Hans Köchler

The Voting Procedure in the United Nations Security Council

Examining a Normative Contradiction in the UN Charter and its consequences on International Relations

Contents

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1. The Voting Procedure in the UN Security Council and Traditional Power Politics

According to the generally accepted doctrine of contemporary international law, the norms of international conduct have moved away from mere power politics and a concomitant overbearing sovereignty towards a new system of co-operation ultimately based on human rights.[1] The abandonment of the *jus ad bellum* doctrine initiated this change of the value system and of moral awareness. However, because of the pressures of realpolitik, this process was sluggish and rife with contradictions. A particularly striking example was the widely displayed "idealism" of the four sponsoring governments at the San Francisco Conference who propagated the idea of creating a new world order based on freedom and equal rights for men and women of all nations (Preamble of the UN Charter). However, in the same breath, they excluded themselves from the universal application of these principles. With the formulation of Art. 27 of the UN Charter (the Yalta voting formula), the sponsoring governments overruled the principle of equality and installed a veto right to shield their national interests from any obstructions.[2] In spite of the regulation requiring a member of the Security Council to abstain from voting when a party to a dispute (which is valid only in certain cases and rarely obeyed), the veto privilege of the five permanent members remains the chief cause for the undermined credibility of the United Nations and its inability to function as a democratic body. Although the moral and pragmatic consequences of such a regulation are obvious, above all, one must recognize its legal implications. With the Yalta voting formula, the sponsoring governments "smuggled" a principle into the Charter which does not comply with the principle of the sovereign equality of states. Thus, a keystone of traditional power politics, under the disguise; of a new, peace-and-partnership politics as advocated in the Preamble, has been carried over into the post war era.

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[1] See Hans Köchler, *The Principles of International Law and Human Rights. The Compatibility of Two Normative Systems.* Studies in International Relations, V. Vienna: International Progress Organization, 1981.

[2] Hans Kelsen appropriately speaks of an "open contradiction" between the UN's political ideology and its legal constitution ("Organization and Procedure of the Security Council of the United Nations," in *Harvard Law Review,* vol. 59 [1956], p. 1121).

After the careful examination of the voting procedure in the Security Council, one can uncover the problems of a body employing the principles of power politics and identify the contradictions to the general legal principles enshrined in the UN Charter. If one values the rule of law over traditional power and interest politics (as does the UN Charter in conformity with contemporary international law), genuine democratic principles must prevail.

When politics serves as a power tool,[3] the body controlling the norms often exempts itself from their application. The broad political immunity enjoyed by the members of many national legislations provides a very good example. Apparently the sponsors of the UN Charter agreed with this maxim. At the end of World War II, they used their advantaged position to eternalize the Status quo of 1945 in the UN Charter. The sponsoring governments also ensured their permanent voting privilege in the Security Council through Arts. 108 and 110, para. 3: They made the acceptance of the proposed Charter and any later amendments dependent upon their concurring votes as permanent members of the Security Council.

Again and again scholars of international relations have stated that a functioning United Nations is possible only with a basic unity among the permanent members of the Security Council. Many experts agree that when this harmony exists, issues of power politics rarely arise. The veto privilege is unnecessary, they further argue, and its power is essentially “neutralized”. Thus, in the present situation after the end of the Cold War and as a result of the crumbling of the bipolar world order that has prevailed since World War II – many proclaim a new age of co-operation and of the rule of law which assigns the United Nations the role intended by its founders, which so far has not emerged because of the pervasive rivalry between East and West.

This euphoria, however, is deceptive with regard to legal philosophy and even dangerous considering the actual political Situation. These emotions obscure the basic necessity for the reform of the United Nations' normative framework, which currently depends exclusively on

[3] See, in this context, the article by the author, "Die Repräsentationslehre," in

the vicissitudes of international politics. With the end of the East-West conflict, new tensions can unfold at any time. This is evident in the intensifying North-South conflicts. Structurally deficient statutes in the UN Charter should not be left to the imponderables of the international balance of power. Although today's unity within the Security Council greatly decreases the chance of the application of the veto, the possibility of a future conflict between the permanent members remains. The veto could then become a factor.

In certain cases, a particular power constellation may be helpful in "neutralizing" a structural deficiency. But in other cases, the existing order may even enforce that structural deficiency so as to jeopardize the implementation of the basic aims of the Charter. The history of the United Nations since the 1950s gives ample proof of this danger. The structural deficiency caused by the normative contradiction in the United Nations system must therefore be eliminated.

In addition to this practical reasoning, the philosophy of law must never resign itself to the status quo of power politics without strictly analyzing the ideology of those holding power. Philosophers must insist on the consistent application of the principles agreed upon and criticize fundamental) inconsistencies in international regulations according to Hans Kelsen's maxim of the "unity of normative knowledge."[4] In this particular case, one must analyze the direct conflict between the outdated principles of power politics[5] entrenched in the Charter's normative code and the principles of international co-operation and partnership encouraged by the United Nations. As appropriately stated by former Secretary-General Kurt Waldheim in his annual report of 1972, a system of collective security controlled by a few great powers is, in some respects, more characteristic of the 19th century than of the present.

Philosophie – Recht – Politik. Springer: Vienna/New York, 1985, pp. 27ff.

[4] See Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*. Tübingen, 2nd ed. 1928, reprint Aalen, 1960, p. 108.

[5] The power politics of the "great powers" and its complete incompatibility with an international legal order have been appropriately characterized by F. A. Freiherr von der Heydte, who speaks of the "despotism of the world powers, born out of consummate state power and driven by the whim of the world powers" ("The Thornburgh Doctrine: the end of international law," in *Executive Intelligence Review*, May 25, 1990, p. 66).

The veto in the Security Council is a left-over from the power-oriented doctrine of international law of past centuries. But before drawing any normative conclusions, one must investigate the veto's various aspects and actual effects on the international order.

2. The (Indirect) Embodiment of the Veto in the UN Charter

In Chapter V, Art. 23 the UN Charter names five states as permanent members of the Security Council and under Art. 27, par. 3 accords them the veto power over substantive matters. However, Art. 27, para. 3 states this privilege only indirectly, not explicitly.[6] Decisions are to be made by an affirmative vote of nine (of the fifteen) members "including the concurring votes of the permanent members." This regulation is moderated in that parties to a dispute must abstain from voting on decisions falling under the specifications of Chapter VI (Pacific Settlement of Disputes) and Art. 52, para. 3 ("pacific settlement of local disputes").

However, the temptation to use the veto as a tool of power politics occurs only when the interests of a permanent member are at stake (i.e. when the member is more or less involved in, and thus a party to, a dispute). To make matters worse, the permanent members can veto the determination of an issue as either a "dispute" or a mere "situation" (according to arbitrary regulations made after the San Francisco Conference which will be discussed later in this text). Thus, the permanent members have a so-called "double" veto power on the meta-level that decides the preliminary question of whether or not a certain matter is subject to the veto. They can therefore fully protect their interests, and the abstention clause contained in Art. 27, which looks good on paper, is worthless.

A similar problem arises in regard to the regulation limiting the veto to non-procedural (substantive) matters. The permanent members of

[6] For the euphemistic paraphrase of this grave fact contained in Art. 27 (as a characteristic aspect of diplomatic language), see the pertinent presentation by Wilhelm G. Grewe*, Spiel der Kräfte in der Weltpolitik. Theorie und Praxis der internationalen Beziehungen.* Düsseldorf/Vienna, 1970, p. 451

the Security Council circumvent this restriction of the veto, too, by reserving themselves the right to define the specific Status of the decision on whether something is itself subject to the veto (a substantive matter) or not. This is the classic example of the "double veto." Although the Charter regulations tend to restrict the exercise of the veto, the permanent members constantly expand its realm of application as dictated by their considerations of power politics.

The criteria for the membership of other states in the Security Council stand in odd contrast to the self-serving Charter interpretations of the great powers (see chapter 5 of this paper). Art. 23, para. 1 declares that when electing the non-permanent members of the Security Council, the General Assembly should give highest consideration to a state's contribution to the maintenance of international peace and security, whereas the sincerity of the permanent members never undergoes such examination. With their voting privilege, these five nations appear as "teachers" whose commitment to peace supposedly extends beyond all doubt. However, the history of the United Nations shows that "the wolf was sent to tend the sheep." Not only is the Veto rule in direct contrast to the central principles of the Charter and the practice of the "double Veto" immoral from the viewpoint of international partnership, but these regulations have enabled the superpowers of 1945 (all of whom have since become nuclear powers, which certainly does not facilitate democratic dialogue) to introduce their hegemonial interests as the *shaping principles in international law* over the decades of post-war history. The great powers even depicted their interests as indispensable for the maintenance of international peace. Astonishingly this ideology of domination by the victors of World War II[7] has remained unchallenged – with the exception of a few scholars in non-aligned countries.

