Unlawful Resolutions of the Security Council and their Legal Consequences

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The question of whether the ICJ is entitled to deal with the legality or illegality of Security Council resolutions, under Article 25 of the Charter, or whether the Court must abstain from any control in this regard, has been the subject of much recent discussions[1]. But the problem of the Court's competence is not the subject matter of the following considerations. The competence of the Court ratione personae is, until today, clearly limited – only states can be parties before the Court –, so that only in rare cases this problem may arise. Evidently, there is no competence of the Court to declare a resolution with binding effect upon the Security Council, to be null and void, because the decisions of the Court produce such a binding effect only inter partes. Therefore, the problem of the legality of a resolution can only become relevant as a preliminary question. Also, the often stressed high authority of the Court[2] cannot entail a competence in this field, nor can its judgments per se create customary law[3]. If a party should ever win a case, due to a Court's decision denying

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1 M. Bedjaoui, *The New World Order and the Security Council, Testing the Legality of its Act*, 1994, 131 et seq.; H. Mosler, "On Art. 92", 990 et seq., in: B. Simma (ed.), *The Charter of the United Nations. A Commentary*, 1994; T.Stein, "Das Attentat von Lockerbie vor dem Sicherheitsrat der Vereinten Nationen und dem Internationalen Gerichtshof", *AVR* 31 (1993), 206 et seq.

2 G. Jaenicke, "Völkerrechtsquellen", in: H.J. Schlochauer (ed.), *Wörterbuch des Völkerrechts*, Vol. 3, 1962, 772, qualifies the decisions of the ICJ to produce a quasi normative effect; W. Heintschel v. Heinegg, "Die weiteren Quellen des Völkerrechts", in: K. Ipsen (ed.), *Völkerrecht*, 1990, 225.

3 D.P. O'Connell, *International Law*, Vol. I, 1965, 30: "In discovering the formation of international law, it is important not to underestimate the

the binding force of the resolution, a third state, not being party in that case, may use the decision as an argument, but it cannot claim not to be bound on account of this decision. Nevertheless, litigation may arise if a state, bound by a decision of the Court, refuses to fulfill its obligations towards third states in respect of a resolution by invoking the Court's decision.

Apart from these procedural questions, it must first be clarified whether resolutions of the Security Council, emanating under Article 25 of the Charter, can really be unlawful or whether they create law by themselves. Only when unlawfulness must be stated, the problem arises of whether an unlawful resolution produces, nevertheless, a binding effect. If one denies such an effect, how states should behave when facing this situation? An example may serve to focus on this problem: The Security Council established a tribunal in order to convict war criminals who committed cruelties in former Yugoslavia. If the resulting resolution would not be covered by the competence of the Council[4], would then a state be free to disregard it? And what would be its relationship with other states which did recognize the validity of the resolution?

I. As to the Question of Legality or Illegality of Resolutions

The United Nations, in their capacity as an international organization, are a subject of international law; they have a legal personality. Every subject of international law is bound by international law and may, therefore, violate international law in a specific situation. Thus, one can, prima facie, assume that a resolution of the Security Council could be unlawful, measured on objective rules of international law. The competences may be overstepped, or substantive rules of the Charter or of customary international law applicable besides the Charter[5] may be disregarded. The extreme position taken by some scholars before World War I , stressing the view

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role of judicial decisions in the cristallisation of custom"; but see K. Doehring, "Die Rechtsprechung als Rechtsquelle des Völkerrechts. Zur Auslegung des Art. 38 Abs. 1 Ziff. d des Statuts des Internationalen Gerichtshofs", in: *Richterliche Rechtsfortbildung*, Festschrift der Juristischen Fakultät zur 600-Jahr-Feier der Ruprecht-Karls-Universität Heidelberg, 1986, 549 et seq.

4 As to this question K. Oellers-Frahm, "Das Statut des internationalen Strafgerichtshofs zur Verfolgung von Kriegsverbrechen im ehemaligen Jugoslawien", *ZaöRV* 54 (1994), 417/18.

5 ICJ Reports 1984, 424.

that every state is free to determine by itself the limits of its rights, is, of course, abandoned. This position was based on the premiss that international law is a system of pure coordination and opposed to any subordination, and that, therefore, the successful execution of the state goals furnishes the evidence also of its rights[6]. Such a view could lead to the assumption that the Security Council alone determines its rights. But this position is, of course, not tenable. The existence of objective rules in international law cannot be challenged as it was the case in former times, and the common view today recognizes the subordination of all legal persons under the rules of objective international law. Therefore, the assumption that the United Nations – as a quasi sovereign organization – is competent to judge alone on the lawfulness of its own behaviour, cannot be justified. A sovereign state in its relations to other sovereign states must accept that these relations are governed by rules that bind every sovereign and that this subordination under common rules cannot unilaterally be abolished, inspite of the fact that no instance exists being competent to determine and define the law finally[7]. This reference to the position of sovereign states is meant to show that sovereignty alone is not an argument proving the legal independence of a legal subject. That is also true for the United Nations.

