

Regrettably, this attitude is manifested also in other cases. In *U.S. v. Enger*⁵⁸ the Department of Justice argued that the Vienna Convention was not self-executing, a view that was wisely rejected by the court⁵⁹ and was obviously inconsistent with the approach taken by the Diplomatic Relations Act.⁶⁰ Recent case law reveals a certain hostility of the courts to the domestic applicability of customary international law or treaties.⁶¹ The purpose of this comment is to call attention to this regrettable and unsalutary trend.

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THE LEGAL EFFECT OF VETOED RESOLUTIONS

On December 31, 1979, the United Nations Security Council, at the initiative of the United States, adopted Resolution 461. It deplored the continued detention of the U.S. hostages in Iran and called on the Government of the Islamic Republic to secure their release. Operative paragraph 6 of the resolution stated that the Council would meet on January 7, 1980, "in order to review the situation and, in the event of non-compliance with this resolution, to adopt effective measures under Articles 39 and 41 of the Charter of the United Nations."¹ As the hostages had not been released, the United States on January 10, 1980, submitted draft resolution S/13735 to the Security Council detailing a sanctions program against Iran.² The question was called on January 13. Ten members voted for the resolution, whereupon it was vetoed by the Soviet Union.³

After the veto, Donald McHenry, U.S. Ambassador to the United Nations, told the Council that

under resolution 461 (1979) the Council undertook a binding obligation to adopt effective measures and under Article 25 of the Charter all Member States are obliged to respect the provisions of resolution 461 (1979). The Soviet veto now attempts to block the membership from fulfilling that obligation. The question then arises what a member bound by resolution 461 (1979) and acting in good faith pursuant to its obligations under Article 2 (2) of the Charter, should do to implement that resolution.

without having sought or urging that advice be sought from the Department of State as to the foreign policy implications of such a position; Brief for the United States in Docket No. 78-1714.

⁵⁸ 472 F.Supp. 490 (D.N.J. 1978).

⁵⁹ *Id.* at 542.

⁶⁰ 92 Stat. 808 (1978). The act formally repealed certain statutes superseded by the Vienna Convention on Diplomatic Relations and provided, *inter alia*, for the dismissal of any action or proceeding against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention; §§3(a) and 5.

⁶¹ See, e.g., *Dreyfuss v. Von Finck*, 534 F.2d 24 (2d Cir. 1976) (customary international law); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (treaty provisions); *Canadian Transport Co. v. United States*, 430 F.Supp. 1168, 1172 (D.D.C. 1977) (treaty violation). For a praiseworthy contrast, see the recent judgment of the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala* of June 30, 1980, 49 U.S.L.W. 2039 (1980), reprinted in 19 ILM 966 (1980).

¹ Resolution 461 (1979), adopted by the Security Council at its 2184th meeting, Dec. 31, 1979, reprinted in 19 ILM 250 (1980).

² UN Doc. S/13735 (Jan. 10, 1980). See also UN Doc. S/PV.2191, at 2 (Jan. 11, 1980).

³ UN Doc. S/PV.2191/Add.1, at 54-55 (Jan. 13, 1980).

. . . the membership of the United Nations at large remains obligated to review the situation and the event of Iran's non-compliance with it, an event that has come to pass, and to take effective measures consistent with the Charter to implement that resolution.⁴

That view was not universally held. The Soviet Union responded in the strongest terms.⁵ Chen Chu of China recalled, in more moderate tones, that his Government had voted for Resolution 461 (1979) but had been rather reserved, at the time, about any subsequent automatic adoption of measures in accordance with its operative paragraph 6.⁶ Now, some 2 weeks later, he felt that sanctions would not contribute to a resolution of the situation.⁷ Hence China's abstention.

Thus it appeared that S/13735, like other vetoed Security Council resolutions, was dead. In fact, reports of its death proved greatly exaggerated.

On April 7, 1980, President Carter announced, coincidentally with the termination of diplomatic relations with Iran, the initiation of a number of programs against Iran and Iranian nationals.⁸ With respect to economic sanctions, Mr. Carter associated himself with S/13735, in part, it would seem, to gain added authority for his action. The President said: "[T]he Secretary of the Treasury will put into effect official sanctions prohibiting exports from the United States to Iran, in accordance with the sanctions approved by 10 members of the United Nations Security Council on January 13 in the resolution which was vetoed by the Soviet Union."⁹ Even more explicit in its use of the vetoed Council resolution was the resolution of the European Common Market Foreign Ministers (ECMFM) adopted on April 22, 1980.¹⁰ Paragraph 5 of the dispatch provided, in relevant part:

The Foreign Ministers of the Nine, deeply concerned that a continuation of this situation may endanger international peace and security, have decided to request their national Parliaments immediately to take any necessary measures to impose sanctions against Iran in accordance with the Security Council resolution on Iran of 10 January 1980, which was vetoed, and in accordance with the rules of international law.

ECMFM's citation of the vetoed Security Council resolution, like President Carter's, may be construed in one sense as no more than an incorporation by reference of the factual program envisaged in the ill-fated resolution. But the ECMFM paragraph also implies that the vetoed resolution is, with "the rules of international law," a coequal basis for the contemplated sanctions program. If the Ministers' view was that a Security Council resolution was not needed for the initiation of trade and other export controls by one or more states against another state engaged in a serious and continuing violation of international law, then the reference to the vetoed resolution was gratuitous and confusing. If their view was that the Charter and inter-

⁴ *Id.* at 61.