In fact, the permanent members' privileged position enables

[7] This ideology is clearly expressed in a declaration by the Soviet Union on its position concerning the Veto power. Here, the veto relies on the rule of unanimity which is seen as an essential means to maintain the unity of the great powers (GAOR, 2nd Session, 1st Committee, 114th Meeting, November 18, 1947, p. 501). See also Stalin's letter to Roosevelt of September 14, 1944 where he mentioned the preservation of the unity of the great powers in order to avert future aggressions as the goal of the Soviet foreign policy.

them to maintain the fiction of superpower status even today, although most of them cannot live up to this claim economically, politically or militarily. The attempt to eternalize an advantageous balance of power (with the help of a national constitution or international regulations) has always been a great temptation in the realm of power politics which employs all measures, including legal definitions, to force the future into the framework of the present in order to preserve the advantage of the dominant player over his competitors. However, as the leaders in authoritarian Socialist countries finally failed to institutionalize an unchallenged claim to power for the official political party, so will the permanent members of the Security Council eventually fall in securing their "great power" status through a UN Charter that is amendable only with their consent and is therefore being *forced* on other states. The ever-changing distribution of power will inevitably lead to alterations of the current system, regardless of legal regulations and privileges. If such adjustments do not take place and the UN continues to operate exclusively on the power balance of 1945, the worldwide euphoria over the re-established unity among the permanent members, no matter how great it may be, will not conceal the inequalities of the current UN system. These injustices steadily weaken the credibility of the Charter. An artificial superpower status based on, and secured by, permanent membership in the Security Council cannot survive against the reality of the world order. The radical changes, particularly in Eastern Europe, demonstrate that a normative framework which no longer represents the social reality must fall.

The re-emergence of a missionary superpower ideology in the United States must not obscure the developing multipolar world order. This new order also requires the United Nations to liberate itself from hegemonial policies of the victorious powers of World War II and make way for a system of international relations based on partnership and mutual respect.

3. The Veto Privilege as the Major Impediment to the Achievement of Collective Security

Since the ratification of the UN Charter, the main impediment – in terms of power politics – to the achievement of collective security has been the veto. This privilege furthermore contradicts basic principles of international law as outlined especially in Art. 1, para. 2 of the Charter.[8] At the founding conference in San Francisco, the Mexican delegate declared that integrating the Yalta voting formula[9] into the UN Charter would establish an international system "in which a mouse could be condemned but in which lions would not be restricted."[10] Small- and medium-sized states are especially powerless vis-à-vis a system that reduces them to mere spectators when important issues, as defined in Art. 39 of the Charter, are at stake. Finland's Ambassador Jakobson, who deplored the Security Council's restricted capacity to act on important international affairs, spoke of an "atrophy of the primary function of the United Nations."[11] This dissatisfaction was voiced several times,[12] but changes in the Charter were never seriously considered. Even the former General Assembly Presidents admitted at a meeting in connection with the fortieth anniversary of the United Nations that since the beginning of the organization, the Security Council rarely acted as originally intended. They recalled that the authors of the Charter presumed that the great powers would continue to co-operate with one another and would rarely use the veto.[13] Although it has become possible in recent

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[8] "The veto right of the five permanent members of the Security Council places them above the law of the United Nations, establishes their legal hegemony over all the other Members, and thus stamps the Organization with the mark of an autocratic regime." Hans Kelsen, "Organization and Procedure of the Security Council of the United Nations," p. 1121.

[9] For a precise historical documentation of the origin of the veto provision see Sidney Bailey, *Veto in the Security Council,* New York, 1968. A particularly detailed account of the legal problem is offered by Tae Jin Kahng in *Law, Politics and the Security Council. An Inquiry into the Handling of Legal Questions Involved in International Disputes and Situations*. The Hague, 1964, esp. Chapter IV: "Questions Relating to Procedure of the Security Council: Voting," pp. 111-148.

[10] Cited in Inis C. Claude, *Power and International Relations.* New York, 1962, p. 161.

[11] *First Committee, 1654th meeting, October 15, 1969,* in GAOR, *24th Session, First Committee,* vol. I, pp. 7f.

[12] In his annual report of 1982, Secretary-General Javier Pérez de Cuéllar also expressed, in connection to these developments, his regrets that the member states had "strayed far from the Charter."

[13] "Instead of the basic unity of the great powers on which the Security Council's

times to pass resolutions on regional conflicts (e.g. 598 [1987] on the war between Iraq and Iran and 665 [1990] on the conflict between Iraq and Kuwait where measures of collective security were taken), it is incorrect to conclude that, with the diminishing East-West conflict, the work of the UN is on solid ground.. The new unity among the permanent members results from an altered global power relationship which forms a new power bloc. A polarization between the industrialized *North* and the economically disadvantaged *South* emerges. In the present Situation; the permanent members of the Security Council, who constitute a bloc led by the United States, apply the principles of the Charter only very *selectively* to safeguard the common interests of the industrialized world. How else, for example, can the lack of collective security measures against Israel be explained as it refuses to abide by resolution 242 (1967) in occupying and even annexing Arab territory?[14] In its occupation practices, Israel continuously violates the Fourth Geneva Convention of 1949[15] without enforcement measures ever being considered by the Security Council. Another example of this policy of double standards was the Security Council's passive attitude towards the invasion of Panama by the United States.[16]

It goes without saying that such an inconsistent application of the principles of the UN Charter undermines the good intentions of previous collective security measures during the fifty year existence of the United Nations.[17] Above all, it is the permanent members of the Security Council and their allies who have launched military aggressions and thus jeopardized world peace. It has therefore become obvious that the

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authority was to have been grounded, the division and mutual hostility of those powers dominated the international scene and made a mockery of the hopes of San Francisco." (Brian Urquhart, *Hammarskjold.* New York/Toronto, 1972, pp. 7f.) Benjamin Cohen speaks of an "excessive" emphasis on the unity among the great powers as the basis of a new world order, as it became obvious at the conferences of Dumbarton Oaks and San Francisco: *The United Nations: Constitutional Development, Growth and Possibilities.* Cambridge, Mass., 1961, p. 14. The "new" world order proclaims a similar harmony.

[14] See *Statement by H.E. Yasser Arafat, President of the State of Palestine, Chairman of the Executive Committee of the Palestine Liberation Organization (Seventh United Nations International NGO Meeting on the Question of Palestine, Geneva, August 29-31, 1990),* NGO/IMPQ/VII/15 (GE.90-69758), pp. 6f.

[15] See the detailed legal analysis in *The Human Rights Situation in Palestine.* Ed. Hans Köchler, Vienna, 1989.

[16] See John Quigley, *The Invasion of Panama and International Law.* Studies in International Relations, XVI, Vienna, 1990.

[17] See especially para. 4 of the memorandum presented by the International Progress Organization to the President of the Security Council on September 28, 1990.

Security Council "can by no means be a regularly effective authority vis-à-vis the other states in upholding international law."[18] Power politics causes the selective application of the norms of international law and renders them *de facto* obsolete. This inconsistency produces a climate of "legal insecurity" where even the sanctions and enforcement measures provided for in the Charter forfeit their obligatory and morally binding character.

The great powers definitely would not have initiated the founding of the United Nations without the incorporation of the veto privilege into the Charter.[19] The American expert of international law, F. A. Boyle, explained that "[a] Security Council without a great power veto would have been a non-starter from the beginning."[20] Shortly after the foundation of the United Nations, former U.S. Secretary of State Cordell Hull stated bluntly that "our government would not remain there a day without retaining the veto power."[21] The United States, like the other permanent members, apparently considered the "veto power" as the appropriate institutional safeguard for its interests in the UN[22] at a time when U.S. resolutions faced the increasing threat of being voted down in the General Assembly.[23] The veto was considered a reassurance and comfort in the realm of power politics that could prevent a defeat by the majority. Even appeals to the permanent members for a restrained use of their privilege and reminders of their

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[18] Alfred Verdross and Bruno Simma, *Universelles Völkerrecht. Theorie und Praxis.* Berlin, 3rd ed. 1984, p. 35. (Trans. from German)

[19] "[I]f the veto had not been made part of the rights of the five permanent members, primarily responsible for establishing authority in the Council, it is unlikely that the United Nations could have been established. (Harry Almond, in *The Reagan Administration's Foreign Policy. Facts and Judgment of the International Tribunal.* Ed. Hans Köchler, Vienna/London, 1985, p. 438.) See also Inis L. Claude, Jr., "The Management of Power in the Changing United Nations," in *International Organization* (Spring 1961), p. 225: "the veto Provision was not inserted in the Charter in a fit of absentmindedness."