Despite all these arguments some considerations may be opposed to them. One could, perhaps, describe the Charter of the United Nations as a world constitution and say that the Charter is meant to work in this direction[8]. Additionally one may invoke in this connection the principle of universality[9]. Under this view one could argue that also under the constitution of a state the subordinated legal subjects have to obey all orders of the supreme authority, even when they are not in conformity with the existing rules. The binding force of those orders persists as long as no actus contrarius is pronounced. A Constitutional Court, too, when controlling the government, may disregard the existing law, but neverthe-

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6 E. Kaufmann, *Das Wesen des Völkerrechts und die clausula rebus sic stantibus*, 1911, 153, took the view that the won war proves the winner's right.

7 H. Steinberger, "Sovereignty", in: R. Bernhardt (ed.), *EPIL* 10 (1987), 408: "Sovereignty is a legal status within but not above international law".

8 It is a widely accepted view that the interpretation of the Charter corresponds to that of a constitution; Mosler, see note 1, 980, characterizes the Charter as a "great constitutional instrument"; R. Monaco, "Sources of International Law", in: R. Bernhardt (ed.), *EPIL* 7 (1984), 426; G. Ress, "Interpretation", in: Simma, see note 1, 27 et seq.

9 K. Dicke, "Universality", in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. 2, 1995, 1353.

less its decisions bind all legal subjects. Moreover, in some states the Highest Court is not competent to control the legislator and the government when acting in conformity with the will of the parliament, and in states disposing of a High Court which has the competence to exercise judicial review, the judiciary abstains from intervening in the activities of the political authorities where questions of an essentially political nature are at stake. If judicial review is refused, a governmental action remains uncontrolled regardless of its legality. If a French Court refuses to admit a case with the argument that it is confronted with an act "de gouvernement", no control will be existent[10]. The well known political question doctrine in the United States has the same result[11], and in the United Kingdom the act of state doctrine frees the government from any judicial control when invoking the prerogative of the crown[12]. In all these cases, i.e. when the nonjusticiability of the government action is recognized, those actions produce binding force erga omnes regardless of their lawfulness. Only in cases where the illegality of the government behaviour oversteps an insupportable degree one may think of a right of resistance; but even this right is questioned by famous philosophers, e.g. by Immanuel Kant[13]. But even such a right to resist, based on natural law and directed contra legem, cannot be positively articulated in the constitutional text; a constitution guaranteeing a right against itself abolishes itself[14].

If we are prepared to qualify the Charter of the United Nations as a world constitution, we might also be prepared to accept that even illegal actions of such a world government must be tolerated. The rationale to compare per analogiam a state's constitution with a kind of world constitution may be based on the following suggestions. A national government may act illegally, and even a constitutional court may do so. The reason for accepting, nevertheless, the binding force of those decisions can be found in the inevitable necessity to uphold peaceful life in the community whose legal system is normally in accordance with the rule of law. One may even ask whether, under certain conditions, the strict observance of the legality could entail the complete destruction of the community. The

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10 J.H. Stahl and D. Chauvaux, "Chronique générale de jurisprudence constitutionnelle française", *AJDA* 51 (1995), 684 et seq., dealing with the litigation concerning the legality of nuclear tests. The decision of 29 September 1995 is reported on 749.

11 Baker v. Carr, 369 U.S., 186, (1962); T.M. Franck, *Political Questions. Juridical Answers*, 1992.

12 R.J. Walker, *The English Legal System*, 6th edition, 1985, 172.

13 I. Kant, *Die drei Kritiken* , edited by R. Schmidt, 1952, 411 et seq.

14 H. Krüger, *Allgemeine Staatslehre*, 1964, 948; K. Doehring, *Allgemeine Staatslehre*, 1991, 104 et seq.

human being, as a political animal, cannot survive when peaceful life is not possible. When we transfer this basic perception into the system of the United Nations, we might conclude that the international community, too, can only survive by accepting final orders of the world government which may be not always in accordance with all legal requirements.

Of course, such a concept seems to result in the statement that it would be better to have a unlawful legal order than to have a lawful legal disaster. The legal theory of a consistent consequent decisionism comes to the same result, as has been expressed by Thomas Hobbes in his famous statement: "auctoritas non veritas facit legem". International rights and objective norms may be set aside if otherwise serious dangers and sufferings must be expected, or even the existence of the community as such could not be protected.

