I.P.O. RESEARCH PAPERS

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THE DUAL FACE OF SOVEREIGNTY

CONTRADICTIONS OF COERCION IN INTERNATIONAL LAW

"Recent lines of internationalist thought"

INVITED ARTICLE

The Global Community – Yearbook of International Law and Jurisprudence 2019
Oxford University Press, Fall 2020

PREPRINT VERSION
February 2020

INTERNATIONAL PROGRESS ORGANIZATION

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Abstract

The article explores the dialectic of power and law as exemplified in the ambiguous status of sovereignty, in particular in the Charter and practice of the United Nations Organization. One of the main challenges for the rule of law, whether domestic or international, is how to enforce legal norms without privileging the enforcers. This is where sovereignty has revealed its dual face in relations between states. Unlike domestic constitutional systems, the framework of norms of the United Nations lacks basic elements of a separation of powers, granting special status to states that were the most powerful upon the organization's foundation. The Charter's principle of sovereign equality stands in direct contradiction to the norms regulating the use of coercive powers by the Security Council. Analyzing multilateral as well as unilateral sanctions regimes, the article explains how the antagonism between equality and "coercive privilege" has enabled major global players to evade scrutiny of their conduct, and proposes an amendment of the wording of Article 27(3) of the Charter.

Preliminary remarks

Appreciating the invitation from *The Global Community: Yearbook of International Law and Jurisprudence* to contribute to "Recent Lines of Internationalist Thought," I would like to share my observations on the contradiction between two aspects of sovereignty: as freedom *from* coercion and as freedom (authority) *to* coerce. The present analysis results from my involvement with situations of international disputes and conflicts in the last several decades. As President of the International Progress Organization, a non-governmental organization in consultative status with the United Nations (ECOSOC), I have repeatedly been made aware of instances where the world organization was powerless vis-à-vis blatant violations of international law, in particular as regards the ban on the use of force, but also concerning the universal protection of human rights. In the course of the 1991 Gulf war, the International Progress Organization raised the issue of the Security Council's policy of comprehensive economic sanctions and its compatibility with norms of *jus cogens*.[1] As international observer, appointed by the United Nations,[2] at the Lockerbie bombing trial in the Netherlands,[3] I witnessed the detrimental impact of power politics on international law and subsequently tried to identify the difficulties and obstacles in the practice of international criminal justice.[4]

Having witnessed the hope of international civil society for the revival of the United Nations after the end of the East-West conflict, and the disillusionment when the Council was again paralyzed in the face of unilateralist policies in a suddenly unipolar environment, I took part in the debates on a democratic reform of the world organization[5] and presented specific proposals for the amendment of the UN Charter, with normative consistency in mind.[6] In connection with my earlier reflections on normativity, i.e. on the validity of norms and the rule of law in general,[7] and on the relationship between human rights and international law,[8] I subsequently tried to identify the areas where inconsistencies would have to be eliminated in order to make the "international rule of law"[9] a meaningful and legitimate concept.[10] The contradiction between sovereign equality of states and the rules on the exercise of coercive power by the Security Council is one such case.

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[1] *Statement by the delegate of the International Progress Organization before the United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities*. United Nations, Document E/CN.4/Sub.2/1991/SR.10, 20 August 1991. Cf. also, Hans Köchler (ed.), *The Iraq Crisis and the United Nations: Power Politics vs. the International Rule of Law. Memoranda and declarations of the International Progress Organization (1990 – 2003)*. Studies in International Relations, Vol. XXVIII. Vienna: International Progress Organization, 2004. – For a general analysis, cf. Hans Köchler, *The United Nations Sanctions Policy and International Law*. Penang (Malaysia): Just World Trust (JUST), 1995.

[2] Letter dated 25 April 2000 from the Secretary-General addressed to the President of the Security Council. United Nations/Security Council, S/2000/349, 26 April 2000.

