberty" indicates that the European integration project has from the very first advocated the concept of positive, value-based peace.

In 2012, the European Union was awarded the Nobel Peace Prize for having for more than six decades contributed to the promotion of peace and reconciliation and for advancing reconciliation also with Eastern Europe after the fall of the Iron Curtain. The accession of several Central, Eastern and South-Eastern European States was praised by the Norwegian Nobel Committee. In summary, it said: "The Norwegian Nobel Committee wishes to focus on what it sees as the EU's most important result: the successful struggle for peace and reconciliation and for democracy and human rights. The stabilizing part played by the EU has helped to transform most of Europe from a continent of war to a continent of peace."[150] In other words, the EU received the Nobel Peace Prize for advancing positive/value-based peace in all of Europe, including by its enlargement policy. Having successfully established permanent peace and security between its Member States, it now concentrates on exporting its accomplishment to neighbouring States and the wider world.

146 Treaty establishing the European Coal and Steel Community of 18 April 1951, available at: https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11951K/TXT (2/8/2023).

147 Of 27 May 1952, available at: https://aei.pitt.edu/5201/1/5201.pdf (2/8/2023) – unofficial English translation.

148 For a German version of the draft treaty on the EPC that was adopted on 10 March 1953 by the Joint Assembly of the European Coal and Steel Community see https://www.politische-union.de/epg1.htm (3/8/2023). *Griffiths*, in: Martin (ed.), pp. 19 ff.

149 Treaty establishing the European Economic Community (Rome, 25 March 1957), available at: https://www.cvce.eu/en/obj/treaty_establishing_the_european_economic_community_rome_25_march_1957-en-cca6ba28-0bf3-4ce6-8a76-6b0b3252696e.html (2/8/2023).

150 *The Nobel Prize*, Press release of 12 October 2012, available at: (https://www.nobelprize.org/prizes/peace/2012/press-release/ (2/8/2023).

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2. Value Basis of and Value Projection by the EU

European integration has always been based on the same common values that are shared by the CoE Member States – democracy, rule of law and human rights – and accordingly, previous CoE membership has always been a *conditio sine qua non* of EEC/EC/EU membership. Today, both the value basis of the EU and the determination of the Member States to protect it from and defend it against threats from within and without are expressly set forth in the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU).[151] The 8th recital of the preamble of the Treaty on the Functioning of the EU which replaced the E(E)C Treaty adopted and rephrased the aforementioned concordant recital of the preamble of the latter: "Resolved by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts".

The TEU is much more explicit in this regard. In Art. 2 TEU, it expressly sets forth the Union's fundamental values – human dignity, freedom, democracy, equality, the rule of law and fundamental rights – that are common to the Member States. Pursuant to Art. 49 TEU, respect for these values and commitment to promote them is a condition of EU membership, the EU enlargement policy being an instrument of fostering sustainable peace in a growing part of Europe.[152] Art. 7 TEU and Art. 354 TFEU establish an ineffective but non-exclusive political enforcement procedure regarding Art. 2 TEU that is complemented by the much more effective judicial enforcement procedures under Art. 258, 260 TFEU and Art. 267 TFEU.[153]

The EU's own human rights, rule of law and democratic credibility is higher than that of any other international organisation dealt with in this paper. Art. 6 (1) TEU makes the CFR-EU – the most comprehensive, modern and judicially enforceable international human rights catalogue which counts the ECHR, the case-law of the ECtHR and the ESC among its sources – a part of primary EU law. Its scope of application regarding both the EU institutions and the Member States is co-extensive with the scope of application of EU law.[154] As regards the EU-internal rule of law, the CJEU ensures "that in the interpretation and application of the Treaties the

151 Art. 1 (3) TEU: "the Treaties".

152 "A credible enlargement policy represents a strategic investment in Europe's security and prosperity, and has already contributed greatly to peace in formerly war-torn areas.", *European External Action Service*, Shared Vision, Common Action: A Stronger Europe, Global Strategy for the European Union's Foreign and Security Policy, June 2016, available at: https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf (2/8/2023). See also the Tirana Declaration of the EU-Western Balkans Summit of 6 December 2022, available at: https://www.consilium.europa.eu/media/60568/tirana-declaration-en.pdf (8/8/2023), paras. 2 and 3.

153 See *Giegerich*, The Rule of Law in the European Union – Countering Recent Challenges to Self-Evident Truths Politically, Judicially and Financially, Saar Expert Papers 2021/12, available at: https://jean-monnet-saar.eu/wp-content/uploads/2021/12/Paper-1.pdf (3/8/2023); *Blanke/Sander*, ZEuS 2023/2.

154 See Art. 51 (1) CFR-EU and CJEU, case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, paras. 19 ff.

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law is observed". The Member States are obliged to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".[155] Pursuant to Art. 10 TEU, the EU functions as a quasi-federal representative democracy with the only directly elected supranational parliament worldwide and a Council of representatives of democratically legitimated Member State governments.

According to Art. 3 (1) TEU, the Union's "aim is to promote peace, its values and the well-being of its peoples". This is further specified by Art. 3 (5) TEU regarding the EU's relations with the wider world where "the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights … as well as the strict observance and the development of international law, including respect for the principles of the United Nations Charter." This paragraph obliges the EU peacefully and in conformity with international law to project its values to other parts of the world and promote the international rule of law, both in order to contribute to international (positive) peace and (human) security worldwide. More specifically and closer to home, Art. 8 (1) TEU provides for a value-based, peaceful and cooperative neighbourhood policy by the EU. "Under the European Neighbourhood Policy (ENP), many people wish to build closer relations with the Union: our enduring power of attraction can spur transformation in these countries."[156]

Based on Art. 217 TFEU, the EU has in recent years concluded several association agreements in order to help stabilising and transforming neighbouring States such as Ukraine. One aim of the association with Ukraine is "to promote, preserve and strengthen peace and stability in the regional and international dimensions in accordance with the principles of the United Nations Charter, and of the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the objectives of the Charter of Paris for a New Europe of 1990".[157] Art. 2 and 3 of the Association Agreement set forth the general principles that are to shape the association relationship: "Respect for democratic principles, human rights and fundamental freedoms … and respect for the principle of the rule of law … the principles of a free market economy … good governance, the fight against corruption, the fight against the different forms of transnational organised crime and terrorism, the promotion of sustainable development and effective multilateralism". Unfortunately, Russia used the "Euromaidan" mass protests in Ukraine that toppled the pro-Russian President Janukovich in early 2014 in order to secure conclusion of this Agree-

155 Art. 19 (1) TEU.

156 See *European External Action Service*, Shared Vision, Common Action: A Stronger Europe, Global Strategy for the European Union's Foreign and Security Policy, June 2016, available at: https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf (2/8/2023).