The rationale of the right to disregard legal rules in a situation of distress is also relevant in this connection. In international law, too, the invocation of the state of distress can justify neglect of legal rules, which normally must be observed[15]. Again an example may be helpful. Suppose the Security Council declares a state to be an aggressor although objectively this qualification is wrong or looses its justification due to later information[16]. Should states, nevertheless, be bound by the resolution, and should states be obliged to respect the resolution when the Security Council insists on the argument that peace can only be preserved this way? There are many examples of such behaviour. The right to invoke the situation of distress as an escape clause, may that be as a justification or exculpation, forms part of general principles of law, well known in nearly all legal systems, and this right also forms part in the ILC's Draft on the responsibility of states[17]. The classical authors when treating general theories of law and state often dealt with the so called "Staatsraison", i.e. the question of whether the need to protect the state against its complete destruction prevails finally over legality.

Where constitutions, e.g. that of Germany, confer upon the Constitutional Court the competence to review not only legal but also political decisions of the government[18], due to the impact on constitutional norms,

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15 K. Zemanek, "Das Kriegs- und Humanitätsrecht", in: H. Neuhold (ed.), *Österreichisches Handbuch des Völkerrechts*, Vol. 1, 2nd edition , 1991, 419.

16 The situation of changing circumstances is envisaged by E. Suy, "Some Legal Questions concerning the Security Council", in: I. v. Münch (ed.), *Staatsrecht — Völkerrecht — Europarecht*, Festschrift für Hans-Jürgen Schlochauer, 1981, 677 et seq.

17 Cf. ILC 48th Session, Doc. A/CN.4/L.528/Add.2 of 16 July 1996.

18 But even in those cases the German Federal Constitutional Court hesi-

the problem remains whether the court should really stop government activities when they are the appropriate means to protect against serious dangers for the community. It is interesting to note in this context that the German Federal Constitutional Court permitted to neglect the individual right to just compensation for illegal expropriation. The justification for this decision has been found in the argument that otherwise the complete insolvency of the state must be feared[19]. Those decisions reveal that, at least under extreme conditions, Constitutional Courts may become a political organ of the state. Regardless the legal evaluation of those decisions we must see that every action of a government or a court which cannot procedurally be challenged remains binding upon citizens, may they be legal or illegal.

When we define the United Nations Security Council as a world government acting in the frame of a world constitution, we face the question of whether its decisions must be respected as is the case with the decisions of a national government, described above, i.e. to respect, ultimately, unlawful decisions too. The decisive argument for this result may be again that the strict observance of the legality could entail chaos[20].

However, this analogy meets serious scruples. The constitution of a state does not know lacunae within its legal system, in particular within the system of final decisions. The recognition of lacunae in law destroys the legal system, at least if it is not settled who then is competent to fill the lacunae whenever they appear. Also the constitution of a state cannot extensively enumerate the tasks of the state and the goals justifying its existence[21]. The final purpose of state power is to take care of the welfare of its subjects in a comprehensive sense, whereas the United Nations, in their capacity as an international organization, have only to perform specific purposes laid down in the Charter[22]. The expressly defined pur-

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tates to correct an internationally doubtful position of the government, although under the Consitution all state power is bound not to disregard international law; BVerfGE Vol. 55, 349 (367) and BVerfGE Vol. 77, 137 (164).

19 BVerfGE Vol. 27, 253 (284); Vol. 38, 128 (133); Vol. 84, 90 (130 et seq.).

20 H. Kelsen, *The Law of the United Nations. A critical Analysis of its fundamental problems*, 1950, 294; G. Dahm, *Völkerrecht*, Vol. 2, 1961, 212, took the view that the members of the United Nations are not entitled to question the legality of the Security Council's resolutions and are also prevented from restricting them by reservations; Bedjaoui, see note 1, 127: "Nobody doubts that the maintenance of international peace and security must have priority".

21 Doehring, see note 14, 80 et seq.

22 As to the purposes and principles of the United Nations Charter see: R.

poses of an international organization are the essential element when we define this subject of international law. The United Nations, as it is the case with all other international organizations, enumerate their purposes exactly and exhaustively, and they are not competent to take care of the general welfare of their members. In contrary, the United Nations are obliged to respect the autonomy of the states as far as possible. The rights and duties of states cannot be compared with fundamental rights within a constitutional system, limiting the freedom as far as the common wealth it requires. Within the system of the United Nations any limitation of the autonomy of its members needs specific grounds which must be found in specific purposes defined in the Charter. The Friendly Relations Declaration, too, defines the limits of the freedom of the states by indicating specific duties, and it can also not be compared with a national constitution[23].

Additionally, the Security Council cannot be qualified as an executive power established by a World Constitution. It is true that the members of the United Nations undertake to respect the resolutions of the Council and to accept their binding force, but they cannot be forced to execute actively these resolutions. No system exists to compel the members to cooperate as is the case with national governments. No state is obliged to render military support[24]. The most that can be demanded is that a state has to exercise seriously its discretion when the United Nations ask for military support[25]. Under a national constitution everybody can be forced to participate in common affairs and efforts when otherwise the community cannot be protected against perils, may that be against catastrophes or military aggression.