[3] Cf. the reports on trial and appeal proceedings, which I submitted to the Secretary-General of the United Nations: Hans Köchler and Jason Subler (eds.), *The Lockerbie Trial: Documents Related to the*

Sovereignty and coercion

Enforceability is a basic criterion distinguishing a *legal* from a *moral* norm. As defining element of law, coercion comprises a wide range of measures, including the use of armed force as its most extreme form. Law – as "coercive normative order" (Kelsen)[11] – is upheld through the state's "monopoly of violence" (Weber).[12] This all-encompassing authority (*summa potestas*) is expressed in the legal *sovereignty* of the state, classically defined as "la puissance absolue et

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I.P.O. Observer Mission. Studies in International Relations, Vol. XXVII. Vienna: International Progress Organization, 2002.

[4] Hans Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads*. Vienna/New York: Springer, 2003. – As regards the problematic role of the Security Council, cf. Hans Köchler, *The Security Council as Administrator of Justice?* Studies in International Relations, Vol. XXXII. Vienna: International Progress Organization, 2011.

[5] I had initiated these debates in the last decade of the Cold War, in connection with conferences I organized on the development of international relations and the role of the United Nations (e.g. International Meeting of Experts on the New International Economic Order, Vienna, 2-3 April 1979; International Conference on the Principles of Non-alignment, Baghdad, 4-6 May 1982; International Conference on the Question of Terrorism, Geneva, 19-21 March 1987). In commemoration of the 40th anniversary of the foundation of the UN, I organized an international colloquium on how to apply democracy to relations between states (New York City, 31 October 1985). Cf. Hans Köchler (ed.), *Democracy in International Relations*. Studies in International Relations, Vol. XII. Vienna: International Progress Organization, 1986. In 1991, I convened the "Second International Conference on A More Democratic United Nations" (CAMDUN-2) at the United Nations Office at Vienna (17-19 September 1991). Cf. Hans Köchler (ed.), *The United Nations and the New World Order: Keynote Addresses from the Second International Conference on A More Democratic United Nations*. Studies in International Relations, Vol. XVIII. Vienna: International Progress Organization, 1992.

[6] Hans Köchler, "The Democratization of the United Nations Organization: Ideal versus Real," in: Saul Takahashi (ed.), *Human Rights, Human Security, and State Security: The Intersection*, Vol. 3, Chapter 3. (Series "Praeger Security International.") Santa Barbara, CA, Denver, CO, Oxford, UK: Praeger / ABC-CLIO, 2014, pp. 63-90.

[7] Hans Köchler, *Philosophie – Recht – Politik: Abhandlungen zur politischen Philosophie und zur Rechtsphilosophie*. Veröffentlichungen der Arbeitsgemeinschaft für Wissenschaft und Politik an der Universität Innsbruck, Vol. IV. Vienna/New York: Springer, 1985.

[8] Hans Köchler, *The Principles of International Law and Human Rights: The Compatibility of Two Normative Systems*. Studies in International Relations, Vol. V. Vienna: International Progress Organization, 1981. Original German version: "Die Prinzipien des Völkerrechts und die Menschenrechte: Zur Frage der Vereinbarkeit zweier Normensysteme," in: *Zeitschrift für öffentliches Recht und Völkerrecht*, Vol. 32 (1981), pp. 5-28.

[9] Hans Köchler, *Democracy and the International Rule of Law: Propositions for an Alternative World Order. Selected Papers Published on the Occasion of the Fiftieth Anniversary of the United Nations*. Vienna/New York: Springer, 1995.

[10] Hans Köchler, "Normative Inconsistencies in the State System with Special Emphasis on International Law," in: *The Global Community – Yearbook of International Law and Jurisprudence 2016*. Ed. Giuliana Ziccardi Capaldo. Oxford: Oxford University Press, 2017, pp. 175-190.

[11] Hans Kelsen, Reine Rechtslehre. *Mit einem Anhang: Das Problem der Gerechtigkeit*. Vienna: F. Deuticke, 1960, pp. 45ff.

[12] Max Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* (1921/22). Ed. Johannes Winckelmann. 5th rev. ed. Tübingen: Mohr, 2009, § 17.

perpétuelle d'une République" (Bodin).[13] Traditionally, the term has denoted the *internal* as well as *external* freedom of action of the state and its ruler (including the freedom to coerce, at both levels).