[20] *World Politics and International Law.* Durham, 1985, pp. 129f. See also Ronnie W. Faulkner, "Taking John C. Calhoun to the United Nations," in *Polity,* vol. 15 (1983), p. 490: "Without the veto the UN would collapse and an exceedingly valuable form of attempting resolution of major conflict would be lost."

[21] *The Memories of Cordell Hull.* New York, 1948, vol. 2, p. 1664.

[22] See David Nicol, *The United Nations Security Council: Towards Greater Effectiveness.,* New York, 1982, p. 14. Also in his pessimistic analysis of the role of power politics in the legal procedures of the United Nations, U.S. scholar of international law, Clyde Eagleton, has heavily criticized the United States "which put into the Charter the veto ... to enable us to escape submission to law" ("The Task of the International Lawyer," in *American Journal of International Law,* vol. 41 [1947], p. 437).

[23] See Robert E. Riggs, "The United States and Diffusion of Power in the Security

obligation as Member States to act in accordance with the principles of the Charter[24] could not reduce the negative effects of the veto. The declaration on this matter by US-Representative Austin at the General Assembly session on October 30, 1946 could be understood only in the Sense of a moral appeal, an appeal to self-control, which naturally goes unheeded when so-called "vital interests" are at stake.[25] For example, the United States – in obstructing the implementation of resolution 242 (1967) – frequently used the veto to prevent a UN condemnation of Israel (nineteen times since 1981, seven within a one-year period between 1989 and 1990). Also, through its arbitrary interpretation (or over interpretation) of resolution 661 (1990), the United States prematurely interfered militarily with a naval blockade in the Arab Gulf. These cases clearly demonstrate the United States' lack of self-control in regard to the veto. In fact, this lack of self-restraint mirrors the Soviet Union's excessive use of the veto in the past – at a time when it still enjoyed actual superpower status – when it tried to secure its interests vis-à-vis the Western bloc. One therefore must agree with the pessimistic evaluation by the experts of the *Carnegie Endowment for International Peace:* "The veto ... is essentially negative. Its effect is not to foster cooperation; it is to prevent action."[26] Also the UNITAR seminar concluded that the Security Council no longer had a constructive role to play and actually had become a "reactive" body because of the privilege of the permanent members.[27] Not surprisingly under these circumstances, the doctrine of international law speaks of a *lex imperfecta*[28] with regard to the norms and regulations for the preservation of peace (as propagated in the new spirit of cooperation in world politics), especially since the System of

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Council," in *International Studies Quarterly, vol.* 22, no. 4 (Dec. 1978), pp. 513-544.

[24] See Benjamin Cohen, *The United Nations: Institutional Development, Growth, and Possibilities.* Cambridge, Mass., 1961, p. 15.

[25] "The unanimity requirement in the Security Council does not relieve the permanent members from any responsibilities and obligations they have assumed under the Charter."

[26] *The Secretariat of the United Nations (Under the auspices of the Carnegie Endowment for International Peace).* New York, 1964, p. 52.

[27] David Nicol, op. cit., p. 12. In a similar way, Secretary-General Kurt Waldheim has pointed out that the Security Council has "been less successful in pre-empting conflict by early consideration of potentially dangerous situations." It has only been *reactive,* that is to say, it has only acted after a conflict had already begun *(Address by the Secretary-General to the Board of Directors of Reuters, 8 March, 1978,* United Nations Press Release, SG/SM/2543).

[28] See A. Verdross and B. Simma, op. cit., p. 78 (§ 100).

collective security as outlined in Chapter VII has been rarely effective thus far. It is necessary, however, to prove that the "mistake" is not a lack of consensus among the great powers. Rather, the error remains a problematic legal construction: namely, the privileged status of certain members in the Security Council.

If this privileged status did not exist, a qualified majority could handle measures of collective security. The problem lies primarily *not* in the factual conditions for the application of the Charter,[29] but in a contradictory normative regulation. This flaw has led to the invalidation of the rule of the majority and, thus, of the principle of equality when important issues are at stake.

The international order changes constantly; only those holding power like to see it as static. However, the fate of the international order and, thus of the United Nations, must not be determined by a more or less favourable and always unstable global power balance. But before exploring these problems of normative consistency in greater detail, one must investigate the dispute over the veto rule *within* the United Nations system.

4. The Origin of the Controversy over the Voting Privilege in the United Nations

The Yalta voting formula, as formulated by the sponsoring governments at the Conference of Dumbarton Oaks and adopted at the Yalta Conference (February 4-11, 1945), is now the basis for Art. 27 of the UN Charter. This formula already received sharp criticism at the United Nations Conference on International Organization in San Francisco (April 25 – June 25, 1945). Upon the decision, of Sub-Committee I1I/1/ B on May 19, 1945, the other governmental delegations on May 22, 1945 presented the sponsoring governments (United States,

[29]Many supporters of a peace order guaranteed by the United Nations see therein, however, the central challenge to the UN. Along these lines are the general observations by Justice Holms: "even the most gifted begetters of a constitution cannot completely foresee the exigencies which may arise under it" (quoted by Benjamin Cohen, op. cit., p. 8). The unpredictability of future conditions for application has often been pointed out and regretted (see Cohen, ibid.: "It was quite another thing to limit constitutional power to a preferred procedure that would not work in the absence of such an ideal harmony.").

Soviet Union, China, and United Kingdom) with a questionnaire dealing with the veto's realm of application. Question 1 inquired whether the veto also applies "to a decision of the Security Council to *exercise its power to investigate*" *a* dispute with a view to its settlement. Question 4 asked if the veto can be applied when the Security Council determines if "*the continuance of the dispute is* likely to endanger the maintenance of international peace and security." Question 19 addressed the "meta-problem" of defining an issue in regard to the applicability of the veto: "In case a decision has to be taken as to whether a certain point is a procedural matter, is that preliminary question to be considered in itself as a procedural matter or is the veto applicable to such preliminary question?" The extensive answer in the *Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council* (June 7, 1945) immensely expanded the application of the veto. The authoritative definitions given in the answer greatly increased the sponsoring governments' power to control and direct the course of the: UN. Every question concerning the veto was answered affirmatively. Particularly interesting – in terms of power politics – is the permanent members' *chain of events* argumentation: The Security Council's decisions may provoke a chain of events which is said to begin immediately with the Council's decision to initiate an investigation or make a recommendation to the parties to a dispute (point I/4 of the answer). They argued that such a chain of events caused by the Security Council finally may require the Council to resort to measures of enforcement under Chapter VII of the Charter and that for this reason, the decisions on the above mentioned preliminary questions require the unanimity of the permanent members.[30] To counterbalance this extensive interpretation of their power, the sponsoring governments pledged a "voluntary self-control" which, to this point in time, they have not fulfilled. This pretended collective sense of responsibility hid the actual power interests in their answer: "It is not to be assumed, however, that the permanent members, any more than the non-permanent members, would use their 'veto' power wilfully to obstruct the Operation of the Council" (point I/8). The reply to question 19 explicitly institutionalized a Kind of

[30] For a detailed analysis of the "Chain-of-Events-Theory" see Sidney Bailey, op. cit.,

"double veto" (point II/2 of the answer) in that "the decision regarding the preliminary question as to whether or not a certain matter is procedural" is itself a substantive issue and is therefore subject to the veto. Thus, the sponsoring governments authoritatively established a monopoly on the interpretation of the Charter in order to expand the application of their privilege. The high-handedness of the sponsoring governments (which is completely incompatible with the ideals of transnational democracy) also appears in the formulation of point I/9 of their answer. Here, they claim for themselves the "primary responsibility" for international peace and state that "they could not be expected ... to assume the Obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred." Thus, a usurpation of power covers up the permanent members' unwillingness to accept the decisions of the majority in a body that should operate above all by democratic rules. However, a concept of great powers, as that during the era of the World Wars, no longer fits into today's world order after the great powers have shown that in all disputes so far they have only pursued their own interests.

The United Nations General Assembly has only grudgingly consented to these authoritative practices. On December 13, 1946 the Assembly passed a resolution voicing its disagreement with the interpretation of Art. 27 of the Charter (A/RES/40[I]) and warned that the misuse of the veto could obstruct the functioning of the Security Council. The resolution requested that every effort be made "to ensure that the use of the special voting privilege ... does not impede the Security Council in reaching decisions promptly." Moreover, the General Assembly recommended that the Security Council accept procedures compatible with the Charter as soon as possible in order to decrease the difficulties in the application of Art. 27.