Moreover, the Security Council cannot be seen as a world government because it is under no strict duty to act when the community of nations is endangered. It is true that normally a competence entails the duty to act. But, regrettably, that is not the case with the Security Council due to the delimited possibility to hinder every action by a veto. A national government, on the other hand, is always under the duty to exercise its competences, and only this duty justifies the acceptance that even unlawful decisions must be respected, whether they stem from a government or a Constitutional Court. If the Security Council remains inactive, the states

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Wolfrum, "On Art. 1", 49 et seq., in: Simma, see note 1.

23 When the Resolution of the General Assembly A/RES/ 2625 (XXV) of 24 October 1970 stresses the principle of sovereign equality of all states, it shows clearly the incompatibility of the United Nations with a state.

24 J.A. Frowein, "On Art. 43", 636 et seq., (638), in: Simma, see note 1.

25 K. Doehring, "Collective Security", in: Wolfrum, see note 9, Vol. 1, 1995, 110 et seq., (113).

keep their right to self-preservation under Article 51 of the Charter. Under a national Constitution the right to exercise self-defense is an exception because one relies on the responsibility of the government. The right to self-defense under the Charter is only restricted when the Security Council takes the "measures necessary" to maintain the security. The term "necessary" in Article 51 of the Charter can only mean measures which afford at least a protection of the same effectiveness as the endangered state could produce by himself[26]. Since any binding effect of the inactivity of the Council cannot be supposed, it would be somewhat strange to suppose a binding force of its illegal actions, because the inactivity might support illegality.

When the Security Council enacts unlawful decisions — i.e. not in accordance with the Charter of the United Nations and the general rules of international law — the question remains of whether the Charter must be interpreted in a way that even those decisions produce binding force upon the members. But the Charter does not answer this question. The position that the whole peace-keeping system of the United Nations would collapse if states would be free to judge themselves about the legality of resolutions and to deny the binding effect due to an autonomous judgment[27], may be conclusive but not coherent and, in the end, not convincing. This position would result in an obligation to do wrong. The Vienna Convention on the Law of Treaties (UNTS Vol. 1155 No. 18232) contains the provision that treaties disregarding peremptory norms of international law are invalid. If ever the Charter of the United Nations would be interpreted in a way that it orders the binding force of resolutions irrespective of their lawfulness, an evident conflict with the Vienna Convention would exist. Moreover, the Charter itself presupposes the existence of peremptory norms, and it declares their respect to be the predominant goal of the whole treaty when strongly confirming the prohibition to use force and the duty to protect human rights.

Suppose a Security Council's Resolution imposes an economic embargo on a state, may be in connection with military measures, and this resolution could entail an intolerable starvation whose result would be comparable with a genocide, it would be incomprehensible to prohibit humanitarian support by a state in this situation. Of course, this situation forms an extreme example, but it demonstrates what may occur when the binding

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26 It is surprising that the term "necessary" in Article 51 of the Charter is seldom defined by commentators, but see *Oppenheim's International Law*, J. Jennings (ed.), 9th edition, Vol. 1, Part 1, 1992, 423, note 22, where it is held that necessary measures are only those producing sufficient effect.

27 See note 20.

force of all the resolutions of the Security Council is recognized, regardless of whether the result of the resolution is in accordance with peremptory norms of international law.

This consideration is meant to indicate a decisive limit of the binding force of Security Council resolutions. As we will see, one may tolerate the disregard of dispositive norms of international law if otherwise the peace among states could not be preserved[28]. But this cannot be true regarding peremptory norms losing their legal nature when not respected[29]. It was a decisive progress in international law that states became willing to recognize the existence of ius cogens. Of course, when different norms of ius cogens come into a collision with each other, the only way to solve the problem is to decide on the predominance of one of them measured on its importance for the protection of mankind. But as long as this balancing act is not necessary, the peremptory norm must be respected.

II. As to the Legal Consequences

When we accept the view that resolutions of the Security Council might be unlawful in a given case, and when we accept the view that those resolutions do not create new law and cannot produce an indisputable binding effect upon the states, as is the case with national constitutional law, the question must be answered what behaviour can be expected from the states.

The basic problem, of course, is to be seen in the possibility that an autonomous judgment of a state about the binding force of a resolution is appropriate to destroy the peace-keeping system of the United Nations and to make it, in the end, ineffective and incapable of accomplishing its goals. Of course, situations may occur where the failure not to support resolutions actively has not the effect to abolish their effectiveness at all. But it could also be that activities of a state may hamper or even hinder any success of the Security Council. But it is often very difficult to distinguish between the effect of an omission of support and an active action against the measures of the Security Council. If, for instance, a resolution orders the prolongation of an embargo, and a state considers

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28 E. Klein, "Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensgefährdenden Streitigkeiten", in: R. Bernhardt et al. (ed.), *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit. Menschenrechte.* Festschrift für Hermann Mosler, 1983, 481, points out that the Security Council may temporarily neglect rights when otherwise peace cannot be preserved.