⁵ *Id.* at 61-62.

⁶ UN Doc. S/PV.2184, at 11 (1979).

⁷ UN Doc. S/PV.2191/Add.1, at 56 (1980).

⁸ Sanctions Against Iran: Remarks Announcing U.S. Actions, April 7, 1980, 16 WEEKLY COMP. OF PRES. DOC. 611 (Apr. 14, 1980).

⁹ *Ibid.*

¹⁰ New York Times, April 23, 1980, at 12, col. 1.

national law require Council authorization for such sanctions, the invocation of a *vetoed* resolution may have had more significant legal implications. President Carter's language was more cautious than ECMFM's. Though perhaps intended to do no more than gild his decision, it too seemed to imply that an action, otherwise unlawful, might acquire a certain lawfulness because ten states voted for it in the Security Council. There are, in short, a number of indications suggesting that the customary processes of international law are beginning to install, at the international constitutive level, a new modality of Security Council lawmaking. We might refer to it as the "majoritarian" system, for it tends to transpose the majority decision dynamics of the General Assembly to the Security Council, ignoring the veto, and ascribing prescriptive and authorizing power to proposals supported by a majority in the Council but formally ineffective. A consideration and appraisal of the political and legal implications of the innovation would appear urgent.

In general, a proposal that has almost been accepted under the rules of the arena in which it was lodged has no legal effect itself, though it may contribute to the consolidation of a customary norm. Whether it has fallen just short of a majority or been virtually unanimous and then vetoed, it has, under the rules of the arena in which it was forwarded, no prescriptive force. After rejection, it is no longer called a "resolution," but is referred to as a "draft" or "*projet*." Yet because of the many ambiguities in the ethics of organized democracy, proponents who have lost on an issue sparking violent emotions may often feel that there is something inherently unjust in the way the decision procedure worked. This feeling of dissatisfaction will be even stronger when the rules of the arena allow a *liberum veto*, for then it is possible that a nearly unanimous expression will be negated by a single actor. Displeasure notwithstanding, if the arena rules continue to express the common interests of most of the politically relevant actors, no one will insist that a democratic "spirit" overrides a procedural "letter" and that the proposal has actually passed and become law. Indeed, where one of the functions of the veto is to maintain ongoing coordination between the outcomes of the formal arena and processes of effective power, acknowledgement of the lawfulness of the veto, as distasteful as it may be in the particular case, may be necessary for the formal arena's ongoing viability, if not existence.

In the United Nations, the institution of the veto in the Security Council was created as a genetic feature. Charter Article 27 limits decision by majority to procedural matters. "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members." Like Article 5 of the Covenant of the League of Nations, this regime expressed a conception of the inexorable relations between authority and control and a shared feeling about the indispensability of great power consensus both for the effectiveness of individual decisions as well as for the continuing viability of the Organization. The innovation of a majoritarian system as a customary revision of the Charter with regard to Security Council lawmaking is radical

and can be expected to be acceptable only if the features and dynamics of the effective power process have changed.

It is understandable that states denied the veto privilege in an organized arena should chafe at their disability and seek to minimize its legal effect. But it is, to say the least, surprising to find states with the veto consciously undertaking to minimize its effect in order to achieve short-term and quite transient objectives. It is especially disconcerting when the denigration of the veto is not necessary to achieve those ends.

When wielded by adversaries, the veto has worked against the United States. But in a curious way it may have preserved the United Nations by allowing or forcing it to yield to reality. As the relative influence of the United States in the General Assembly has waned, the veto has increasingly served American interests. Indeed, it may now contribute to the ability of the United States to continue to be an active supporter of the Organization. Departures from the veto regime, such as the General Assembly's "Uniting for Peace" Resolution¹¹ (an American initiative), in retrospect are viewed by many in the foreign affairs establishment with very mixed feelings.

Obviously, none of the permanent members of the Security Council is about to surrender the veto. But careless language can erode its effectiveness. Some stand to gain much more than others by the addition of a Security Council majoritarian system that ascribes some legal power to important questions even after they have been vetoed. The United States and Western Europe might well pause and reflect on the long-term constitutional and political implications of installing a majoritarian system in the Security Council before they endorse a revision which may prove irreversible.

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THE CASE OF THE NONPERMANENT VACANCY

Five states are permanent members of the United Nations Security Council.¹ Ten others, characterized in Charter Article 23 as "non-permanent members,"² are elected by the General Assembly for a term of 2 years; no nonpermanent member may be immediately reelected.³ Under Rule 144 of the Assembly's Rules of Procedure, five nonpermanent members are elected each year.⁴ Under Rule 85, election of nonpermanent members is an "important question" requiring a two-thirds majority of Assembly members

¹¹ GA Res. 377A (V), Nov. 3, 1950, 5 GAOR, Supp. (No. 20) 10-12.

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¹ United Nations Charter Article 23(1). Permanent members designated in that provision are the "Republic of China," France, the USSR, the United Kingdom, and the United States.

² Article 23(1) establishes qualitative criteria to guide the Assembly in the election of the nonpermanent members, the most politically significant being that of geographical distribution. In 1963, Article 23 was amended to expand the number of nonpermanent members from 6 to 11. *See infra*.

³ Charter Article 23(2).

⁴ UNITED NATIONS, RULES OF PROCEDURE OF THE GENERAL ASSEMBLY (1972).