157 Art. 1 (2) lit. c of the Association Agreement between the EU and European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part of 27 June 2014 (OJ 2014 L 161, p. 3).

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ment as a pretext for annexing Crimea and initiating and supporting militarily an armed uprising in the Donbas region of Eastern Ukraine, in clear violation of the UN Charter and international law.[158] This triggered a chain of events resulting in the full-scale Russian invasion of Ukraine on 24 February 2022 which continues to this day and constitute even more blatant violations of the UN Charter and international law.[159] The Ukrainian people's decision, in exercising their right of self-determination, to move closer to the EU on a common basis of democracy, the rule of law and human rights, in order to enhance democratic security, caused the Russian leadership to commit a crime of aggression[160] that destroyed inter-State security in Europe.

Among the general provisions on the EU's external action, Art. 21 (1) TEU sets forth that "the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." It also commits the EU to partnership and multilateralism. Art. 21 (2) TEU lists the EU's international relations objectives and includes not only the safeguarding of its values, fundamental interests, security, independence and integrity *vis-à-vis* external threats (lit. a). Rather, the paragraph also mentions the consolidation and support of democracy, the rule of law, human rights and the principles of international law (lit. b) in the sense of value projection, the preservation of (negative) peace, prevention of conflicts and strengthening of international security in accordance with the UN Charter (lit. c), the fostering of sustainable development (lit. d, f) and ultimately, the promotion of "an international system based on stronger multilateral cooperation and good global governance" (lit. h).

Overall, these treaty provisions demonstrate that the EU has adopted the concepts of positive peace and human security (including democratic security) and is committed to promote them by projecting its compatible values, all within the framework of the UN Charter and international law. Art. 215 TFEU on restrictive measures enables the EU to implement its value projection commitment. On this basis, the EU has *e.g.* imposed economic sanctions on Russia and individual sanctions on Russians because of the war of aggression against Ukraine[161] and also enacted the more general so-called European Magnitsky Act in 2020 authorising the

158 See A/RES/68/262 of 27 March 2014.

159 See A/ES-11/L.1 of 1 March 2022; A/ES-11/L.5 of 7 October 2022.

160 See Art. 8bis of the Rome Statute of the International Criminal Court of 17 July 1998, as amended in 2010.

161 For an overview of the 11 sanctions packages since 23 February 2022, see *European Council/Council of the European Union*, EU response to Russia's invasion of Ukraine, available at: https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/#sanctions (4/8/2023). See *Kokott*, ZEuS 2023/1, pp. 3 ff.

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Council to subject natural or legal persons, entities or bodies to restrictive measures because of serious human rights violations and abuses.[162]

Another example of value projection regarding economic and social rights as well as environmental standards is the Corporate Sustainability Due Diligence Directive that is currently going through the EU's ordinary legislative procedure.[163] When enacted, it will export human security by prohibiting European businesses from participating in the violation of core human rights and environmental standards in their supply chains outside Europe.[164]

3. EU Intergovernmental and Supranational External Action related to Peace and Security

The Treaties distinguish two forms of external action by the EU – supranational action pursuant to Art. 205 ff. TFEU and intergovernmental action in the framework of the Common Foreign and Security Policy (CFSP) pursuant to Art. 23 ff. TEU. The EU's supranational decision-making procedures are effective, democratic and subject to the strictest judicial review, while its intergovernmental decision-making procedures lag far behind in all three respects. In contrast to intergovernmental acts, supranational acts generally have direct effect and primacy over Member State law.

According to Art. 21 (3), 23 TEU, Art. 205 TFEU, both forms of external action must be consistent and respect the principles and pursue the objectives set out in Art. 21 (1) and (2) TEU. In other words, they are to be value-based, value-projective and geared towards positive peace and human security in Europe and beyond. In contrast to supranational external action, the intergovernmental CFSP is executive-heavy, dominated by the European Council and the Council which usually act unanimously, with little or no influence of the supranational institutions (Commission and European Parliament)[165] and sparse judicial control by the CJEU.[166] This

162 See Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses (OJ L 410 I, p. 13) and Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses (OJ L 410 I, p. 1). For the current sanctions list, see Council Decision (CFSP) of 5 December 2022 (OJ 2022 L 314, p. 90). See *Giegerich*, 75 Jahre Menschenrechtsrevolution: Von der UN-Charta zur EU-Sanktionsregelung im Bereich Menschenrechte, Saar Expert Papers 2020/12, available at: https://jean-monnet-saar.eu/wp-content/uploads/2020/12/Giegerich_75-Jahre-Internationale-Menschnerechtsrevolution.pdf (4/8/2023).

163 Commission proposal of 23 February 2022, COM(2022) 71 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071 (16/8/2023). Position adopted by the European Parliament on 1 June 2023, P9_TA(2023)0209, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html (16/8/2023).

164 See *Giegerich*, ZEuS 2022/2, pp. 213 ff.

165 Art. 24 ff. TEU.

166 Art. 275 TFEU.

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causes a rule of law problem which the CJEU has mitigated by narrowly interpreting the limitation on the Court's jurisdiction.[167]

a) Common Foreign and Security Policy

In June 2016, a "Global Strategy for the European Union's Foreign And Security Policy" was published[168] that is firmly based on the concept of positive peace ("sustainable peace") and human security and also includes cyber security, energy security and "the root causes of conflict and poverty". The EU promises to "foster human security through an integrated approach", because "[i]nternal and external security are ever more intertwined: our security at home entails a parallel interest in peace in our neighbouring and surrounding regions". Peace and security, prosperity, democracy and a rules-based global order should constitute the basis of clearly value-based global EU external action that would also champion the indivisibility and universality of human rights and foster the resilience of democracies and provide prosperity within the Union.