A further attempt by the General Assembly (resolution 117 [II] of November 21, 1947) instructed an Interim Committee to investigate the problems of the voting procedure in the Security Council and to confer with a committee to be appointed by the Security Council (point 2 of the resolution). However, the Council never established such a

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committee. Because of the Security Council's unwillingness to co-operate, the Interim Committee had to publish its report without such consultation. This document, *The Problem of Voting in the Security Council* (Doc. A/578 of July 15, 1948),[31] attempts to *classify* decisions with regard to the application of the veto (namely in connection with the procedural or substantive nature of a matter). A kind of casuistry was elaborated for that purpose. This detailed list established ninety-eight types of possible decisions in regard to their procedural or substantive nature, leaving some questions unclassified, however. A special Sub-Committee was formed for the compilation of this list. The Committee furthermore introduced an additional category of issues to be decided by a majority in the Security Council (any seven – now nine), regardless of whether considered as procedural or substantive by members of the Sub-Committee.

Furthermore, item 22 of the Statement attempted to define the term "dispute" and in the conclusions of its report, the Interim Committee recommended that the General Assembly urge the permanent members of the Security Council to limit the use of the veto as much as possible. "[I]f there is not unanimity, the minority of the permanent members, mindful of the fact that they are acting on behalf of all the United Nations, would only exercise the veto when they consider the question of vital importance to the United Nations as a whole, and that they would explain on what grounds they consider this condition to be present" (part IV/A: point 3 [c] of the recommendations to the General Assembly).Unfortunately, this appeal to "selflessness" in hopes that the permanent members "will not exercise their veto against a proposal simply because it does not go far enough to satisfy them" (point 3 [d]) has remained as ineffective as most of the deliberations of the Security Council itself.[32] Because of the functional deficiencies of the Security Council, the Interim Committee cautiously suggested that the General

[31] Because of its extensiveness, the author does not cover the Interim Committee's report in great detail in this paper.

[32] A similar type of appeal later appeared in President Dwight D. Eisenhower's Letter to the Soviet Union of January 12, 1958. It was rejected by Bulganin and was likewise ineffective: "we should make it the policy of our two governments at least not to use the veto power to prevent the Security Council from proposing methods for the pacific settlement of disputes pursuant to Chapter VI."

Assembly examine the possibility of convening a Special Session for Charter amendment according to Art. 109.

In resolution 267 (111) of April 14, 1949, the General Assembly endorsed the report of the Interim Committee and recommended, *inter alia,* that the members of the Security Council deem as procedural those types of decisions listed in the annex of the resolution when already seven (now nine) affirmative votes have been cast (para. 2). The resolution mentions, among others, the following cases as examples of such decisions: whether a question is a situation or a dispute for the purposes of Art. 27, para. 3; the recommendation of states for membership in the United Nations; the decision on the procedural or substantive nature-of a matter – in order to prevent the so-called "double veto". Moreover, the General Assembly explicitly accepted the recommendations in section IV/A/3 of the Interim Committee's report (see above) in order to protect the efficiency and prestige of the Security Council from the damage caused by an excessive use of the veto (para. 3 of the resolution addressed to the Security Council). The permanent members accepted none of these recommendations and continued to categorize the decisions exactly *opposite* to the General Assembly's resolution. The declaration of the President of the Security Council on voting procedures of October 18, 1949 (SCOR, 4th Year, 452nd Meeting) stated that the permanent members had tried to reach a consensus on the General Assembly's recommendations, but that the disapproving attitude of the Soviet Union prevented an agreement. In this case, the emerging East-West conflict paralyzed the Security Council already in the *preliminary question* of whether a decision was subject to the veto or not.

On November 2, 1949 the General Assembly again appealed to the permanent members of the Security Council (res. 296 [IV]) to refrain from using the veto on recommendations for admission to membership in the United Nations. The permanent members completely ignored this resolution, too. Until 1968, the veto cancelled a membership application at least thirty times.

The General Assembly's most important attempt so far to prevent the paralysis of the United Nations in measures of collective

security[33] was the *Uniting for Peace Resolution* of November 3, 1950.[34] This resolution attempted to counter the hindrance of the Security Council caused by the excessive use of the veto and the negligence of previous recommendations by the General Assembly. Resolution 377 A [V] states "that failure of the Security Council to discharge its responsibilities ... does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security." Thus, the resolution demands: "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility ..., the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures ... to maintain or restore international peace and security." According to this resolution, the General Assembly may convene within twenty-four hours of the request for an emergency session by any nine members of the Security Council or by the simple majority of the Members of the General Assembly. With this resolution, the General Assembly emphasized its overall responsibility for the functioning of the United Nations at a critical time. The resolution was the General Assembly's response to the continued violation of letter and spirit of the Charter by the permanent members who had resorted to the veto exactly when they were party to a dispute. The provisions of the *Uniting for Peace Resolution* were applied in the Korean War (1950), the Suez Crisis (1956), the Congo Crisis (1960), the conflict between India and Pakistan (1971) and the Afghanistan conflict (1980). As of yet, however, this procedure has not been applied to the Palestinian question.[35] With this resolution, the General Assembly clearly stated its rights and responsibilities under the Charter to act in all such future cases. Experts of international law, however, question the General Assembly's authority to recommend measures which, according to Chapter VII, fall under the jurisdiction of

[33] See John W. Halderman, *The United Nations and the Rule of Law*. Dobbs Ferry, NY11966, p. 152.

[34] See for greater detail L. H. Woolsey, "The 'Uniting for Peace' Resolution of the United Nations," in *The American Journal of International Law,* vol. 45 (1951), pp. 129-137.

[35] See the suggestion of the author – in his capacity as President of the International Progress Organization – to the Secretary-General of the United Nations: cable message of June 1, 1990 (K/JC/12167).

the Security Council. Art. 11, para. 2 of the Charter states: "Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion." This argumentation, however, is only a mere formality, for the guiding principle of application of the UN Charter reads: "All Members, to ensure all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter." (Art. 2, para. 2)

All later attempts to eliminate the veto, particularly Libya's initiatives[36] which were supported by many countries of the Third World, have been thwarted. Since the 30th Session of the General Assembly, Libya has repeatedly and vehemently demanded the abolition of the veto privilege in the Security Council. At the 34th Session of the General Assembly, a solid majority (43 in favour, 34 against, 44 abstentions) adopted a draft resolution presented in the VIth Commission, but upon Finland's request, the General Assembly postponed a decision on the resolution until the next session. Initiatives in subsequent sessions of the General Assembly (e.g. the draft resolution presented in the 37th Session by Libya and supported by Mauritania, Mali, Benin and Iran) encountered a similar reaction. The postponement tactics occurred several more times at the request of Finland and Australia, respectively, until the 40th Session. Understandably, Libya did not make any further formal efforts because of these obstructions. Meanwhile, this matter

[36] Since the 1970s, the Leader of the Libyan Revolution, Mu'ammar al-Qadhafi, has repeatedly pointed out the incompatibility of the veto privilege with the fundamental principles of democracy. See his message of November 11, 1975 addressed to several heads of state in connection with the debates of the 30th Session of the General Assembly where he pointedly states: "I am waiting for the day on which our peoples will gain a political and historical victory: when we will jointly succeed in abolishing the veto. The veto is arbitrary, it is similar to the privileges of medieval kings." (Trans. from Arabic) See also *Le Monde* of August 19, 1976: *Le colonel Kadafi: supprimer le droit de veto à l'ONU.* Qadhafi calls the veto "une injustice, une agression et une attaque contre l'indépendance et la libre volonté des peuples." Since 1975 Qadhafi has addressed this topic in a number of speeches, particularly at the 5th Summit Conference of the Non-aligned Movement (June 18, 1976), to the Ministers of Foreign Affairs of the Islamic Conference (May 16, 1977) and at the Summit Conference of the Organization of African Unity (OAU) (August 8, 1982). See also his address on the 34th anniversary of the foundation of the United Nations (October 24, 1979) and his message of August 9, 1981 to the Secretary-General of the United Nations. – As for Libya's foreign policy regarding the veto, see the *Jamahiriya Mail,* no. 442 of February 26, 1986: *Veto 'has paralyzed' Security Council,* as well as the speech by the Secretary of the General People's Committee for Foreign Liaison at the UN General Assembly (1989): "the effectiveness of the United Nations was 'crippled' by veto powers of the permanent members of the Security Council" (according to *Jordan Times,* October 4, 1989).

seems defunct among UN bureaucrats.

5. The Specific Abuse of the Veto for Reasons of Power Politics

The General Assembly hoped to restrain the permanent members of the Security Council with the lengthy list of types of decisions. The absurdity of this casuistic method shows that power politics – if it is the driving force behind the adoption of a procedural norm – cannot be contained by mere classification efforts and lofty moral appeals.

