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WHEN PERMANENT MEMBERS OF THE UNITED NATIONS SECURITY COUNCIL BREACH INTERNATIONAL PEACE AND SECURITY: REFORM VERSUS STATUS QUO?

This panel was convened at 2:00 p.m. on Wednesday, March 29, 2023, by its moderator, Karin Landgren of Security Council Report, who introduced the speakers: Alain Germeaux, Principle legal adviser of the Luxembourg Ministry of Foreign and European Affairs; Juan Manuel Gómez-Robledo Verduzco, Deputy Permanent Representative to the United Nations for Mexico; Martin Kimani, Permanent Representative to the Permanent Mission of Kenya to the UN; and Jennifer Trahan of the NYU Center for Global Affairs

Remarks by Professor Jennifer Trahan*

What do you make of the events of this year with Russia's invasion of Ukraine?

It is always unsettling when force is used in a way that ignores the rules of international law established in the United Nations Charter—*a fortiori*, when it is by a permanent member of the UN Security Council. Concomitantly, the "veto" privilege that these states have under Article 27(3) of the UN Charter[1] has tended to result in that body being deadlocked it such situations, unable to carry out the peace and security functions it has under the UN Charter. In the present circumstances, the UN General Assembly has recognized Russia's attack on Ukraine as aggression,[2] meaning also that the crime of aggression has been committed.[3]

When a permanent member is the country breaching international law through the unauthorized use of force, it effectively results in the paralysis of the UN Security Council due to the existence of the veto. I have long argued, including in my book *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*,[4] that this need not be the case, if the provisions of Article 27(3) were actually exercised in accordance with existing rules of international law—so that the veto does not block the Security Council from taking action to prevent or stop atrocity crimes, or aggression.[5]

States also have other options to keep the veto within the limits intended by the drafters of the UN Charter. For example, more use could be made of resolutions under Chapter VI of the UN

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[1] The word "veto" is not found in Article 27(3), which states that a resolution requires the affirmative vote of the permanent members in order to pass. *See* UN Charter, Art. 27(3). It is read to permit permanent members to abstain, also allowing the resolution to pass.

[2] *See* GA Res. ES-11/1 (Mar. 2, 2022); GA Res. ES-11/L.2 (Mar. 21, 2022).

[3] For the International Criminal Court's definition of the crime of aggression, see Rome Statute of the International Criminal Court, Art. 8*bis*, July 17, 1998, 2187 UNTS 90 (as amended).

[4] Jennifer Trahan, Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes (2020).

[5] *Id.*, Ch. 4; Jennifer Trahan, *Legal Issues Surrounding Veto Use and Aggression*, 55 Case W. Res. J. Int'l L. 61 (2023) (expanding the arguments to aggression).

Charter, which comes with obligatory abstention of a party to a dispute from voting[6] (although there are limits to what can be achieved under Chapter VI, which covers the pacific settlement of disputes). Russia's February 25, 2022 veto[7] of condemnation of its own aggression was arguably[8] a resolution under Chapter VI; if this interpretation had been pressed, it would have been clear that this resolution should not have been subject to a veto at all.

Russia's invasion also rekindles parallel consideration of how Article 2(4) of the UN Charter can be enforced, and, given Security Council paralysis, what role the UN General Assembly may play. In the present situation, the UN General Assembly has been active, vociferously condemning the invasion (twice),[9] condemning illegal attempts at annexation,[10] and voting for the creation of a compensation mechanism.[11]

There is, however, something more that the General Assembly must do. It should recommend the establishment of a Special Tribunal on the Crime of Aggression (STCoA)[12] if states want the core norm of the UN Charter against aggressive use of force, Article 2(4), to be enforced in the present situation.[13] Such an *ad hoc* response is needed, given the current gap in jurisdiction that exists at the International Criminal Court (ICC) vis-à-vis the crime of aggression, excluding from jurisdiction the nationals of non-states parties and crimes committed on their territories.[14] In the future, states parties to the ICC's Rome Statute must also amend the Statute to fix the ICC's jurisdiction over the crime of aggression and bring it in line with the jurisdiction of the Rome Statute's other three crimes.[15] This is a very important two-step process—creating the STCoA and amending the Rome Statute—to avoid the selective application of justice, ensuring that the crime can be prosecuted both in the present situation and in the future.[16]

Thus, when a permanent member—any permanent member—breaches international law on the use of force, one sees the dramatic limitation in the functioning of the UN Security Council. However, this need not mean that the international community is without options.