Using a combination of soft and hard power and in cooperation with its partners, the EU "will promote a rules-based global order with multilateralism as its key principle and the United Nations at its core. … A multilateral order grounded in international law, including the principles of the UN Charter and the Universal Declaration of Human Rights, is the only guarantee for peace and security at home and abroad. A rules-based global order unlocks the full potential of a prosperous Union with open economies and deep global connections, and embeds democratic values within the international system."

The Global Strategy also places great emphasis on the implementation of the UN's Sustainable Development Goals, because sustainable development makes States more resilient and secure, promoting stability in the East and South. The EU and Member States together are the leading development assistance providers worldwide, thereby investing in global peace and security.

The EU's vision of global governance for the 21st century is also geared towards positive peace and human security: "Guided by the values on which it is founded, the EU is committed to a global order based on international law, including the principles of the UN Charter, which ensure peace, human rights, sustainable development and lasting access to the global commons. … The EU will strive for a strong UN as the bedrock of the multilateral rules-based order, and develop globally coor-

167 CJEU, case C-455/14 P, *H v. Council and Commission*, ECLI:EU:C:2016:569; case C-134/19 P, *Bank Refah Kargaran v. Council*, ECLI:EU:C:2020:793. See also *Breitler*, Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?, European Law Blog, 13/10/2022, available at: https://europeanlawblog.eu/category/common-foreign-and-security-policy/ (8/9/2023).

168 See *European External Action Service*, Shared Vision, Common Action: A Stronger Europe, Global Strategy for the European Union's Foreign and Security Policy, June 2016, available at: https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf (2/8/2023).

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dinated responses with international and regional organisations, states and non-state actors." The EU is also committed to the reform of the UN, including the Security Council, and the International Financial Institutions in accordance with "the principles of accountability, representativeness, responsibility, effectiveness and transparency."

Notwithstanding its commitment to multilateralism, however, the EU recognises that "an appropriate level of ambition and strategic autonomy is important for Europe's ability to promote peace and security within and beyond its borders. We will therefore enhance our efforts on defence, cyber, counterterrorism, energy and strategic communications." This is considered as necessary "to promote the common interests of our citizens, as well as our principles and values."

b) Common Security and Defence Policy

The introduction and gradual expansion of the EU's Common Security and Defence Policy (CSDP) has led to the dissolution of the Western European Union (WEU) in 2011.[169] Pursuant to Art. 42 (1) sentence 1 TEU, the CSDP constitutes an integral part of the CFSP. But the content of this policy does not deliver what the title promises: There is some common security but little common defence policy. Art. 42 (1) sentences 2 – 4 TEU defines the content of the common security policy: The EU can draw on civilian and military assets provided by the Member States[170] in order to conduct military and non-military "missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter."[171] On this basis, the EU has carried out several military missions mandated by the UN SC and many civilian missions.[172] The EU has become a regional arrangement in the sense of Chapter VIII (Art. 52 ff.) of the UN Charter.

Concerning defence, Art. 42 (7) sentence 1 TEU obliges all Member States to aid and assist any Member State that is victim of armed aggression on its territory "by all means in their power, in accordance with Article 51 of the United Nations Charter." While this provision is stricter than Art. 5 NATO Treaty, it imposes obligations on each Member State individually only but does not introduce any common defence policy. Moreover, Art. 42 (7) sentence 2 TEU reserves the right of the neutral EU Member States to stay out. It is a matter of controversy whether the non-neutral Member States are obliged to provide military aid and assistance to the Member State under attack.[173] According to Art. 4 (1) of the bilateral Treaty of

169 *Macalister-Smith/Gebhard*, margin note 29; *Walter*, in: Simma and others (eds.), margin note 62.
170 Art. 42 (3) TEU.
171 See further specifications in Art. 43 (1) TEU.
172 See *Walter,* in: Simma and others (eds.), margin note 63.
173 One counter-argument can be derived from the wording of Art. V of the modified Brussels (WEU) Treaty of 1948/1954 that Art. 42 (7) TEU replaces. Art. V read as fol-

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Aachen,[174] France and Germany are expressly obliged to render military assistance to each other in the case of an armed attack. In any event, NATO is clearly designated as the primary collective defence organisation.[175] Art. 42 (7) TEU has so far only once been invoked – by France in reaction to the terrorist attacks in Paris in November 2015.[176] It is complemented by the supranational solidarity clause of Art. 222 TFEU regarding terrorist threats and attacks in the territory of Member States.

In its present form, the CSDP is geared towards negative peace and inter-State security by coordinating the security and defence policies of the Member States. But it also envisages protection against non-military threats to inter-State security. This becomes clear from its most recent outcome, the EU's Strategic Compass for Security and Defence[177] that was endorsed by the European Council in March 2022, in reaction to Russia's aggression against Ukraine:[178] "This Strategic Compass details how the European Union and its Member States will strengthen our security and defence. Over the next decade, we will make a quantum leap to become a more assertive and decisive security provider, better prepared to tackle present and future threats and challenges. … we must be more resilient against hybrid threats, cyberattacks and climate-related risks, natural disasters and pandemics. We must secure our access to strategic domains. We must invest more … [to] increase our ability to act and lower unwanted strategic dependencies."

c) Common Defence and European Defence Forces

There is no fully-fledged common EU defence policy, and the EU has not yet developed into the European pillar of NATO. Pursuant to Art. 42 (2) (1) sentence 1 TEU, such a policy is to be progressively framed within the CSDP. Art. 42 (2) (1) sentence 2 TEU makes the further step to establishing a common defence contin-

lows: "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power." Available at: https://web.archive.org/web/20200506111157/http://www.weu.int/Treaty.htm#1 (8/8/2023).