29 Klein, see above, 487.

this decision to be unlawful and thus ignores it[30], the delivery of goods would be an active action against the orders of the Security Council. But when a state refuses only to freeze capital of the state under embargo, this would be a failure to act. Or, when a resolution of the Security Council obliges not to grant military support to a state which has been declared to be an aggressor, the delivery of weapons to that state would be an active action against the goal of the resolution, whereas the failure not to hinder the aggressor to cross the territory of another state would only be an omission.

Therefore in both cases it is only decisive whether the behaviour of a state, when refusing to recognize the legality of the resolution, hampers or abolishes the effect of the Security Council's measures. The pure distinction between activity and omission can not help to disclose the problem of the obstructing state's rights.

Before the entry into force of the United Nations Charter, every state decided itself about the legality of its conduct, and, of course, this decision could be wrong in respect of objective international law. But no instance existed which could judge in this matter with binding force upon the community of nations. An obligatory judiciary did not exist and does not exist until today. Every state had to rely on self-preservation and self-help to protect its rights. It was the aim of the founders of the United Nations to soften and to moderate this state of affairs by introducing into the Charter the provision that the Security Council resolutions produce binding force. However, — as it has been pointed out — this machinery cannot be meant to perform unlawfulness. The authors of the Charter did not reflect enough on the possibilities to avoid such an unacceptable effect. Thus, the competences of the ICJ have been too limited by excluding international organizations and in particular the United Nations from a standing before the court in a litigation. If this limitation would not be given, every state would be in the position to sue the United Nations for illegal decisions before acting unilaterally against them[31]. Another possibility would be to oblige the Security Council to ask the ICJ for a statement when a state challenges the lawfulness of a resolution. Such a statement could have binding effect upon the United Nations and their members, similar to the situation in states where Constitutional Courts are established. Neutral judges may be in a better position to control the legality of political actions and to test whether they overstep legal boundaries. Of

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30 Suy, see note 16, 677 et seq.

31 Surprisingly, it is not even required in German Constitutional Law to bring a case before the Federal Constitutional Court before the Federal Government takes action against a member of the Federation in order to restore law and order; see BVerfGE Vol. 7, 367 (372).

course, decisions of a Court may also violate the law, but they are, at least, more acceptable than those of political organs acting more or less under the pressure of political interests. The veto-power clearly demonstrates this situation.

All these ways have not been opened, and one cannot expect that they will be opened in the near future. It is, therefore, indispensable to look at legal possibilities to avoid conflicts deriving from this dilemma.

As far as the legality of a resolution is challenged with the argument that the Security Council did not remain in the frame of its competences and thus acted ultra vires, it is — for the purpose of the question treated here — only decisive whether such a disregard of the competences can compel a state to violate the law. The question about the consequences of illegalities within the internal law of international organizations, i.e. the question dealt with by the ICJ in the so called Certain-Expenses-Case[32], are not the subject matter of the reflections presented here which are only concerned with the situation how states should behave when facing an unlawful resolution. When their actions would be unlawful unless a resolution exists, can they become lawful due to a resolution only?

III. Necessity to differentiate between the Sources of International Law

A solution of the problem can only be approached by recalling that the rules of international law are different regarding their force, their rank and their consistence against modifications. The statute of the ICJ contains only a somewhat rudimentary distinction when enumerating them. Nothing can there be found about the relationship between the sources of law. That was obviously left to the doctrine.

Treaties may supersede customary law, but they may also create it[33]. Many treaties on the same subject matter and with corresponding content may permit the conclusion that they establish customary law with binding effect upon the whole community of nations, at least if this lies in the interest of the community. In other cases, a well established rule of customary law will be set aside by the partners of a treaty. But it is also recognized, that peremptory norms of international law, created by the practice of states as so called ius cogens superveniens, can have the effect of rendering invalid provisions of concluded treaties[34]. It may suffice to

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32 ICJ Reports 1962, 151–180.

33 K. Doehring, "Gewohnheitsrecht aus Verträgen", *ZaöRV* 36 (1979), 77 et seq.; E.R. Baxter, "Treaties and Custom", *RdC* 129 (1970), 25–105.

mention here the Vienna Convention on the Law of Treaties. Even general principles of law of a profound nature, originated in national legal systems, may have the effect of rendering treaties inapplicable when their fundamental nature is recognized, or at least they may give rise to modification of the treaty[35].