Any such power gives rise to the question of *legitimacy*. In the modern state system, this kind of supreme authority is to be derived from the status of the *citizen* as autonomous subject (as defined e.g. in Immanuel Kant's practical philosophy).[14] The normative order of the state – its constitution – is not grounded in some metaphysical quality, but is the result of an act of *collective will* of its citizens. In this context, the very rationale of the coercive power of the state is to preserve each individual's *freedom from coercion*, i.e. its "sovereign" status as citizen on the basis of equality[15]. This authority at the meta-level, so to speak, is the essence of the *domestic rule of law*. It requires an elaborate system of checks and balances to prevent an arbitrary exercise of the supreme power vested in the state.

Similarly, in modern international law, the state's sovereign status, its supreme authority to govern, has meant *independence*: as freedom <u>from</u> coercion by other sovereign states,[16] but not freedom <u>to</u> coerce other states. The principle has been unequivocally stated by the General Assembly of the United Nations: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."[17]

In view of the multitude of states as sovereign entities, the United Nations Charter codifies the *external* sovereignty of the state in the principle of *sovereign equality* (Article 2[1]).[18] In a manner structurally similar to the domestic level, the power to coerce exists only at the

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[13] Jean Bodin, *Les Six Livres de la République*. Paris: Iacques du Puys, 1576. Livre I, Chapitre IX: *De la souveraineté*, p. 152.

[14] Cf., *inter alia*, Immanuel Kant, *Foundations of the Metaphysics of Morals and, What Is Enlightenment?* Trans. by Lewis White Beck. New York: Macmillan; London: Collier Macmillan, 1989, p. 65. See also, Hans Köchler, "Sovereignty, Law and Democracy versus Power Politics," in: *Force or Dialogue: Conflicting Paradigms of World Order*. Ed. David Armstrong. New Delhi: Manak, 2015, Ch. II: "The integral definition of sovereignty," pp. 60ff.

[15] The term is understood here in the normative, not factual (descriptive) sense.

[16] For a general analysis, cf., *inter alia*, Antonios Tzanakopoulos, "The Right to Be Free From Economic Coercion," in: *Cambridge Journal of International and Comparative Law*, Vol. 4 (2015), pp. 616-633.

[17] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*. General Assembly, resolution 2625 (XXV), 24 October 1970, Principle 3, Para. 2.

[18] The aspect of equality is also expressed in the "constitutional separateness" which, according to Alan James, is a characteristic of external sovereignty. (*Sovereign Statehood: The Basis of International Society*. London: Allen & Unwin, 1986, p. 24)

meta-level, namely to enforce the norms that result from the state's sovereign status, in particular non-interference into the internal affairs and the principle of the non-use of force (Article 2[4]). This is also expressed in the Charter's Preamble – in the form of an *obligation* upon the world organization itself that "armed force shall not be used, save in the common interest."

However, the authority of coercion at the meta-level, vested in the United Nations Security Council, also implies that the norm of non-interference, a basic element of sovereign equality, does not apply to collective enforcement measures under Chapter VII of the Charter (Article 2[7]), i.e. in cases of threats to the peace, breaches of the peace, and acts of aggression. According to the UN Charter's hierarchy of norms, the preservation of peace – *conditio sine qua non* for the universal realization of sovereignty – justifies the violation of specific norms that are connected to sovereign equality, on the basis of exception.

The principle of sovereign equality implies a relationship of *juxtaposition*, not *superposition* of states, irrespective of their status in terms of power, number of the population, economic strength, etc.[19] Thus, in international law, and in particular in the context of the Charter, "sovereignty" is a *normative*, not a *descriptiv*e notion.[20] Accordingly, the authority (power) of coercion, including the use of armed force, is essentially limited to action in the *defense* of sovereignty.[21]

The external sovereignty of the state is not absolute. It is relative to the sovereign status of all other states, and in this sense essentially a *negative right*, namely of not being subordinated to other subjects of international law. Consequently, sovereignty may only be invoked on the basis of *mutuality*. No state – and no regional grouping or organization of states – is entitled to superimpose itself upon the others, or to unilaterally use force against other states, whether in the name of national interests or universal principles. There is no *jus ad bellum* in modern international law.

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[19] Cf. also Brad R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order*. New York: Oxford University Press, 2011, ch. 1, pp. 3ff.