The power-oriented motivation manifested in the veto rule becomes obvious, as indicated in the above survey, most clearly in the *regulation of the veto's application.* A superpower wants to use its privilege *excessively;* therefore, the veto must be interpreted *broadly.* This explains why the permanent members established for themselves a "privilege of definition" when they subjected the preliminary question of defining a matter as either procedural or substantive to the veto. At the same time, they made the only restrictive regulation completely obsolete: namely, the obligation to abstain from voting when party to a dispute (Art. 27, para. 3). In the eyes of the legal scholar, this arbitrary interpretation exposes the permanent members' real motivations in the introduction of the "double veto".

a. The "Double Veto"

As seen above, the "double veto" arises in the classification of decisions as procedural or substantive. In this case, these holding the privilege of interpretation may expand the range of the veto at will. The Australian representative's criticism of the Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council (see above) was direct and to the point: "The permanent member, according to that ruling, can say, not only 'I can veto the decision of the Council,' but 'I can determine the question which I will veto' " (SCOR, 49th Meeting, p. 425). This

opens the door for arbitrary interpretation and results in the misuse of the Charter. As early as this meeting, Australia mentioned that the Four Sponsoring Governments' authoritative; ruling of June 7, 1945 was never confirmed in open session at the Conference in San Francisco and declared that the statement on the "double veto" was in no way to be considered as an "authentic interpretation of the Charter." Hans Kelsen articulated a similar view. He explained that the Statement of the Four Sponsoring Governments expressed only a particular opinion at that particular moment and that it "is even doubtful whether these four states are obliged *inter se* to maintain the opinion they have expressed in the Statement"[37] since the declaration was not a binding contract.[38]

The permanent members' overbearingness and self-provided increase in power status through the "double veto" have been undermined to a certain extent since the treatment of the Formosa Case in the Security Council. On November 27, 1950, the President of the Security Council, referring to Rule 39 of the *Provisional Rules of Procedure of the Security Council,* upheld the confirmation (by a majority of nine votes) of the procedural character of the question of inviting a representative for the purpose of information in spite of the (National) Chinese veto (in this case, a representative from the Peoples Republic of China.) He justified his decision with the following statement: "I think that if such a situation as this is allowed to stand, a very grave precedent will have been created which may well impede the whole functioning of the United Nations in the future."[39] This was the first time that the President employed the *presidential ruling* according to Rule 30 of the *Provisional Rules of Procedure* to prevent the arbitrary use of the "double veto" by a permanent member who was involved in a dispute. This decision was similar in its moral and exemplary significance for the enforcement of the UN Charter to the *Uniting for Peace Resolution* of the General Assembly. (The formal question of

[37] The Soviet Union, however, saw the declaration of San Francisco as binding upon the permanent members.

[38] "Organization and Procedure of the Security Council of the United Nations," in Harvard Law Review, vol. 59 (1946), pp 1103f.

[39] SCOR, 506th Meeting, p. 7. – As for the details concerning this decision, see Inis L. Claude, Jr., *Swords into Plowshares.* London, 3rd ed. 1966, pp. 141f.

whether problems of voting procedure may be treated by the President as a point of order [Art. 30] and whether *a presidential ruling* is admissible is only of secondary importance vis-à-vis the overall task of implementing the Charter in its entirety.)[40] Benjamin Cohen also states in his analysis of the prospects for the constitutional development of the United Nations that the decision on the procedural character of a question should have been left to a presidential ruling according to Rule 30 in order to avoid a "double veto."[41] For "neither the words nor spirit of the Charter require that the judgement of one permanent member should make a procedural question substantive when seven of the other members in good faith conclude that it is clearly a question of procedure."[42]

b. Circumventing the Abstention Clause

In a manner similar to the "double veto," the permanent members of the Security Council evade the requirement in para. 3 of Art. 27 of the Charter to abstain from voting when involved as a party to a dispute.[43] After all, the veto privilege is only tempting and useful if one is involved, that is if one's "vital" interests are at stake.[44] Here, too, the sponsoring governments, and subsequently the permanent members; have arrogated to themselves a privilege of definition in order to lead more or less concealed proxy wars without the risk of being challenged. With this power, they can block an unacceptable resolution at its conception. Of course, allowing "the Wolf to tend the sheep" never disturbed the advocates of power politics. Until now, theorists in international relations

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[40] For this formal question see Tae Jin Kahng, *Law, Politics, and the Security Council. An Inquiry into the Handling of Legal Questions Involved in International Disputes and Situation.* The Hague, 1964, pp. 121ff.

[41] "[W]ithout the Four Power Statement, the Security Council would have had little difficulty in treating the preliminary question as a question to be determined by the presiding officer ..." *(The United Nations: Constitutional Development, Growth, and Possibilities.* Cambridge, Mass., 1961, p. 12).

[42] Benjamin Cohen, *The United Nations,* p. 13

[43] See Paul Tavernier's detailed argument in "L'abstention des États parties à un différend (article 27 § 3 in fine de la Charte). Examen de la pratique," in *Annuaire Français de Droit International,* vol. 11 (1976), pp. 283-289.

[44] At the Dumbarton Oaks Conference (1944), the Soviet Union even insisted that the veto, then favored by the United States, should become effective above all in cases when one of the great powers is party to a dispute.

have been alone in raising their voices against the prominent standing of the maxim *might makes right* in resolving transnational conflicts. In fact, throughout the history of the United Nations the permanent members have almost always ignored the provisions requiring them to abstain from voting. In this manner, they have systematically undermined an essential safeguard to the implementation of the Charter.

There is an irreconcilable contradiction between the obligation in the Charter; to abstain from voting on decisions under Chapter VI and the Statement of the Four Sponsoring Governments. The Statement gives the permanent members the right to veto the definition of a question as, either a situation or a dispute. This "meta-veto" renders the Charter's provisions for abstention obsolete.[45] Andrew Boyd has aptly described the state of powerlessness of the non-permanent members of the Security Council vis-à-vis this arrogance of definition: "When a small state has a dispute with a great power, and brings that dispute to the Council, the great power will say it is not a dispute, and will thus retain its right to vote on the dispute …"[46] Thus, the inequality established by the veto rule itself doubles again and paves the way for an arbitrary exercise of power beyond all constitutional and procedural control. In 1951, the permanent members rejected Egypt's suggestion to present this controversy to the International Court of Justice. The basic principle of law according to which no one can be judge in his own suit was completely abandoned. The Security Council has thus forfeited an important basis of legitimacy for its compulsory jurisdiction. The League of Nations dealt with this problem of involvement more credibly. Its analysis was not characterized by the Machiavellian attitude held by the permanent members of the Security Council. In the consultations on the boundary dispute between Iraq and Turkey, the *Permanent Court of International Justice* precisely formulated its judgement and upheld the principle that involvement in a dispute

[45] This is also pointed out in a survey published by the United Nations on its 40th anniversary: "The Security Council," in *The United Nations at Forty. A Foundation to Build on.* New York, 1985, p. 41: "the Charter provision when the Council is considering the pacific settlement of disputes has not been applied in most cases where a permanent member has been perceived by others to be involved."

[46] *Fifteen Men on a Powder Keg: A History of the United Nations Security Council.* London, 1971, p. *86.*

implies the obligation to abstain from voting: “in the case' of the settlement of a dispute, the rule of unanimity is applicable, subject to the limitation that the votes cast by representatives of the interested Parties do not affect the required unanimity ... The we11-known rule that no one can be judge in his own suit holds good.”[47]

The UN Charter, however, is inconsistent in its application of the “involvement clause.” This is the unavoidable result of the Sponsoring governments' determination to preserve their privileged status after World War II. The obligation to abstain from voting when party to a dispute does not apply to decisions outlined in Chapter VII of the Charter *(Action with Respect to Threats of Peace, Breaches of the Peace, and Acts of Aggression),* where – according to the common understanding of due legal process – it is most needed. The provision – as indicated above – is applicable only to decisions according to Chapter VI *(Pacific Settlement of Disputes)* and Chapter VIII, Art. 52, para. 3 *(pacific settlement of local disputes).* The statutory scope of application of the clause which, because of the formulation of Art. 27, para. 3, is extremely limited anyway, was therefore even more restricted by the previously described "double veto" in regard to the definition of a dispute. This has created a situation that virtually offers the permanent members a total "immunity" when pursuing aggressive strategies. They enjoy special procedural protection by using the UN Charter for their own purposes.