174 Vertrag zwischen der Bundesrepublik Deutschland und der Französischen Republik über die deutsch-französische Zusammenarbeit und Integration of 22 January 2019 (BGBl. 2019 II p. 899). For an English translation, see: https://www.auswaertiges-amt.de/blob/2192638/ccd486958222bd5a490d42c57dd7ed03/treaty-of-aachen-data.pdf (17/8/2023).

175 Art. 42 (7) (2) TEU.

176 *Archive Europa*, EU Defence Ministers ready to assist France after Paris Attacks, available at: https://archive.europa.ba/?p=38009 (17/8/2023). See also: https://jean-monnet-saar.eu/?p=1043 (13/8/2023).

177 *Knezović/Duić*, ZEuS 2023/2, pp. 219 ff. See also *European External Action Service*, A Strategic Compass for Security and Defence, available at: https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf (8/8/2023).

178 *European Council*, European Council Meeting (24 and 25 March 2022) – Conclusions, EUCO 1/22, 25/3/2022, available at: https://data.consilium.europa.eu/doc/document/ST-1-2022-INIT/en/pdf (8/8/2023), para. 12.

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gent on a simplified treaty amendment – a unanimous decision by the European Council that requires ratification by the Member States in accordance with their respective constitutional requirements. Moreover, both the common defence policy and the common defence must not prejudice the specific character of the security and defence policy of certain (i.e. the neutral) Member States and respect the obligations of NATO members as well as be compatible with NATO strategies and policies.[179]

This is all a far cry from the truly common European Defence Forces envisaged by the EDC Treaty of 1952. Because of the institutional repercussions, the establishment of a fully integrated EU army could not be based on Art. 42 (2) (1) sentence 2 TEU but would require treaty amendments in accordance with the ordinary revision procedure in Art. 48 (2)–(5) TEU.[180] The question is whether the tectonic shift caused by Russia's war of aggression against Ukraine should prompt the EU to evolve into a true European Defence Union, using the EDC Treaty as a blueprint. Thus transforming the EU from a *peace* power into a peace *power* would be entirely in accordance with recital 11 of the TEU's preamble, as it would reinforce the European identity[181] and the EU's independence "in order to promote peace, security and progress in Europe and in the world". But no concrete plans have yet been made in this regard.

4. Cybersecurity – Economic Security – Strategic Autonomy/European Sovereignty

Security concerns have also pervaded supranational internal and external policies of the EU. Already in 2020, the European Commission sent a communication to five other institutions and bodies on the "EU Security Union Strategy".[182] The Strategy covers the period 2020 – 2025. While it is primarily concerned with internal security against physical and digital threats from, e.g. crime, terrorism and disease, it also considers factors such as "climate change, demographic trends and political instability beyond our borders" as well as external threats (including hybrid ones) by state and non-state actors. It advocates a security policy firmly grounded in the common European values (rule of law, equality, fundamental rights and democracy) and security partnerships with third countries. This strategy has meanwhile been much refined.

179 Art. 42 (2) (2) TEU.
180 See *Riedel*, EuR 2022, pp. 546 ff.
181 See already the Declaration on European Identity of 14 December 1973 that was adopted by the Summit of the Heads of State and Government of the nine Member States of the European Communities, available at: https://www.cvce.eu/de/obj/declaration_on_european_identity_copenhagen_14_december_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html (8/8/2023).
182 COM(2020) 605 final of 24 July 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0605 (9/8/2023).

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Also in 2020, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy jointly communicated to the European Parliament and the Council "The EU's Cybersecurity Strategy for the Digital Decade".[183] The communication describes cybersecurity as an integral part of Europeans' security, underlines the importance of network and information systems for the critical infrastructure, the economy, finances, security, democratic processes as well as defence and speaks of a complex threat environment including State and non-State actors.

At an informal meeting, the EU Heads of State or Government adopted the Versailles Declaration of 10/11 March 2022 in reaction to the Russian aggression against Ukraine, in which they stated: "Confronted with growing instability, strategic competition and security threats, we decided to take more responsibility for our security and take further decisive steps towards building our European sovereignty, reducing our dependencies and designing a new growth and investment model for 2030."[184] They underlined the necessity to improve protection against "ever-growing hybrid warfare, strengthening our cyber-resilience, protecting our infrastructure – particularly our critical infrastructure – and fighting disinformation", reducing energy dependencies in order to ensure security of energy supplies as well as strategic dependencies regarding critical raw materials, semi-conductors, medicines and agricultural products.[185]

The "European Economic Security Strategy" (EESS), jointly communicated by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy,[186] invokes "[t]he global pandemic, Russia's illegal and unprovoked war in Ukraine, hostile economic actions, cyber and infrastructure attacks, foreign interference and disinformation and a global increase in geopolitical tensions" as reasons for addressing "vulnerabilities whether on energy security, pandemic preparedness, or the resilience of our economies, supply chains and key technologies more generally. … With geopolitical tensions rising and global economic integration deeper than ever before, certain economic flows and activities can present a risk to our security. … The EU is not alone in this process: countries all over the world have started addressing challenges to their economic security."[187] The current situation justifies the development of a "comprehensive strategic ap-

183 JOIN(2020) 18 final of 16 December 2020, available at: https://digital-strategy.ec.europa.eu/en/library/eus-cybersecurity-strategy-digital-decade-0 (9/8/2023).

184 Informal meeting of the Heads of State or Government, Versailles Declaration, available at: https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf (8/8/2023), para. 7.

185 Id., paras. 10a, 15 and 21.

186 Joint Communication to the European Parliament, the European Council and the Council of 20 June 2023 – JOIN (2023) 20 final, available at: https://ec.europa.eu/transparency/documents-register/detail?ref=JOIN(2023)20&lang=en (8/8/2023).

187 See the G7 Leaders' Statement on Economic Resilience and Economic Security of May 20, 2023, available at: https://www.mofa.go.jp/files/100506843.pdf (8/8/2023) and the commentary by *Goodman*, G7 Gives First Definition to 'Economic Security', available at: https://www.csis.org/analysis/g7-gives-first-definition-economic-security (8/8/2023). See also *Nguyen*, The G7's Fear of Economic Coercion through Weaponised Interde-

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proach to economic security, de-risking and promoting its technological edge in critical sectors." In view of the EU's roots in economic integration, its concern with economic security is unsurprising.