[20] On the different interpretations of sovereignty cf. Michael Ross and Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty*. Foreword by Inis L. Claude, Jr. University Park, PA: Pennsylvania State University, 1995: "Conflict between De Jure and De Facto Requirements," pp. 53ff. – See also M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge: Cambridge University Press, 2005: "Sovereignty," pp. 224ff.

[21] In certain (exceptional) cases, this may also include action in defense of fundamental human rights (insofar as the sovereign status of a state is ultimately derived from the inalienable rights – the autonomous status – of its citizens). – On the link between sovereignty and human rights cf.

Unlike at the *domestic* level, because of the very sovereignty of states no comprehensive and unified system of norm enforcement has yet been developed in the *international* realm. The measures of coercion at the disposal of the UN Security Council are essentially confined to the area of *collective security* (Chapter VII of the Charter). Unavoidably, the limited scope of "law enforcement" has, to a large extent, made the international system one of self-help. As of yet, there is no global jurisdiction except in some narrowly defined areas of criminal justice.[22] Even in this area, the "supreme international crime" – to initiate a war of aggression – cannot be prosecuted independently from power politics.[23]

In view of the deficiencies of international criminal justice (regarding *personal*, not state responsibility), the Security Council's authority of multilateral enforcement vis-à-vis *states* is of crucial importance. Collective coercion by the Council is meant to prevent unilateral coercion, in particular acts of aggression, by individual states. In theory and on paper, this is the closest approximation to the "international rule of law" under the existing body of norms.[24]

Multilateral coercion

The Security Council is the body to which the member states have conferred "primary responsibility for the maintenance of international peace and security" (Article 24 of the Charter). However, in spite of the noble mandate, the rules for the exercise of its vast coercive powers in the domain of collective security not only *undermine*, but also, actually and effectively, *invalidate* the legitimacy of the Council's "monopoly of violence." According to Article 27(3), five specifically named states – the Council's permanent members (P5) – are given the authority to veto the determination of the existence of any threat or breach of the peace, or act of aggression (Article 39), and also to block the subsequent imposition of

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Köchler, "Sovereignty, Law and Democracy versus Power Politics;" and: *The Principles of International Law and Human Rights*.

[22] This includes ad hoc courts established by the Security Council, and the International Criminal Court. For details, see Hans Köchler, *Global Justice or Global Revenge?*

[23] The International Criminal Court can adjudicate cases of the crime of aggression only on the basis of a Security Council determination under Chapter VII of the Charter, which means effective impunity for officials and personnel of the most powerful countries, the Council's permanent members. For details, see, *inter alia*, Anne Marie de Hoon, *The Law and Politics of the Crime of Aggression*. Amsterdam: Vrije Universiteit, 2015.

[24] Cf. also Kelsen's argument regarding the status of "international law" as law in the genuine, not only metaphorical, sense, meaning mechanisms of enforcement: *The Legal Process and International Order*. London: Constable & Co., 1935.

coercive measures (Articles 41 and 42).[25] This privilege applies to all cases brought before the Council under Chapter VII, including those where a member of the Council is party to a dispute. Vested with the power of veto, a permanent member of the Council can act as *judex in causa sua*.[26]

Although it is rarely admitted in public international discourse, this statutory monstrosity means that, unlike in domestic jurisdictions, the main enforcers of the law are effectively *above* the law.[27] Because of their *monopoly* over how the Council uses its coercive powers – its *monopoly of violence* –, these five states enjoy total immunity as regards their own transgressions of the law. The veto privilege, in tandem with the non-abstention rule hidden in the subordinate clause of Paragraph 3 of Article 27,[28] unashamedly establishes a *double standard* in the most important domain of international law. This reminds of the interpretation and practice of sovereignty in the era of *absolute rule*. Referring to the statutory role and powers of the Security Council, Hans Morgenthau quite aptly referred to the permanent members as "the Holy Alliance of our time."[29]

The lack of even a modicum of a separation of powers has introduced an element of *anarchy* – often referred to as realpolitik – into the very system in which the United Nations Organization operates. It has made the "international rule of law" a questionable notion when invoked in matters of collective security. The provisions for coercive measures under

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[25] The term "veto" is nowhere used in the Charter. The drafters preferred to euphemistically refer to a requirement of "concurring votes" of the permanent members instead. For details, cf. the author's analysis, *The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction and its Consequences on International Relations*. Studies in International Relations, Vol. XVII. Vienna: International Progress Organization, 1991.