6. The Veto and the Sovereign Equality of States (Analysis of a Normative Contradiction)

The arbitrary nature of power politics manifested in the “double veto” has increased the inequality among the member states and made the contradictions within the Charter clearly visible. This leads back to the question of whether the veto is at all compatible with letter and spirit of the UN Charter. Power politics dictated the introduction of this

[47] PCIJ Series B, No. 12, November 21, 1925, pp. 31f.

rule, and the member states accepted the normative inconsistency caused by its incorporation into the Charter as a *fait accompli.* This not only jeopardizes the systemic consistency of the Charter, but at the same time it is extremely detrimental to the universal acceptance, legitimacy and implementation of United Nations resolutions. The voting privilege stated in Art. 27 stands in direct conflict with the universal recognition of the United Nations as a transnational authority. Art. 2, para. 1 states that "The Organization is based on the principle of the sovereign equality of all its members." This pledge, however, is nullified by the provisions of Art. 27 without any exculpation.[48] The General Assembly again confirmed in the *Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*[49]that "the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations" and that the principle of equal rights "constitutes a significant contribution to contemporary international law" *(Preamble).*[50] Para. 1 of the Declaration further defines sovereign equality, among other aspects, as *juridical equality.*[51] A voting privilege for certain members of the United Nations, however, is in no way compatible with juridical equality. Nor can the euphemisms which frequently appear in the contemporary doctrine, of international law soften this contradiction on the normative level (for example, when the category of "grave exception"[52] serves to justify the

[48] See also C. Narasimhan, *The United Nations. An Inside View.* New Delhi, 1988, p. 29.

[49] Resolution 2625 (XXV) of October 24, 1970.

[50] The non-aligned states also emphasized the principle of sovereign equality. It is exactly this norm that is said to have contributed to the *emancipation of* formerly colonized nations; without this principle of juridical equality small countries would be at the mercy of the great powers (see Nacer-Eddine Ghozali, "Le non-alignement instrument de l'indépendance et de la souveraineté," in *The Principles of Non-alignment. The Non-aligned Countries in the Eighties*
- *Results and Perspectives.* Ed. H. Köchler. Studies in International Relations, VII [London/Vienna, 1982], pp. 79 and 85).

[51] Formulations under para. 2 of the Declaration (General Part) might, however, be seen as a relativation of the previously said (as a kind of reassurance, so to speak, vis-à-vis the superpowers). It is stated that "nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter." Thus even in such a declaration formulated with internationalist pathos and moral ambition the precautions of power politics finally take effect.

[52] A. Verdross/B. Simma, op. cit., p. 105.

actual situation). Both equality and inequality cannot rule at the same time. One principle nullifies the other.[53] A norm is either universally valid or not valid at all. The Charter therefore needs clarification along the lines of Kelsen's principle of the unity of normative knowledge. This would eliminate the current jeopardy of the entire system caused by the repealing of basic normative principles by subordinate norms. All of the energy and argumentative skills spent by experts of international law (many of whom belong to the United Nations establishment) to deny or conceal this contradiction are quite remarkable. They argue, for example, that the functional inequality inherent in the veto privilege is actually a "material" (as opposed to a "formal") equality since the provision legally reflects the existing differences between states.[54] But this theory establishes the powerful's right to rule as the central principle of the United Nations and, thus, of international law. Such an acceptance of the "normative power of the facts" *(normative Kraft des Faktischen) is* by no means compatible with the spirit of the Charter. Acknowledging that a larger population, superior economy and greater military capabilities entitle a country to additional rights clearly expresses the surrender of international law to power politics. Because the principle of equality, as documented by the Declaration of the General Assembly, is to be understood in the *normative,* not in the factual sense,[55] any argumentation along the lines of material (factual) inequality is irrelevant. On the national level the exercise of civil, as well as political, rights (e.g. the right to vote) is independent of the economic status of the citizen. Here, such a violation of equality would meet certain condemnation. The same should hold true at the international level, if states are seen as subjects of international law. (The perspective could change only if the System of international law were completely restructured with the concept of transnational democracy. Here, each citizen is seen as *a direct* member of the international

[53] See Herbert Weinschel, "The Doctrine of the Equality of States and its Recent Modifications," in *The American Journal of International Law,* vol. 45 (1951), pp. 427f.: *"equality* has been transformed into *inequality* for all Members of the United Nations, except the five permanent members of the Security Council."

[54] Ignaz Seidl-Hohenveldern thinks the principle in Art. 2, para. 1 of the Charter does not require a formal (that is normative) understanding of equality. See *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften.* Cologne/Berlin/Bonn/Munich, 4th ed. 1984, p.147.

[55] For this interpretation cf. also D. Ninčić, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations.* The Hague, 1970. For him, equality is "equality before international law" and "equality in international rights," and thus is not

community [as a cosmopolite in the true sense]. This theory relates the concept of equality to the individual, eliminating the intermediary role of a collective entity such as the state.)[56]

Boutros-Ghali also speaks euphemistically of the "relative" juridical equality of states and their "functional" inequality which, according to him, results from their "political" inequality.[57] However, if one follows this argument and accepts the confusion of the normative and the factual levels, one might succeed in disguising the normative contradiction, 'but will find even greater problems with the constant modification of the list of permanent members according to the ever changing balance of power. One would have to define criteria for the "superpower Status" based on which some states would actually have a greater weight in international affairs and which therefore would grant some states more rights and privileges than others. Because the balance of power has changed enormously since 1945, the present list of permanent members would no longer include certain states while other countries like Germany, India, Brazil, Japan, etc. would be included. The surrender of the normative level to the factual by the above process would lead to a chaotic situation. Rules and regulations of international law, if they are to be of a binding nature, must be completely separated from the considerations of power politics. It is the specific task of international law to establish a normative framework for power politics, i.e. to control it, and not simply to legitimize the facts that have been created through power politics. Any argument based on a "material" inequality as the justification of normative privileges (which then, from a formal point of view, would not contradict the idea of equality) must be abandoned.

Other attempts to resolve the normative contradiction in Art. 27 of the Charter through semantic distinctions will fail also. For example,

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of material character.

[56] See the author's analysis in *The Principles of International Law and Human Rights,* loc. cit., p. 18: the state, as a subject of international law, constitutes only a secondary, indirect reality. In terms of legal philosophy, the genuine reality is that of the individual (citizen) as a subject of international law, i.e. as the bearer of inalienable rights in relation to all mankind *(civitas maxima).*

[57] B. Boutros-Ghali, "Le principe d'égalité des États et les organisations internationales," in [Académie de droit international] *Recueil des Cours,* vol. 100 (1960), II, pp. 30ff.

one theory argues that the veto right "does not refute the general validity of the norm, on sovereign equality" because an exception from the general rule does not negate the entire framework.[58] After all, the argument continues, exceptions from the general norm are found not only in international law, but also found and accepted in national law. Besides, the only principal organ of the United Nations having general jurisdiction is the General Assembly. And here, it is argued, every state enjoys sovereign equality expressed in one equal vote. But a closer look exposes this tactic of appeasement as a legally unsound argument. The crucial responsibility of maintaining international peace and security, including the power to impose sanctions, is reserved for the Security Council. Moreover, the UN Charter itself – despite the sovereign equality of all states in the General Assembly – can be amended only with the consent of the permanent members of the Security Council. That is to say the General Assembly has no "sovereignty" over the Charter. The terminological distinction between an *exception* to the general rule and an *abrogation* of the rule does not provide a solid justification of *Art.* 27. An "exception" may be made only in subordination to a more significant norm (see the justification for state of emergency laws). Such an exception becomes effective only as a last resort to secure the permanent recognition of the higher norm. This justification does not exist in the case of the veto. No higher legal value is at stake; rather, a factual power interest is secured. Instead of protecting the basic norms of the UN Charter, this "exception" amounts to a normative contradiction that *de facto* jeopardizes the functioning of the system of collective security and causes the United Nations' lack of legitimacy in the realm of international law. The Yugoslav legal expert Magarašević (quoted earlier) also admits that the departure from the principle of sovereign equality has created new relationships of *relative equality* and *functional inequality* within the hierarchy of states and, in particular, in the system of collective security. *Might, hegemony* and *domination* dictate these

[58] So argues Aleksandar Magarašević in "The Sovereign Equality of States," in *Principles of International Law Concerning Friendly Relations and Cooperation.* Ed. Milan Sahović, Belgrade, 1972, p. 191. In contrast to this, Herbert Weinschel, op. cit., clearly speaks of the abandonment of the principle of sovereign equality ("the principle of state equality has been compromised in the Charter in favor of the live great powers," p. 428).

relationships.[59] In some respects, the veto rule seems a relic of the traditional understanding of sovereignty attributing supreme authority to the nation state. The superpowers used this ideology to preserve their hegemonial interests.[60] This understanding of sovereignty concurs with the doctrine. of the primacy of the national legal system[61] – in contrast to the primacy of the transnational legal order.[62] The doctrine of the indivisibility of the sovereignty of the state[63] may be understood in the sense of *a negation* of the majority rule as a final result (with the implication of the obligation to apply the rule of unanimity).[64] This means that a single state claiming sovereignty, in the sense of supreme authority, would "retain the right to negate any infringement of [its] rights by the majority."[65](John C. Calhoun spoke of a "right of nullification.") However,

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[59] Op. cit., p. 193.