The EESS specifically mentions two recent instruments against economic threats: (1) the Foreign Direct Investment Screening Regulation[188] that establishes a framework for Member State screening of inbound FDI on the grounds of security or public order; (2) the EU Anti-Coercion Instrument that was politically agreed in June 2023 between Parliament and Council but not yet finally enacted.[189] As paraphrased in the EESS, the latter "instrument's objective is first and foremost to deter countries from restricting or threatening to restrict trade or investment to bring about a change of legitimate policy in the EU, but also foresees the possibility for the EU to take countermeasures as a last resort. The EU will also cooperate with partner countries to monitor instances of coercion and assess and identify the scope for coordinated responses." The EESS also addresses the need to control outbound investment in order to prevent technological advances made by companies in the EU from "enhancing military and intelligence capabilities of actors who may use them to undermine international peace and security …".

The European Council has quickly applied these strategic considerations to the EU's relations with China which "is simultaneously a partner, a competitor and a systemic rival." Relations should be "anchored in respect for the rules-based international order … In line with the Versailles agenda, the European Union will continue to reduce critical dependencies and vulnerabilities, including in its supply chains, and will de-risk and diversify where necessary and appropriate."[190]

There also is a "European Union Space Strategy for Security and Defence", jointly communicated by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy.[191] This communication characterises space as critical for the strategic autonomy of the EU and its Member States and advocates cooperation with the US and NATO in space security.

pendence – Geopolitical Competition Cloaked in International Law?, EJIL:Talk!, 22/6/2023, available at: https://www.ejiltalk.org/the-g7s-fear-of-economic-coercion-through-weaponised-interdependence-geopolitical-competition-cloaked-in-international-law/ (8/9/2023).

188 Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investment into the Union (OJ 2019 L 79 I, p. 1).

189 Political agreement on new Anti-Coercion Instrument to better defend EU interests on global stage, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3046 (8/8/2023).

190 European Council Conclusions of 30 June 2023, EUCO 7/23, available at: https://www.consilium.europa.eu/media/65398/2930-06-23-euco-conclusions-en.pdf (8/8/2023), para. 30 ff.

191 Joint Communication to the European Parliament and the Council of 10 March 2023 – JOIN (2023) 9 final, available at: https://ec.europa.eu/transparency/documents-register/detail?ref=JOIN(2023)9&lang=en (8/8/2023).

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The strategic autonomy of the EU (some also speak of European sovereignty[192]) that has been debated since 2013 denotes the Union's capacity to act autonomously (independently of other actors) in strategically important policy areas such as the economy, defence, energy supply and preservation of values.[193] Since 2016 three shocks have intensified that debate: the Trump shock concerning reliability of the transatlantic security partnership with the US; the COVID-19 shock concerning security of supply chains and the relationship with China; the Ukraine shock concerning energy security as well as military vulnerability and the relationship with Russia. The Ukraine shock has triggered "Europe's geopolitical awakening"[194] and reaffirmed the importance of strategic autonomy. In our context, strategic autonomy means the EU's effective self-determination – not self-sufficiency – in maintaining and promoting positive peace and human security in Europe and beyond, but without abandoning multilateralism and the EU's function as a supporting pillar of the European Security Architecture of complementary institutions.

5. Intra-Federal and Intra-Institutional Division of Competences in Security Matters

The broad value-based peace and security concept of primary Union law together with the obligation to global value projection by the EU as the most powerful trading block in the world may raise power grab concerns not unlike those discussed with regard to the UN SC in the context of the expansion of the UN's security concept.[195]

But there are several major differences between the SC and the Council of the EU: First, the latter is subject to the principle of conferred powers in Art. 5 (2) TEU that is expressly confirmed in Art. 3 (6) TEU with regard to external action. Powers not conferred upon the EU by the Treaties remain with the Member States (intra-federal division of competences). Where the EU exercises powers under the TEU or TFEU, it must respect Member States' "essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".[196] Secondly, the Council is bound to cooperate sincerely with the other EU institutions (Art. 13 (2) TEU) whose involvement in the decision-making process is determined by the pertinent legal basis of the planned measure (intra-institutional division of competences). Thirdly, the Council's decisions, and

192 Such as French President Macron in his Sorbonne speech of 26 September 2017, available at: https://international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html (9/8/2023).

193 *European Parliament*, EU strategic autonomy 2013–2023: From concept to capacity, 8/7/2022, available at: https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733589 (9/8/2023).

194 EU's Strategic Compass (note 177), Foreword by Josep Borrell.

195 See above B.II.

196 Art. 4 (2) TEU. See also Art. 72 TFEU.

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in particular those that relate to sanctions, are subject to effective judicial review by the CJEU.[197] Fourthly, the members of the national governments in the Council of the EU are democratically accountable to their respective national parliaments,[198] and the Council cooperates with the directly elected European Parliament when it legislates.[199] Fifthly, according to Art. 6 (2) TEU, the EU is obliged to accede to the ECHR and thereby submit to external human rights review by the ECtHR, with a view to enhance coherence in human rights protection in Europe. While accession has not yet taken place, a provisional agreement on the revised draft accession instrument has recently been reached.[200] In the meantime, the ECtHR can indirectly review Convention conformity of EU measures, if individual applications are lodged against Member States' implementing acts.[201]

The expansion of the security concept, in conjunction with the split of external EU powers into supranational (TFEU) and intergovernmental (CFSP/CSDP) ones, may raise questions under Art. 40 TEU. It can be controversial if EU action concerning human security is to be based on a power conferred in the framework of the CFSP (Art. 23 TEU) or rather a supranational power enshrined in the TFEU.[202] Since the appropriate legal basis of an EU act does not depend on its terminology, but its purpose and content, extending the use of the term "security" has no influence. It neither expands nor diminishes EU powers, nor does it require or suggest the use of a CFSP basis. Therefore the "securitisation" of any issue has no bearing on the intra-federal or intra-institutional division of competences.