[26] Cf. Hans Köchler, "Normative Inconsistencies in the State System with Special Emphasis on International Law," p. 180.

[27] The problem was extensively addressed in the final discussions about the drafting of the UN Charter at the United Nations Conference in San Francisco. The delegate of Mexico remarked "that he was inclined to feel that the delegates were engaged in establishing a world order in which the mice could be stamped out but in which the lions would not be restricted." (*Documents of the United Nations Conference on International Organization – San Francisco, 1945*. London/New York: United Nations Information Organizations, 1945, p. 4434) – After the organization's establishment, John Foster Dulles, US Secretary of State 1953-1959, honestly admitted the state of affairs: "The Security Council is not a body that enforces agreed law. It is a law unto itself." (*War or Peace*. New York: Macmillan, 1950, p. 194)

[28] The provision means that in decisions based on Chapter VII (that are binding upon all member states), a party to a dispute is not obliged to abstain from voting. An obligation to abstain only applies to (non-binding) decisions under Chapter VI and Chapter VIII, Article 52, Par. 3, which have the character of "recommendation" or "encouragement" respectively (in the wording of the Charter). Ironically, this means that a *higher* standard is applied to resolutions of *lower* importance (i.e. those that are mere recommendations) as compared to binding resolutions.

[29] Hans Morgenthau, *Politics among Nations*: *The Struggle for Power and Peace*. New York: Knopf, 6th ed. 1985, p. 503.

Chapter VII are actually tools of power politics in the hands of the Council's privileged members. Not only can a permanent member block any decision by the Council on other than procedural matters, it also can hold the Council hostage of its previous decisions, including those imposing coercive measures such as sanctions.[30]

There are, basically, two aspects to this coercive privilege. On the one hand, a permanent member can impose its will on *how* the Council practices its mandate of collective security, i.e. whether or not the Council is in a position to coerce member states to comply with the law. On the other hand, in addition to the statutory (not accidental) possibility of interference with the Council's mandate of *multilateral coercion* by a permanent member, no action is possible – within the UN system of collective security – against *unilateral forms of coercion* – whether in the form of (economic) sanctions or armed aggression – by the Council's permanent members. This has exposed the "absolutist" face of (external) sovereignty under the UN Charter, which means the potential subordination of all other states, not only the member states of the Security Council, to the projection of power of only *one* state, unrestrained by law. In this regard, the Charter falls behind even the Covenant of the League of Nations.[31]

The state of affairs *delegitimizes* the system of international law in general and, since the very establishment of the United Nations, has had a profoundly *demoralizing impact* on the international community.[32] It has also revealed another predicament in terms of international realpolitik. As the law is *ineffective* – i.e. unenforceable – exactly in those matters that are most crucial for the sovereignty of a state, the less powerful members of the international community find themselves thrown back to a constellation where they have to seek alliances with the "privileged" states in order to preserve at least a relative margin of independence. In terms of principle, however, this subordination to the will of the more, or most, powerful

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[30] This was the case regarding the comprehensive economic sanctions imposed on Iraq following that country's invasion of Kuwait in 1990. Cf. *The Iraq Crisis and the United Nations*.

[31] Again, it was the delegate of Mexico whose precise remarks crystallized the problem. In the debates in San Francisco, he explained that "the Yalta voting provisions [i.e. the great power veto / H.K.] represented a backward step as compared with the voting provisions of the League Covenant concerning the pacific settlement of disputes." (*Documents of the United Nations Conference on International Organization – San Francisco, 1945*, *loc. cit.*) According to Article 5 of the Covenant of the League of Nations, there existed a *general* unanimity requirement for all decisions of the Council, not a veto privilege for specifically named states

[32] Cf. the misgivings expressed in the consultations at San Francisco. See, e.g., the statement of the delegate of Brazil: "The public opinion of many, if not of most, of the nations represented here was opposed to the veto power and the best means of making the Yalta voting formula acceptable would be to provide for free, frank, and full review of the Charter. Only with provision for such review would the Charter be applauded by world opinion." (*Documents of the United Nations Conference*

means nothing less than a departure from the commitment to the rule of law.