[60] As a matter of fact, the authoritarian interpretation of sovereignty in the history of imperialist nation states has led to an "anarchy of sovereignty" (Otto Kimminich, *Einführung in das Völkerrecht.* Pullach bei München, 1975, p. 60), which is still noticeable today because of the virtually Machiavellian practices of the Security Council. As for the problematic aspects of an understanding of sovereignty as an absolute concept, see Clyde Eagleton, "International Law or National Interest," in *The American Journal of International Law,* vol. 45 (1951), p. 720: "If the state is to be an end in itself, and allowed to become all powerful, the rights of individuals will be submerged and other nations will be absorbed."

[61] See Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts.* Tübingen, 2nd ed. 1928, reprint Aalen, 1960.

[62] See Hans Köchler, *The Principles of International Law and Human Rights,* loc. cit. – The ideological basis for the primacy of the national legal order has been succinctly stated in Carl Schmitt's theory of the state. His conception of politics diametrically opposes the idea of a universal legal order in the sense of the primacy of international law which, in the final analysis, amounts to a World State. Since he defines politics according to the *friend-enemy pattern,* he can visualize only *a pluralism* directed by the friend-enemy tensions between states. "Political unity presupposes the real possibility of the enemy and with it another political unity that exists at the same time." *(Der Begriff des Politischen.* Berlin, 1963, p. 54 [trans. from German]). Such an approach to the philosophy of the state leaves no room for a System of collective security as envisioned by the United Nations. As for the absolute understanding of sovereignty in the sense of subordination of the *international rule of law* to a mere policy of the national interest, see especially Hans Morgenthau, *In Defense of the National Interest. A Critical Examination of American Foreign Policy.* New York, 1951.

[63] "Sovereignty is an entire thing, to divide, is, – to destroy it." (John C. Calhoun, *The Works of John C. Calhoun.* Ed. R. K. Crallé, New York, 1851-1857, vol. 1, p. 148). A mutual restriction of state sovereignty resulting from unavoidable transnational effects of certain national policies (e.g. the regional and even global impacts of environmental measures) is definitely compatible with the principle of sovereign equality. As for a reformulation of the concept of sovereignty so far defined in an absolutist way, cf. also the Speech by President Dr. Kurt Waldheim at the Xth General Assembly of Austrian Jurists, September 12, 1988 (cf. *Die Presse,* September 13, 1988: "Einschränkung der Souveränität notwendig?").

[64] This principle is, for example, taken into account in the Charter of the Arab League. § 6 provides for unanimity in the decisions on measures against an aggressor. § 7 clearly states that whatever the majority decides is only binding for those members who have agreed with the decision.

[65] This is argued by Ronnie W. Faulkner in "Taking John C. Calhoun to the United Nations," in *Polity,* vol. 15, no. 4 (Summer 1983), p. 475. In this sense Georg

such an "absolutist" justification of the veto still would require an explanation of why only certain states should – or *may* – benefit from this regulation.[66] This would be possible only if the non-permanent members of the Security Council were denied full sovereignty.

Apart from the problems caused by the veto rule within the normative system of the United Nations, this particular privilege, as indicated above, conflicts with the idea of peaceful co-operation among nations. The veto can nullify any result of a democratic decision-making process. A Council member with the veto power cannot be a true "partner" in efforts to resolve conflicts. Rather, that member dictates the course of the negotiations. When non-permanent members want to promote their interests, they must adapt their proposals to this fact to have a minimal chance of success. The re-structuring of international relations according to democratic principles[67] will clash with this privilege from the very beginning.[68] Here, too, a fundamental lack of credibility confronts the United Nations: Should the principles that are upheld on the national level not play an equally important role in international relations? Even if one sees the veto as a "reservation of sovereignty" when the majority outvotes a state, one cannot justify the veto as a legitimate device to correct the "dictatorship of the majority" because, ironically, this privilege serves the states that least need minority protection.

Schwarzenberger also considers the adherence to the concept of national state sovereignty as a major obstacle to the establishment of an effective international legal order *(Über die Machtpolitik hinaus?* Hamburg, 1968, pp. 52ff.).

[66] It is precisely this "reservation of sovereignty" contained in the veto power of the five permanent members which has so far prevented the establishment of a supranational authority and thus has made impossible the evolution of an international order in the direction of a "world state" constitution (see F. A. Boyle, *World Politics and International Law.* Durham, 1985, p. 129).

[67] See Hans Köchler, *Foreign Policy and Democracy. Reconsidering the Universality of the Democratic Principles.* Studies in International Relations, XIV. Vienna: International Progress Organization, 1988.

[68] In this sense the Chinese delegate Huang Hua supported the abolishment of the veto as a decisive step towards the democratization of the Security Council (see D. Nicol. op. cit., p. 105). With this statement, he undoubtedly expressed the desire of the overwhelming majority of the countries of the Third World and of the members of the non-aligned movement. These countries have felt particularly disadvantaged by the privilege reserved more or less for the industrialized world. As early as 1946, Hans Kelsen stated that the veto "stamps the Organization with the mark of an *autocratic regime"* that is incompatible with international democracy and the principle of the sovereign equality of states ("Organization and Procedure of the Security Council of the United Nations," p. 1121).

Nothing can hide the fact that the veto rule is an alien element in the normative framework of the United Nations. Apart from being incompatible with the universal norms and principles of the Charter, the *selective* application of the veto in the Security Council has revealed the motivation behind its incorporation into the Charter: the promotion of power politics. The misuse of the veto reveals a Machiavellian pattern according to which the superpowers and their allies proceed with their aggressive acts almost every time without being condemned or subjected to collective enforcement action. Even those sectors of international public opinion that have upheld an idealistic view of the United Nations finally recognize that Art. 27 establishes power as the *key* element in international law, even after the abandonment of the imperialist understanding of state sovereignty. The inclusion of power politics in the UN Charter is tantamount to restoring the outdated principle of international law: *ex injuria jus oritur,* i.e. the dogmatic establishment of die positivistic rule of effectiveness.[69]

Thus, the veto gravely hinders the United Nations' efforts to establish a system of collective security based on the universal rule of law and the fundamental principles of human rights. Even though the United Nations – due to today's relatively favourable state of international relations – has mode some progress in maintaining peace and collective security, this development has not eliminated the veto; it remains as an expression of "superior power and privilege."[70] *Neutralizing* the veto in the practice of the Security Council does not equal abolishing it as a legal tool. Unless one entrusts the establishment of a new world order of peace and justice to die goodwill of the great powers, one must explore viable *alternatives* to the present voting procedure in the Security Council. Freeing the community of states from the insecurities of a more or less favourable world order is possible only after the elimination of the veto. Only then can peace relinquish its exclusive dependence on the ever-changing balance of power and rest on universally accepted legal principles.

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[69] See *The Principles of International Law and Human Rights,* loc. Cit., pp. 22ff.
[70] Sidney Bailey in *Veto in the Security Council.* New York*,* 1968, p. 66.

7. The Abolition of the Veto as the Only Alternative to Traditional Power Politics

Since the foundation of the United Nations, experts have pointed out the discrepancy between juridical equality (i.e. "equality of voting strength") and the "inequality of the interests involved." Various committees repeatedly discussed proposals on weighted voting to resolve these inconsistencies.[71] With a constantly growing membership, they argued, this contradiction becomes intensified and could cause many international organizations to gradually lose their authority. Schermers states that, in principle, "... a delegate of a large State will represent more interests than his counterpart from a small State." [72] Indeed, this rule – though irreconcilable with the general doctrine of international law – was used to justify the veto in the Security Council. "Weighted voting" was therefore encouraged for international institutions to protect the interests of larger groups. It is unfair, the experts argued, to set aside a large population's interests in favour of those of several smaller groups (whose combined population is less than that of the one large group). Indeed, this dilemma depicts the role of the "mini-states" in the United Nations system. Here, too, the insurmountable difficulties exist in formulating criteria for weighting the states' voting power. The same holds true for the attempt to define a "material inequality" to justify the normative inequality created by the veto rule. Is it the size of the population or the state's economic and military power that is to be decisive in the weighting process? Or is it the financial contribution to the organization's budget?[73] A political and legal organization such as the United Nations, attempting to control and restrict the exercise of Power, can by no means adopt the voting rules of an international financial institution (e.g. the *International Monetary Fund).* Any type of *weighted* voting, therefore, does not offer a viable alternative to the *dominant* votes of the five

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[71] See Henry G. Schermers, *International Institutional Law,* vol. II: *International Law.* Leyden, 1972, p. 330. See also Ignaz Seidl-Hohenveldern, op. cit., pp. 147ff.

[72] Op. cit., p. 330.