These short indications may demonstrate that the norms of international law possess different ranks[36]. The respective rank does not depend on the form of the creation of the rule, but on its content in regard of substantive law. Even the will of the parties to the treaty is not always the decisive viewpoint. The well recognized freedom to contract ends where the parties cannot dispose of the subject matter which they want to regulate. In this respect, too, essential differences must be envisaged. In general, a treaty can overrule a norm of customary law having binding effect as long as not set aside by consent of the partners[37]. The parties to a treaty may, for instance, stipulate that the so called international standard for aliens can be neglected regarding the mutual treatment of their nationals. In a peace treaty — to give an other example — the parties may waive the private property of their nationals[38], although private property of aliens is normally protected against taking without compensation. On the other hand, the restriction of the minimum standard by the parties to a treaty meets a clear limit. It should never abolish fundamental human rights, since states cannot dispose of those rights whose true holders are the individuals even under international law. It must, however, be seen that even peremptory norms of international law may be exposed to limitations; the question is only who then is entitled to restrict them. Such a right can only be vested in just that legal subject whose protection is the purpose of the rule, but not the legal subject which aims to widen its powers. The right to self-determination may serve as an example. No state is entitled to disregard or even to abolish this right which belongs to the body of international peremptory norms. Nevertheless, the holder of the right to self-determination, a minority or a state, can waive this right, or may fail to invoke it[39]. But there are other peremptory norms which cannot be

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34 J.A. Frowein, "Ius Cogens", in: R. Bernhardt (ed.), *EPIL 7* (1984), 327 et seq., (329).

35 H. Mosler, "General principles of law", in: Bernhardt, see above, 89 et seq., (96).

36 Monaco, see note 8, 432.

37 T. Buergenthal, H. G. Maier, *Public International Law*, 2nd edition, 1989, 108: "In general, states are free to enter treaties that change, as between them, otherwise applicable rules of customary international law".

38 See e.g. Treaty of Peace with Italy, 10 February 1947, UNTS Vol. 49 No. 747, Article 79.

waived because even the legal subjects, protected by them, have no right to dispose of them. Such rules are meant to protect not only the individual but also the interests of all states and all human beings. Nobody can waive the protection of human dignity, including the individual directly affected. A good example is the prohibition of slavery. Even when an individual would be prepared to tolerate his slavery, this waiver cannot justify such a treatment, since the prohibition of slavery is devoted to protect mankind[40]. The essential question in all these cases remains to know who is the holder of a right and has the capacity to dispose of it.

The following reflections will cope with the question of whether the just demonstrated differences of international norms can serve to disclose the problems in regard of the binding effect of Security Council resolutions. Can they produce binding effect when their content evidently contradicts rules of international law?

We should, first, envisage the situation when resolutions of the Security Council are not in conformity with rules of general customary international law which are disposable, i.e. which can be restricted by cooperating states, but which would be in force as long as no restriction is stipulated. Unilateral restrictions would be illegal. On the other hand, the state affected by this disregard of a rule may fail to protest against the foreign act. One may assume that the illegality is eliminated due to the tolerance of the violated legal subject and the new situation is legalized, or one could assume that the illegality persists but cannot be invoked due to the principle of estoppel or acquiescence; but this difference is unimportant, for the infringed holder of the right has disposed of it and was entitled to do so by waiver.

This consideration may help to solve the problem of illegal resolutions when dealing with international rules open for restrictions by states. The following indications may appear as a somewhat artificial construction, but one cannot deny its conclusiveness. An example again may illustrate this concept. A resolution orders an embargo against a state with the consequence that contracts among private firms can no longer be performed. This resolution results in an expropriation of those firms which remains uncompensated. In the frame of transnational trade one faces the interference into the property rights of foreign nationals and thereby a

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39 The Austrian State Treaty, 15 May 1955, UNTS Vol. 217 No. 2949 excludes an unification with Germany (Anschluß) waiving this way the exercise of self-determination of a specific kind.

40 A.M. Treblincock, "Slavery", in: R. Bernhardt (ed.), *EPIL* 8 (1985), 484, points out that the prohibition "... has finally accorded with the dignity of free humankind".

violation of the international law of aliens under which private property is protected against expropriation without compensation[41].

However, this result which seems to constitute an illegality when based on a unilateral resolution of the Security Council, could be legally reached by a treaty between states. Germany, for instance, promised after World War II not to protest against the confiscation of private property of nationals which had been taken as enemy property during the war. The sequestration during the war was in conformity with international law, but the final confiscation would be in contradiction to international law[42]. Whether in those cases any compensation can be claimed by the expropriated person depends on the national law of the waiving state. International law does not regulate this question.

When we transfer this picture on a Resolution of the Security Council having such an expropriating effect and being prima facie in contradiction to international law, the question arises of whether such a resolution can be compared with a treaty between states which moves the illegality into legality. One could argue that the general obligation, contained in the Charter, to respect and to perform the resolutions signifies the consent of the members of the United Nations with disregard of international rules by the Security Council in cases where the rules belong to disposable norms and where this disregard is meant to serve the goals of the Charter. Since it is permitted to states to abrogate norms of customary law as far as they do not have the character of ius cogens, resolutions of the Security Council may also produce this effect when we assume a general consent of the members expressed by the acceptance of the obligations contained in the Charter. Many provisions of the Charter underline the obligation to cooperate in a broad sense. The willingness to abrogate rules, permitted to states in their mutual relations, could also be presumed in this regard.