6. Conclusion: Export of Positive Peace and Human Security without Common Defence

Within the European Security Architecture, the EU is the organisation with the broadest competences concerning internal and external security. It has adopted the concepts of positive peace and human security in the broad sense which it pursues by supranational and intergovernmental action commensurate with the competences which are conferred upon it by the Treaties. It has the most articulate and effectively enforced value basis and the greatest international impact, also in terms of sustainable development. The EU also actively engages in value projection within the limits set by international law. It is a credible protagonist and exporter of positive peace and human security. On the negative side of the balance sheet is the lack of any common defence against armed attacks, but there at least is an obligation of the other Member States to provide aid and assistance to the victim.

197 Art. 19 TEU; Art. 263 ff., 275, 277 TFEU; Art. 47 CFR-EU.
198 Art. 10 (2) sentence 2 TEU.
199 Art. 289 TFEU.
200 See Reykjavík Declaration (note 113), Appendix IV.
201 See ECtHR (GC), Appl. no. 45036/98, *Bosphorus v. Ireland*.
202 See e.g. CJEU, case C-263/14, *European Parliament v. Council of the European Union*, ECLI:EU:C:2016:435.

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IV. Organisation for Security and Co-operation in Europe (OSCE)

1. Human Dimension of Peace during Cold War – Transformation since 1990

The OSCE began in 1973 during the Cold War as the Conference on Security and Co-operation in Europe (CSCE) that produced the politically binding Helsinki Final Act.[203] This Act already embraced the concept of positive peace by underlining the connection between the strengthening of peace and security and the promotion fundamental rights, economic and social progress and the well-being for all peoples.[204] Accordingly, Principle VII of the Declaration on Principles Guiding Relations between Participating States in the Helsinki Final Act pertained to respect for human rights and fundamental freedoms and – making reference to the Charter of the United Nations and the Universal Declaration of Human Rights – included the following passage: "The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States."

After the fall of the Iron Curtain, the Heads of State or Government of the CSCE States assembled in Paris in November 1990 "at a time of profound change and historic expectations" and adopted the Charter of Paris for a New Europe with promises for a better future together.[205] In that political document, the chiefs reaffirmed the importance of democratic and human rights security for inter-State peace and security: "We are convinced that in order to strengthen peace and security among our States, the advancement of democracy, and respect for and effective exercise of human rights, are indispensable." Since "[d]emocracy has as its foundation respect for the human person and the rule of law", rule of law security is also indispensable.

The Charter of Paris institutionalised the CSCE by establishing permanent institutions meeting on a regular basis such as the Council of Ministers (now Ministerial Council) and the Permanent Council that were shortly afterwards complemented by the CSCE Parliamentary Assembly consisting of delegates from the national parliaments, following the model of the CoE Parliamentary Assembly. In 1995, the CSCE was transformed into the OSCE, without, however, changing the status of the project or the non-legal character of the Participating States' commitments.[206]

203 *OSCE*, Conference on Security and Co-operation in Europe, Final act of 1 August 1975, available at: https://www.osce.org/files/f/documents/5/c/39501.pdf (8/9/2023).
204 Last recital of the preamble of the Helsinki Final Act.
205 *OSCE*, Charter of Paris for a New Europe, 19–21/11/1990, available at: https://www.osce.org/files/f/documents/0/6/39516.pdf (8/9/2023).
206 See *Fastenrath/Fastenrath*, margin notes 6 ff., 38 ff.

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2. Comprehensive Political Approach to Security

"The OSCE has a comprehensive approach to security that encompasses politico-military, economic and environmental, and human aspects. It therefore addresses a wide range of security-related concerns … All 57 participating States enjoy equal status, and decisions are taken by consensus on a politically, but not legally binding basis."[207]

This self-description on its official website shows that the OSCE has adopted the broad concept of human security. It also denotes the main difference between the OSCE and the organisations that have been analysed above: The OSCE is not based on an international treaty, but only on a political agreement; it therefore is not an international organisation in the technical sense. This is why it has no Member States, but only Participating States – all 46 Member States of the CoE plus the Holy See, Belarus and Russia, the five non-European successor States of the former Soviet Union as well as Canada, Mongolia and the US. It constitutes the largest regional arrangement in the sense of Chapter VIII of the UN Charter, spanning three continents, and has cooperated with the UN for more than 30 years in promoting and safeguarding peace.[208] Kosovo is the only part of Europe not formally included because of its contested status.[209] The OSCE's international personality is controversial.[210] With few exceptions, Participating States' commitments in the OSCE are political and not legal.

"The OSCE works to build and sustain stability, peace and democracy for more than one billion people, through political dialogue and projects on the ground."[211] As indicated by its name, the OSCE takes a co-operative, consensus-based, primarily inward-looking approach toward strengthening security "in Europe", i.e. between and within its Participating States. This approach can only succeed if all participants act in good faith. Unfortunately, the OSCE has been only moderately successful regarding preventing and resolving the conflicts in connection with the dissolution of Yugoslavia and the Soviet Union,[212] even before the total negation of the OSCE principles and commitments by Russia's armed attack on Ukraine that began in 2014 and intensified in 2022.[213]

207 *OSCE,* Who we are, available at: https://www.osce.org/whatistheosce (11/8/2023).
208 *OSCE*, OSCE and United Nations mark 30 years of co-operation at Security Council meeting, available at: https://www.osce.org/chairpersonship/542826 (15/8/2023).
209 *Walter*, in: Simma and others (eds.), margin notes 57 ff.; *Fastenrath/Fastenrath*, margin notes 1, 12.
210 *Fastenrath/Fastenrath*, margin notes 40 ff.; *Tabassi*, in: Steinbrück Platise/Moser/Peters (eds.), pp. 48 ff.
211 *OSCE*, What is the OSCE?, available at: https://www.osce.org/files/f/documents/d/d/35775_10.pdf (11/8/2023).
212 See the overview by *Fastenrath/Fastenrath*, margin note 10.
213 See the Joint Statement of 24 February 2023 of the OSCE Troika, the OSCE Secretary General as well as the President and the Secretary General of the OSCE Parliamentary Assembly: *OSCE,* People of Ukraine must come first, Russia must end this war, say OSCE leaders, available at: https://www.osce.org/chairpersonship/537999 (11/8/2023).