[73] See Carol Barret and Hanna Newcombe, *Weighted Voting in International Organizations.* Peace Research Reviews, vol. II, no. *2* (April 1968); A. Newcombe, H. Newcombe, J. Wert, *Comparison of Weighted Voting Formulas for the United Nations.* [preprint] Peace Research Institute. Dundas, Ont., 1970; as well as the Suggestion on voting by Harold E. Stassen in his *1990 Draft Charter suggested for a better United Nations Organization to emerge from the original.* New York, 1990, Art. 18, p. 32.

permanent members in the Security Council.[74]

If one rejects the veto privilege of the permanent members for the sake of normative consistency, ethical and democratic credibility and the establishment of a peaceful world order, three alternatives – selected more or less arbitrarily from an array of possibilities – emerge as new "idealistic" determinations of the voting procedure.[75] Each of these alternatives includes an adequate protection of minority rights as a general guideline. This, of course, implies measures restricting the dictatorship of the majority while maintaining the traditional concept of state sovereignty.

(A) If the category of permanent membership remains, the number of member states in the Security Council must increase (e.g. from the present 15 to 21) to provide a more equitable geographical representation.[76] At the same time, the number of permanent members should increase (e.g. from 5 to 7). Permanent membership should principally be linked to the demographic size of a country. Economic strength should never be the main criterion because this would lead to the emergence of a new kind of North-South conflict. At certain intervals, the list of permanent members would have to be revised because states are not Platonic entities and are therefore not immune to the changes of time. The status and "weight" of a state[77] within the international system may change drastically. The General Assembly would define and regulate these matters with a two-thirds majority. In the Security Council, substantive matters would require a two-thirds majority; a simple

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[74] Only in a totally different international system in which the individual (not the state) would enjoy the status of a primary subject of international law could the vote of each state be weighted according to the number of voting citizens of the respective state. This, however, would entail the abandonment of the concept of state sovereignty in the Charter. In such a System (essentially a "World State") the delegates of member states would be direct democratic representatives of an exactly determined number of citizens. It goes without saying that in such a system, the "weighting of votes," for example according to income, would be unacceptable.

[75] This is not in accordance with Harold E. Stassen's suggestion for reform of the United Nations *(The 1990 Draft Charter)* that clings to a superpower regime and even pleads for a reduction of the number of permanent members provided with the veto privilege (pp. 36ff.).

[76] At an earlier stage, ten member states presented a proposal to the General Assembly for the increase in membership *(Question of equitable representation and increase in the membership of the Security Council,* General Assembly, 35th Session, Autumn 1980, Doc. A/34/246). Likewise, the question of increasing the number of permanent members (without veto power) was considered, mentioning India, Japan, Brazil, a reunified Germany, etc. (see Cohen, op. cit., p. 98; Nicol, op. cit., pp. 13ff).

[77] With regard to the territorial composition, economic strength, etc. – A striking example was the change of the social and national identity of the Soviet Union as a formerly unified state, its later disintegration and succession by Russia.

majority would decide procedural issues.

(B) A second alternative is the transformation of the category of permanent membership into a "collective membership" on the basis of *intra-regional rotation.* This system now partially exists in the geographical representation of the non-permanent members of the Council. From a list of countries meeting the qualifications of alternative (A), a simple majority in the General Assembly would elect a country to represent a certain region for a period of one or two years. One might also consider the current regional organizations (EU, OAU, OAS, and Arab League) as collective members.[78] Such a measure could, to a certain extent, counterbalance the arbitrary shaping of majorities in the Security Council. This plan would guarantee that not only proxies – "viceroys" in terms of power politics – serve as permanent members. A qualified two-thirds majority would decide all issues.

(C) A third alternative is the general introduction of the unanimity rule within the present structure of the Security Council. Such a model, however, would reduce the Council's effectiveness considerably, but this plan would strengthen the influence of smaller states and better correspond to the traditional understanding of sovereignty. However, the failure of the League of Nations shows the weaknesses of this system.

Regardless of the alternative chosen, the system must facilitate a new *multipolar* world order. The United Nations is currently based on a factual and normative inequality. The implementation of an alternative system will require radical restructuring and ideological reorientation. The so-called "World Order" (referring to the actual balance of power among states) is undergoing a revolutionary change, unforeseen just a few years ago. These developments have led to a sudden disintegration of once powerful states and a rise of other states and regional groups to international power. The balance of power of 1945 cannot eternally regulate the system of international law. This would make today's nations prisoners of the past and allow the declining superpowers of past decades

[78] The discussions about the new international role of Germany have led to recent considerations of a collective membership for the European Community in the Security Council on a rotational basis.

to exercise a legal arbitrariness[79] that is politically unacceptable, inconsistent with legal theory and in no way proportional to the actual strength of these states in today's world. The Charter of a world organization must not be misused simply to safeguard its authors (the "sponsoring governments") against the uncertainties of future international developments. But this legal protection exists in Art. 108, where the permanent members subjected the ratification of any Charter amendment to their veto power. With power politics playing such an important role, the author is quite conscious of the fact that the realization of an alternative system remains far away.

A philosophical analysis, however, should demonstrate how a system of norms of international conduct could be consistently established. Such efforts attempt to explain corrective measures that are indispensable if the system is not only to provide *legality* secured by power politics, but also *legitimacy* based on moral principles. For this reason, revision of the UN Charter is necessary from (a) the *legal* standpoint, requiring the abolition of the veto causing a normative contradiction which threatens the coherence of the entire system established by the Charter, and (b) the *political* standpoint, requiring the abandonment of the veto privilege in order to control power politics effectively and to adapt the Charter to the newly emerging multipolar world order.[80]

The abolition of the veto would be the decisive step towards restoring the credibility of the United Nations. The idea of maintaining peace through universal *co-operation* would replace the philosophy of securing peace through *co-ordination* among the few privileged holders of power (whose present unity is euphorically welcomed, but may not last). This reorientation would finally bring to life the concept of "collective security" and would be the decisive factor in establishing the rule

[79] F. A. Freiherr von der Heydte describes this challenge in his article about the so-called "Thornburgh Doctrine." "There will be serious consequences for the community of nations when die arrogant despotism of a world power raises itself up thus, to be lord not only over war and peace, but even over law itself." ("The Thornburgh Doctrine: the end of international law," in *Executive Intelligence Review,* May 25, 1990, p. 62.)

[80] This implies the relinquishment of the "realistic" theory of foreign policy that makes the legal dimension subordinate to national interest. This refers not only to Carl Schmitt's political philosophy, but also to Hans Morgenthau's doctrine of the "national interest": *In Defense of the National Interest. A Critical Examination of American Foreign Policy*. New York, 1951.

of law in international relations.[81] By no means must a structural deficiency in the Charter be retained in the wavering hope that the international political order would remain as "favourable" as it now exists, whereby the unity among the superpowers neutralizes the damaging effects of the veto power. The deficiency itself must be eliminated. This would make all of the abstention clauses, casuistic differentiations and definitions of categories of possible decisions obsolete. All of these difficulties clearly indicate that the international community, under the pressures of realpolitik, endorsed a principle that is totally incompatible with the spirit of the UN Charter. Undoubtedly, the victors of World War II (and drafters of the veto rule) have meanwhile squandered their moral credit attained as those who saved the world from the scourge of fascism. These countries, therefore, can no longer claim special responsibility for the maintenance of international peace and justice.

At the San Francisco Conference, the main argument for accepting the veto rule was purely pragmatic: "it was unconceivable that the United Nations should undertake enforcement action against a great power."[82] The *surrender* to power politics was thus present from the very beginning of the United Nations. To no one's surprise, the Security Council was therefore, as stated by Lord Caradon, "sadly and tragically neglected" as an instrument to maintain peace and establish a just world order.[83] The fundamental readjustment in the global political order cannot hide the structural deficiency inherited by the Charter (i.e. the basic mistake committed at the foundation of the United Nations). If one wants to preclude, also for the distant future, the paralysis of the United Nations in its primary tasks of maintaining peace and providing a framework for collective security, one must seek a new consensus an the *revision* of the Charter in order to abolish the special voting privilege that is incompatible with the principle of sovereign equality. Only then can the United Nations credibly Claim to keep power politics in check and to have outlawed, once and for all, the use of force in international relations. A

[81] As for tying international authority to the rule of law as the basic measure for the establishment of a system of collective security, see Rudolf Weiler, "Friede durch internationale Rechtsordnung," in *Internationale Ethik. Eine Einführung.* Vol. 2, Berlin, 1989, pp. 123ff.
[82] Sidney Bailey, op. cit., p. 36.
[83] Quoted according to David Nicol, op. cit., p. 12.

veto privilege actually compensating the superpowers for the earlier abrogation of the *jus ad bellum is* a disgrace to modern international law.