Unilateral coercion

The problem is most acute in regard to *unilateral* enforcement measures that are often justified by reference to the *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001).[33] Part Three, Chapter II of this non-binding UN document[34] provides that an "injured State" may take "countermeasures" against a State "responsible for an internationally wrongful act" in order to "induce" that State to comply with its obligations in terms of international law (Article 49). According to Article 50, threat or use of force is not admissible as countermeasure under these Articles. Countermeasures must further be in conformity with "fundamental human rights"[35] and must not have the nature of "reprisal."

While the above regulations can be interpreted within the logic of individual self-defense (which is not alien to the UN Charter),[36] Articles 48 and 54 of the document authorize "any State other than an injured State" not only to "invoke" the responsibility of another State for the breach of a legal obligation "owed to the international community as a whole" (Article 48[1][b]), but also to "take lawful measures against that State to ensure cessation of the breach" (Article 54). As regards "Serious breaches of obligations under peremptory norms of general international law" (Chapter III of the Articles), Article 41(1) goes one step further, implicitly stating an obligation of States to "cooperate" to bring to an end "through lawful means" any such breach.

Due to the aspect of self-help and the vagueness of the terms, the Articles on State Responsibility further risk encouraging powerful states to act in a realm of legal arbitrariness and to intervene as self-appointed guardians of the law and human rights, circumventing the UN system of collective security.[37] In recent years, these provisions have been repeatedly

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…, p. 4434)

[33] The Articles, drafted by the International Law Commission, were taken note of and "commended" to the attention of Governments by the General Assembly of the United Nations in resolution 56/83 of 12 December 2001.

[34] Under Paragraph 3, the General Assembly resolution explicitly states that its commendation of the articles is given "without prejudice to the question of their future adoption or other appropriate action."

[35] See also resolution 72/168 ("Human rights and unilateral coercive measures"), adopted by the General Assembly of the United Nations on 19 December 2017.

[36] Article 51.

[37] Hans Köchler, *The Concept of Humanitarian Intervention in the Context of Modern Power Politics: Is the Revival of the Doctrine of 'Just War' Compatible with the International Rule of Law?* Studies in International Relations, Vol. XXVI. Vienna: International Progress Organization, 2001.

invoked to justify unilateral sanctions[38] as well as the use of force, whether by single states or ad hoc alliances, under the labels of "humanitarian intervention" or "responsibility to protect" (R2P).[39]

Acts of unilateral coercion are more serious, however, when permanent members of the Security Council are involved, whether individually or in alliance with other states. In such cases, states can act with almost total impunity and may – self-servingly – claim any legal title for their intervention. In this context, resort to coercive measures, whether in the form of sanctions or by use of armed force, cannot be restrained by any legal means nor can it be subjected to proper scrutiny.[40] The decision-making rules of Article 27(3) of the UN Charter make the very international community the Council is meant to represent virtually powerless vis-à-vis those countries. Even the determination, under Article 39 of the Charter, of any such intervention as threat to or breach of the peace, or act of aggression, can be vetoed by a permanent member. This explains excesses of unilateral coercive measures since the end of the global balance of power such as the war against Iraq in 2003 (justified with a need to counter an imaginary threat from arms of mass destruction, and by reference to the aim of establishing democracy and the rule of law in that country).[41]

Furthermore, the increasing number of punitive sanctions regimes imposed by the United States has demonstrated that a unilateral policy of coercion may quickly turn into a tool of Machiavellian politics – to induce other states to change their behavior solely because the state using coercive measures has so decided. The abrogation of the Iran nuclear treaty in 2018 and subsequent imposition of a wide range of punitive political and economic sanctions against that country by the United States are a case in point.[42] Other U.S. sanctions regimes,

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[38] Cf. the author's analysis, *Sanctions and International Law*. Preprint. I.P.O. Research Papers. Vienna: International Progress Organization, 2019, ch. III.

[39] Cf. Sheri P. Rosenberg, "Responsibility to Protect: A Framework for Prevention," in: *Global Responsibility to Protect*, Vol. 1(2009), p. 449.