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3. OSCE's Complementary Security Dimensions

In accordance with its comprehensive approach to security, the OSCE distinguishes three complementary security dimensions – the politico-military, the economic and environmental and the human dimension, following the three baskets of the Helsinki Final Act – and is active in all three of them, including cross-dimensional security challenges.[214] OSCE activities therefore have an enormous range covering for instance arms control, countering terrorism, conflict prevention and resolution, building modern, democratic police services, supporting sustainable economic growth and international economic co-operation, good governance and anti-corruption, strengthening co-operation on environmental issues as part of a broader effort to prevent conflict, building mutual confidence and promoting good neighbourly relations, democratisation and elections, human rights, media freedom and development, tolerance and non-discrimination, rule of law, national minorities, Roma and Sinti, cybersecurity, education and migration.[215]

Three OSCE institutions are concerned with the human dimension of security: the Office for Democratic Institutions and Human Rights (ODIHR), the High Commissioner on National Minorities and the Representative on Freedom of the Media.[216] In 2022, the ODIHR appointed two commissions of three experts at the request of Ukraine with the support by 45 Participating States under the Moscow Mechanism of the human dimension which submitted two reports on human rights violations in Ukraine after the Russian invasion.[217] A third report has meanwhile been submitted on the forcible transfer of Ukrainian children.[218]

The OSCE has the most comprehensive security concept which embraces military, economic, environmental and democratic security. The fact that the organisation is not based on international law, but only political agreements and uses policy instruments instead of legal acts to strengthen peace and security in Europe gives it the necessary flexibility to cover such a broad competence area. It was originally founded to bridge the Iron Curtain by fostering détente and mutual understanding "[r]ecognising the indivisibility of security in Europe".[219] The OSCE as the only pan-European organisation could be put to good use to bridge the war-related

214 *Fastenrath/Fastenrath*, margin notes 46 ff.
215 *OSCE,* Who we are, available at: https://www.osce.org/whatistheosce (11/8/2023).
216 *Fastenrath/Fastenrath*, margin notes 29 ff.
217 *OSCE*, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine since 24 February 2022, 13/4/2022, available at: https://www.osce.org/files/f/documents/f/a/515868.pdf (18/8/2023); *OSCE*, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine (1 April – 25 June 2022), 14/7/2022, available at: https://www.osce.org/files/f/documents/3/e/522616.pdf (18/8/2023).
218 See *Bílková/Hellestveit/Šteinerte*, The Moscow Mechanism Expert Report on the Forcible Transfer and Deportation of Ukrainian Children, EJIL:Talk!, 17/5/2023, available at: https://www.ejiltalk.org/the-moscow-mechanism-expert-report-on-the-forcible-transfer-and-deportation-of-ukrainian-children/ (10/10/2023).
219 Helsinki Final Act of 1 August 1975.

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cleavage between Russia and most of the other Participating States in order to reinstall common security. But its future is uncertain. Its consensus-based decision-making process has been blocked by Russia and the other Participating States are trying to keep the organisation afloat. Since some of them are authoritarian, it is difficult to pursue a credible OSCE policy promoting democratic security.[220]

This constitutes a heavy mortgage for the OSCE: Since the Russian war of aggression against Ukraine was co-caused by the breach of democratic security expressed in the slide of Russia into tyranny and violence, democratic security has proved to be the most essential component of European security. When the Charter of Paris for a New Europe heralded "a new era of democracy, peace and unity" in 1990, the order of enumeration was not accidental: Democracy enables peace, and peace generates unity whereas the destruction of democracy generates breaches of the peace and disrupts unity. When Russia abandoned the human rights, democracy and rule of law promises of the Charter of Paris, it brought war back to Europe.[221]

D. Conclusion: Complementarity and Cooperation of the Four Pillars of the European Security Architecture

NATO, the CoE, the EU and the OSCE are the four pillars of the European Security Architecture under the roof of the UN collective security system to which they submit in accordance with Art. 103 UN Charter. In view of the expanded concept of "international peace and security" at UN level, they can all be qualified as "regional arrangements or agencies" in the sense of Chapter VIII of the UN Charter. They complement each other.

NATO primarily guarantees military security by organising its Member States' collective self-defence against armed attacks from the outside. But after the end of the Cold War, it adopted the value-based comprehensive concept of positive peace and human security and has also pursued policies of maintaining and promoting non-military security elements. When Russia intensified its breach of European negative peace by starting a full-scale war of aggression against Ukraine in 2022, NATO reemphasised its primary mission as an organisation of collective self-defence including accelerated military build-up, without, however, abandoning the positive peace and human security concept.

The CoE has always been the European specialised agency for democratic security as an element of positive peace and human security and an essential condition for the maintenance of negative peace and military security. Democratic security as a subset of human security also comprises human rights and rule of law security that are all credibly maintained within the CoE by a grid of international treaties subject to enforcement by the ECtHR and other bodies. The CoE thus is the main guardian

220 *Friesendorf*, Midlife-Crisis, IPG, 3/7/2023, available at: https://www.ipg-journal.de/rubriken/aussen-und-sicherheitspolitik/artikel/midlife-crisis-6808/ (13/8/2023).

221 *Council of Europe*, State of Democracy, Human Rights and the Rule of Law, Report of the Secretary General of the Council of Europe, 2023, available at: https://www.coe.int/en/web/secretary-general/report-2023 (16/8/2023).