It is much more difficult to cope with the situation where resolutions of the Security Council disregard peremptory norms of international law or when they have the effect that states violate those norms being compelled to perform these resolutions. Let us look at an example. A military conflict between states creates the danger that one of the participants will be exposed to genocide. A third state may be prepared to intervene with military support for the threatened population, but a resolution of the Security Council orders strictly to abstain from any intervention with the argument that peace can otherwise not be preserved. Suppose this resolu-

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41 R. Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht*, 1985, 53.

42 Convention on the Settlement of Matters Arising out of the War and the Occupation, 23 October 1954, UNTS Vol. 332 No. 4762, Part IV, Article 2 and 3.

tion is based on wrong information or would even signify an arbitrary exercise of the discretionary power of the Security Council, the question arises of whether a state can be bound by such a resolution to abstain from the attempt to hinder genocide. It would be an absurd assumption to recognize an order which may result in a permission to commit genocide. Let us look at an other example. Suppose a damaged nuclear plant threatens to cause a catastrophe endangering the population and the environment, and a resolution of the Security Council, based on poor information and underestimating the danger, prohibits any intervention by any state in order to avoid war. Or, suppose a state is prohibited from self-defence by resolution of the Security Council, but the measures taken under Article 51 of the Charter are ineffective, although the Council believes in their effectiveness. The right to self-defence is an inherent right; to commit genocide is a violation of ius cogens and the destruction of the environment is against ius cogens when a certain degree is reached. Must, nevertheless, in all those situations the binding character of a resolution be respected, or can this respect result in an absurdity?

When we are looking for an answer it might be useful to recall the provisions of the Charter dealing with the commitment to a serious loyalty towards the organization and its members[43]. It is a general principle that members of a community are specifically obliged to render mutual assistance and support[44], and that is true for national communities and international communities as well. For a federal state this principle is intensively defined by the German Federal Constitutional Court when invoking the so called "Bundestreue"[45], i.e. enhanced loyalty governing the relations between the federal government and the member states as well as between themselves. This specific loyalty influences not only mutual respect but also mutual support. If a constitution does not contain provisions indicating this basic principle, it may be taken from the spirit of the Federation, and the same concept can be supposed regarding a community of states founding an international organization. The treaty on the European Economic Community declares in its Article 5 expressly the duty to cooperate in the spirit of loyalty and the duty to mutual support[46]. Regarding international organizations one may speak of a general "Organisationstreue", i.e. a special loyalty among the members of the organizations, taking up the terminology of the German Federal Constitutional Court.

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43 See the Arts. 49, 56, 103.

44 As to the interpretation of Article 2 para. 2 see A. Randelzhofer, "On Art. 2", 89 et seq., in: Simma, see note 1.

45 German Federal Constitutional Court, BVerfGE Vol.34, 216 (232).

46 A. v. Bogdandy, "On Art. 5"- note 1, in: E. Grabitz, M. Hilf (eds.), *Kommentar zur Europäischen Union*, 1995.

This special type of loyalty can also be distinguished from the principle of bona fide which is well known when contractual obligations are to be executed, since the loyalty within the organizations or federations requires more than the pure fulfillment of the expressly enumerated duties. The same concept appears also in the method of interpretation. The law-making treaty has to be extensively interpreted, whereas a contract is restrictively interpreted.

This characterized duty to a loyal and helpful cooperation can, of course, also be used to demand an unlimited subordination under the organization's goals. However, this loyalty excludes behaviour which tends to hamper the commonly accepted purposes. When we agree with this concept, it seems appropriate that a state, before acting autonomously and unilaterally against a resolution of the Security Council, arguing that it violates peremptory norms of international law, should inform the Council about its refusal and its intention not to act in conformity with the resolution. This requirement to bring those scruples to the knowledge of the other side corresponds with the principle of proportionality. It finds a comparable parallel in Article 50 of the Charter which provides consultation where a resolution imposes specific economic burdens on a state[47].

The information by the state, filed to the Security Council, should explain why the resolution violates peremptory norms of international law or leads the states to do that. The duty to loyal cooperation, as defined above, would be accomplished when the Security Council seriously investigates the arguments of the protesting state and the invoked facts, and when the Security Council seriously considers whether its decisions could be annulled, modified or maintained so far as they entail obligations of the states.

The above described possibility is not mentioned in the Charter's text. One may, however, argue that this principle of specific loyalty forms part of unwritten international law or even of general principles of law. The duty, for instance, to warn before acting rigorously is well known in regard of the admissibility of reprisals[48]. It finds also expression through the rule which demands to exhaust local remedies before exercising diplomatic protection[49]. Also the rules governing the ius in bello present examples. The requirement to use countermeasures only after having announced

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47 B.-O. Bryde, "On Art. 49", 656 et seq., (658), in: Simma, see note 1, characterizes this prohibition as a lex imperfecta, since the Security Council is under no obligation to react.