[40] There is no binding jurisdiction of the International Court of Justice (unless the states concerned have submitted themselves to the Court's jurisdiction, whether explicitly or implicitly [in relation to an international treaty that may be applicable in a given case]). As regards individual responsibility, ad hoc courts, established by the Security Council, as well as the International Criminal Court (ICC) have proven either ineffective or lacking jurisdiction in most cases. Concerning the ICC, cf. Hans Köchler, "Justice and Realpolitik: The Predicament of the International Criminal Court," in: *Chinese Journal of International Law*, Vol. 16, Issue 1 (2017), pp. 1-9.

[41] Cf. The Iraq Crisis and the United Nations, pp. 55ff.

[42] On 8 May 2018, President Donald Trump decided the withdrawal of the United States from the Joint Comprehensive Plan of Action (JCPA) of 14 July 2015. The Plan was negotiated with Iran by the five permanent members of the Security Council plus Germany and the High Representative of the European Union for Foreign Affairs and Security Policy, and subsequently endorsed by the Security Council in resolution 2231 (2015), adopted at its 7488th meeting, on 20 July 2015.

often including extraterritorial enforcement (euphemistically labeled as "secondary sanctions"),[43] are related to human rights and/or rule of law issues on which the U.S. claims to be the authoritative arbiter.[44] Such unilateral policies and actions, undertaken with an attitude of self-righteousness (that is further encouraged by the absence of checks and balances in the existing system of the UN), often lead to new threats, or may increase existing threats, to international peace and security in the meaning of Chapter VII of the UN Charter.

In all these cases, the *external* aspect of state sovereignty is "operationalized" in a sense of quasi-absolute discretion, enjoyed by a single state, concerning the use of coercive measures against other states. Instead of freedom from coercion, this face of sovereignty means the freedom to coerce, i.e. an arrogation of the monopoly of violence, which, at the international level, is vested in the *collective* authority of the Security Council.

Conclusion: The statutory dilemma

In modern international law, sovereignty does not mean absolute discretion of despotism, but that the state, as entity of international law, is not bound by the will of other states. *Any* state decides itself into which legal obligations it enters, and *all* states together are equally bound by the norms of *jus cogens*. Only such a system is in conformity with the autonomy and dignity of citizens, collectively represented and articulated by the state.[45] *Self-determination* as collective human right can only be realized in such a normative context.

Coercion is a tool at the meta-level – to ensure respect of the sovereignty of *all* states on the basis of mutuality. Thus, coercive measures must be exercised *collectively* and *non-arbitrarily*. However, the latter is impossible under present statutory conditions. No argument can explain away the fact that the principle of sovereign equality contains a *contradictio in adjecto* in connection with the privileged status of the Council's permanent members according to

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[43] In resolution 72/168 (fn. 35 above), the United Nations General Assembly strongly objected to the extraterritorial application of sanctions and called upon all Member States "to take administrative or legislative measures, as appropriate, to counteract the extraterritorial applications or effects of unilateral coercive measures." (Para. 5)

[44] Cases in point are the so-called "Helms-Burton Act" ("Cuban Liberty and Democratic Solidarity [Libertad] Act of 1996"), the "Global Magnitsky Human Rights Accountability Act" (2016), and the "Countering America's Adversaries Through Sanctions Act" (2017), adopted by the United States Congress.

[45] Cf. Hans Köchler, "Sovereignty, Law and Democracy versus Power Politics," p. 61. – Cf. also the position of Michael Ignatieff according to whom "the right of states to be sovereign [–] derives in turn from individual self-determination, the right of individuals to be free." ("The Return of Sovereignty," in: *The New Republic*, 25 January 2012, at https://newrepublic.com/article/100040/sovereign-equality-moral-disagreement-government-roth)

Article 27(3).[46] The very concept of sovereignty becomes void of any meaning if some are (legally) "more equal" than others. At the normative level, there is no such thing as "limited sovereignty" – unless constraints (such as the commitments under *jus cogens*) equally apply to all sovereign actors. The privileges accorded to a small number of countries – in a statute meant to ensure peaceful co-existence on the basis of mutual respect – have not only eroded that very system, but also reintroduced the *jus ad bellum* through the back door.[47]

Under these circumstances, the only constraints on the arbitrary exercise of power lie in the very power of (rival) states holding each other in check. This may also have been an unintended effect of the veto in the period after 1945, when a balance of power actually existed among the Security Council's P5, and later among the two superpowers of the Cold War.