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of the value basis of European peace and security. While the CoE has not engaged in any mission creep, it has undergone an enormous geographic expansion after the end of the Cold War so that its area of democratic security covered all of Europe except Belarus. The exclusion of Russia from the CoE for material breach of democratic security by invading Ukraine has again reduced the organisation's geographic reach. It is currently in a process of consolidation in view of democratic backsliding in several Member States.[222]

The quasi-federal EU constitutes the most closely integrated European organisation with the most advanced value basis, the widest range of peace and security-related objectives, the most effective and democratic decision-making procedures and the most developed rule of law safeguards. Its tasks encompass the maintenance of negative peace and military security (CSDP) as well as the promotion of positive peace and human security in Europe and beyond (CFSP and supranational policies). This includes the projection of its values to neighbouring States and into the wider world, within the framework of the UN Charter and international law. The EU's CSDP has not yet been upgraded to a common defence and joint European defence forces under supranational command have not even seriously proposed. While the TEU includes a mutual assistance clause with a higher degree of obligation than the corresponding clause in the NATO Treaty, it recognises NATO's primacy in matters of collective defence. The EU still is more of a *peace* power than a peace *power*. Beyond military security, economic security is a particularly important element of human security for the EU in view of the internal market at its core. Notwithstanding its commitment to multilateralism, the EU strives for a certain degree of strategic autonomy, i.e. effective self-determination, in matters of peace and security in the broad sense.

The OSCE is the last remaining pan-European organisation with the most comprehensive security concept embracing human security in the broad sense, but its future has become uncertain in view of the rupture caused by the war of aggression which Russia, with the support of Belarus, wages against Ukraine. This is unfortunate for two reasons: (1) The OSCE could facilitate reconciliation between the warring parties and (2) much more needs to be done in several of its Participating States to maintain and enhance democratic security and thereby promote positive peace.

All four organisations are well aware of the need to cooperate in order to jointly ensure positive peace and human security in Europe. They also cooperate with the UN. The cooperation between the EU and the CoE (based on Art. 220 (1) (1) TFEU) is particularly close. It is based on the Memorandum of Understanding between the Council of Europe and the European Union,[223] a political agreement, and covers all areas of common interest, "in particular the promotion and protection of pluralistic democracy, the respect for human rights and fundamental freedoms, the rule of law..." The common goal is "promoting democratic stability and security" on the basis of "enhanced partnership and complementarity". The CoE is recog-

222 Id.
223 Of 11/23 May 2007, available at: https://rm.coe.int/16804e437b (8/9/2023).

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nised as "the benchmark for human rights, the rule of law and democracy in Europe." Based on this Memorandum, the CoE and the EU have established a strategic partnership. In view of the Russian war of aggression against Ukraine, there have been calls from both partners to further enhance that partnership in order to safeguard and promote the common values.[224] The Reykjavík Declaration of 17 May 2023 calls the EU "the main institutional partner of the Council of Europe in political, legal, and financial terms." It also indicated, that the EU's overdue accession to the ECHR would "set the relations between the Council of Europe and the EU on a new path of reinforced co-operation."

Cooperation between the EU and NATO is based on Art. 220 (1) (2) TFEU. It is made more difficult by the fact that only 22 EU Member States are also NATO members; Sweden is about to accede as the 23rd EU Member State. The remaining four EU Members – Austria, Cyprus, Ireland and Malta – pursue a policy of strict neutrality, even in the face of the Russian war of aggression. On the other hand, nine NATO Members are not in the EU, two of them are, however, accession candidates and another two Members of the European Economic Area. Nevertheless, since 2002 a strategic partnership has been built[225] and the cooperation has intensified since 2016 on the basis of joint declarations. The most recent one that was issued in reaction to the Russian invasion of Ukraine is the Joint Declaration on EU-NATO Cooperation by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization of 10 January 2023.[226] This Joint Declaration invokes the NATO Strategic Concept and the EU Strategic Compass as well as the importance of the transatlantic bond. It underlines that the "NATO-EU strategic partnership is founded on our shared values and … our unequivocal commitment to promote and safeguard peace, freedom and prosperity in the Euro-Atlantic area."

In accordance with the concepts of positive peace and human security, the Declaration states: "Authoritarian actors challenge our interests, values and democratic principles using multiple means – political, economic, technological and military." The strategic competition by China as well as persistent conflict, fragility and instability in the European neighbourhood are also addressed. In their strategic partnership, "NATO and the EU play complementary, coherent and mutually reinforcing roles in supporting international peace and security." While NATO remains the

224 See in this sense *Council of Europe*, Report of the High-Level Reflection Group of the Council of Europe, October 2022, available at: https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1 (14/8/2023), paras. 33 ff. See also *Council of the European Union*, Conclusions on EU priorities for cooperation with the Council of Europe 2023–2024, 30/1/2023, available at: https://www.consilium.europa.eu/en/press/press-releases/2023/01/30/conclusions-on-eu-priorities-for-cooperation-with-the-council-of-europe-2023-2024/pdf (14/8/2023).

225 *NATO*, EU-NATO Declaration on ESDP, available at: https://www.nato.int/cps/en/natolive/official_texts_19544.htm (14/8/2023).

226 *NATO*, Joint Declaration on EU-NATO Cooperation, available at: https://www.nato.int/cps/en/natohq/official_texts_210549.htm (14/8/2023). See also the Vilnius Summit Communiqué (note 89).

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foundation of collective defence, a stronger, more capable and interoperable European defence is encouraged. Both partners promise to mobilise the political, economic and military instruments at their disposal to pursue their common objectives. "We will … expand and deepen our cooperation to address in particular the growing geostrategic competition, resilience issues, protection of critical infrastructures, emerging and disruptive technologies, space, the security implications of climate change, as well as foreign information manipulation and interference." The fullest possible involvement of NATO Members outside the EU as well as EU Members outside NATO is encouraged.

The OSCE has long cooperated with NATO, the CoE and the EU at political and operational levels in the pursuit of their common human security concept.[227]

Overall, the four pillars of the European Security Architecture cooperate and complement each other within the framework of the UN collective security system. They jointly contribute to maintaining, promoting or building positive peace and human security in Europe and the wider world. With their different focusses, expertise and strengths – military, political, legal, economic, financial, moral – they strive together to prevent, repel and remove threats in any (including hybrid) form to sustainable peace and human life in dignity. In thus pooling their forces, the four organisations have come a long way, but have an even longer way to go. Especially the EU needs to transform itself into a supranational European Defence Union with its own defence forces in order to become a comprehensive and credible agent of positive peace and human security in Europe and beyond.

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