48 K.J. Partsch, "Reprisals", in: R. Bernhardt (ed.), *EPIL* 9 (1986), 330 et seq., (331).

49 K. Doehring, "Local Remedies, Exhaustion of", in: Bernhardt, see note above, 1 (1981), 136 et seq.

them by a pre-warning also reposes on general principles of law as developed in municipal law. This concept forms part of basic principles of that what we call rule of law, or "Rechtsstaat". It is the calculability of legal consequences which we are focusing on. Nobody should be under a rule which does not clearly determine what follows when disregarded. Within the considerations treated here that means, the Security Council and members of the United Nations must be aware of the dilemma possibly created by a mutual behaviour which the other side could not expect. The incalculability of the mutual reaction produces fear, uncertainty and danger. That can be avoided when one agrees that the duty to inform and to warn does not only belong to a kind of comity but is conceived as a legal requirement, at least in the frame of an international organization. Of course, there may be situations where pre-warning cannot be expected because too heavy dangers are imminent[50].

If such a pre-warning does not result in a harmonization of the controversial positions, there is no possibility to force, in an extreme case, a state to violate peremptory norms of international law. The legal system provides for no solution. But this situation signifies no particularity of international law. A national legal system, too, may undergo perversities and aberrations of a degree which leads to recognize a right to resist, for instance against the National Socialist Regime, the Stalin Regime or that of Pol Pot. It is even imaginable that the public authorities by invoking their constitutional competencies disregard fundamental rules of law so that resistance against these decisions might be justified. The decision of whether resistance is justified or unlawful rests always with the conscience of the actor and escapes from any general judgment.

Therefore, no legal system, neither national law nor international law, can postulate a right of resistance against itself, i.e. a right contra legem. A Constitution saying that resistance against itself is permitted, abolishes itself. An international system saying that resolutions of the Security Council have binding force but, nevertheless, can be disregarded when a state is not willing to comply with, is no longer a legal system. The risk deriving from the resistance against a legal order which, in the view of the resistant, is profoundly unjust, rests with the resistant. The risk of a state resisting against a resolution of the Security Council rests with this state. But a similar risk rests with the United Nations too, because they may become completely ineffective when not respecting serious arguments against their decisions. Therefore, in cases of controversial legal stand-

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50 K. Doehring, "The Unilateral Enforcement of International Law by Exercising Repraisals", in: R. St. John Macdonald (ed.), *Essays in Honour of Wang Tieya*, 1993, 235–242.

points a legal cooperation of the opponents corresponds to the interests of the organization and its members as well[51].

IV. Conclusions

1. The question of whether the ICJ is entitled to review a resolution of the Security Council, or whether such a competence cannot be conceded, presupposes the legal possibility that the Security Council may act unlawfully.

2. The Security Council is obliged to respect the rules of international law, i.e. the limits of its own competencies under the Charter of the United Nations and the rules of general international law as well.

3. Neither can the Charter of the United Nations be qualified as a World Constitution, nor the Security Council as a World Government. The resolutions of the Security Council do not create law but they have to apply it. The concept of a national constitution under which even illegal orders must be respected when emanated from the last instance and not open to revision, cannot be transferred to the United Nations system.

4. Resolutions of the Security Council might violate rules of dispositive law and those of a peremptory nature as well.

5. Since rules of dispositive law can be abrogated through the consent of states, one may conclude that the acceptance of the Charter as a legal system represents or replaces a general consent concerning resolutions of the Security Council, abrogating dispositive rules of international law.

6. Peremptory norms of international law cannot be set aside by resolutions of the Security Council; those resolutions cannot produce binding force upon the members of the United Nations.

7. States being convinced that the Security Council disregards peremptory norms of international law and, therefore, taking the position to be not obliged to respect those resolutions, are under a duty to inform the Security Council about their scruples. They have to warn the Security Council before, unilaterally, acting against the order of a resolution.

8. The Security Council, when being informed about the reluctance of a state invoking peremptory norms of international law, has the duty to consult this state in order to obtain a reconciliation.

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51 This result also corresponds with the basic concept presented by, G. Ziccardi Capaldo, "Verticalita della comunita internazionale e Nazioni Unite. Un riesame del caso Lockerbie", in: P. Picone (ed.), *Interventi delle Nazioni Unite e Diritto Internazionale*, 1995, 61 (72 et seq.).

9. These mutual duties originate from the obligation of both sides to keep in mind that the members of an organization and its central power as well have to act with due regard of mutual loyalty.

10. If no consent can be reached this way, no state can be bound by resolutions violating peremptory norms of international law. The risk of a misinterpretation of international law rests with the state; the risk of an ineffectiveness of its machinery rests with the United Nations.