As regards the primacy of power not only in factual, but also in statutory terms, there is no remedy under the UN Charter. Because of Article 108, any amendment affecting the status of the permanent members will remain a desideratum, at least for the foreseeable future.[48] The inconclusive reform debates within the UN system itself since the Security Council Summit of 1992[49] (and in particular related to the Secretary-General's 2005 Report to the General Assembly)[50] have made it more than obvious that, in the "normative logic" of the UN, power trumps law.

The issue is not merely the abolishment of the veto rule in the Security Council, because it is incompatible with sovereign equality. The dilemma of *ideal vs. real* is most striking in an open violation of the fundamental principle of justice, *nemo judex in causa sua*. In tandem with the veto, the non-obligation for a party to a dispute to abstain from voting[51] has established a position of immunity – and impunity – for the permanent members in matters

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[46] Unlike as suggested by some international law experts, there can be no "relative" juridical equality of states in distinction from their "political" or "functional" inequality. Cf. Boutros Boutros-Ghali, "Le principe d'égalité des États et les organisations internationales," in*: Recueil des cours - Académie de droit international de La Haye / Collected Courses of the Hague Academy of International Law*, Vol. 100 (1960), pp. 31ff.

[47] Hans Köchler, *The Voting Procedure in the United Nations Security Council*, p. 46.

[48] The Article requires the votes of "all the permanent members" for any amendment to be adopted.

[49] Meeting of the Security Council, held at the level of Heads of State and Government on 31 January 1992 in connection with the item entitled "The responsibility of the Security Council in the maintenance of international peace and security." *Note by the President of the Security Council*. UN Doc. S/23500, 31 January 1992.

[50] "In larger freedom: towards development, security and human rights for all." *Report of the Secretary-General.* United Nations, General Assembly, Fifty-ninth session, agenda items 45 and 55, Doc. A/59/2005, 21 March 2005, Par. 170.

[51] Article 27(3); see fn. 28 above.

of war and peace under Chapter VII of the Charter.

Removing the subordinate clause of Paragraph 3 of Article 27 – "provided that, in decisions under Chapter VI, and under Paragraph 3 of Article 52" – would eliminate this particular conflict between idea and reality of justice. Because it has become customary to consider abstention from voting as not being in contradiction with the unanimity requirement of the Charter,[52] this could allow the Council to adopt decisions on actions of the P5 also in cases where those countries are party to a dispute. However, such an amendment, aimed at eliminating one of the most corrosive normative contradictions in the Charter, has proven impossible, simply because of realpolitik. The amendment would tie the hands of the permanent members, the "sponsoring governments" of 1945, who created the organization on the understanding – and statutory assurance – that they will not be restrained in the most sensitive domain of international relations: the use of force.[53]

The Charter, instead of upholding sovereign equality, undermines that very principle through enabling unilateral uses of force by especially designated countries and their allies. Thus, realpolitik reveals the *dual face* of sovereignty: the statutory freedom *of all* from coercion is rendered meaningless by the effective freedom *of the few* to coerce. What remains is the logic of mutual deterrence. There will be no international rule of law without a *comprehensive* and *consistent* system of coercion.

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[52] Although Article 27(3) requires the "concurring votes" of the permanent members, decisions under Chapter VII have often been adopted with the abstention of P5 members (e.g. the People's Republic of China). This practice has been acknowledged by the International Court of Justice: "… the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. (…) This procedure followed by the Security Council (…) has been generally accepted by Members of the United Nations and evidences a general practice of that Organization." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, at 22) On the development of the debate within the UN, cf. also Renata Sonnenfeld, *Resolutions of the United Nations Security Council*. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1988, pp. 46ff.

[53] Not long after the Organization's establishment, this was made abundantly clear by Cordell Hull, U.S. Secretary of State 1933-1944, and one of the most influential drafters of the UN Charter: "… our government would not remain there a day without retaining the veto power." (*The Memories of Cordell Hull*. New York, 1948, vol. 2, p. 1664)