[6] Article 27(3) states: "in decisions under Chapter VI, . . . a party to a dispute shall abstain from voting." UN Charter, Art. 27(3).

[7] S/2022/155 (Feb. 25, 2022) (vetoed by the Russian Federation).

[8] There appears to be some controversy whether it was passed under Chapter VI or Chapter VII, with the resolution invoking neither.

[9] GA Res. ES-11/1 (Mar. 2, 2022); GA Res. ES-11/L.2 (Mar. 21, 2022).

[10] GA Res. A/RES/ES-11/4 (Apr. 7, 2022).

[11] GA Res A/RES/ES-11/5 (Nov. 14, 2022).

[12] For discussion of proposed key features, see, e.g., Letter Dated 12 August 2022 from the Representatives of Latvia, Liechtenstein and Ukraine to the United Nations Addressed to the Secretary-General, at Annex: Yale Club Roundtable: A Special Tribunal for the Crime of Aggression Recommended by the UN General Assembly?, UN Doc. A/ES-11/7-S/2022/616 (Aug. 17, 2022), *at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/465/38/PDF/N2246538.pdf?OpenElement; *Blog Series: The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine*, JUST SEC., *at* https://www.justsecurity.org/tag/u-n-general-assembly-and-international-criminal-tribunal-for-aggression-against-ukraine [https://perma.cc/CFG4-XBCV] (Parts I, II, III, IV).

[13] Article 2(4) prohibits force contrary to the UN Charter, while the crime of aggression only covers situations where there has been a "manifest" Charter violation, so the coverage is not coextensive. But the crime of aggression would encompass the more serious UN Charter violations and thus is a way to enforce Article 2(4) through the regime of individual criminal responsibility. *Compare* UN Charter, Art. 2(4) *with* Rome Statute, Art. 8*bis*.

[14] Rome Statute, Art. 15*bis*(5).

[15] *See* Rome Statute, Arts. 12–13 for the ICC's jurisdiction over genocide, crimes against humanity, and war crimes.

[16] *See, e.g.*, *Statement on Russia's Invasion of Ukraine: A Crime of Aggression. The Need to Amend the Crime of Aggression's Jurisdictional Regime*, GLOB. INST. FOR THE PREVENTION OF AGGRESSION (Mar. 24, 2022), *at* https://crimeofaggression.info/wp-content/uploads/GIPA-Statement_24-March-2022-7.pdf [https://perma.cc/FV3Z-SL46] (calling for amending the ICC's jurisdiction regarding the crime of aggression). The author serves as Convenor of The Global Institute for the Prevention of Aggression (GIPA).

What are the full range of possible responses available to the UN Security Council and UN General Assembly for responding to threats or breaches to the peace? Is the framework sufficient for today's world?

The framework (the UN Charter) is sufficient, but it is how aspects of that framework *are read* that is insufficient.

As mentioned, when it is a permanent member that breaches international law on the use of force —or equally true of a permanent member implicated in genocide, war crimes, or crimes against humanity, or shielding another country complicit in committing those crimes—the UN Security Council can become completely marginalized due to paralysis brought on because of the way that the veto is used.[17] The UN Security Council is then unable to carry out its core function of maintaining international peace and security, which of course is its primary responsibility, mandated by the UN Charter.[18]

One measure that can be taken is the issuance of a Uniting for Peace resolution, as occurred in the situation of Ukraine.[19] This sent the matter from the Security Council to the UN General Assembly to take up the issue in a special session. The limitation of the Uniting for Peace process is that it does not grant the UN General Assembly more power than it has under the UN Charter.[20] Accordingly, that process is not a full solution to Security Council paralysis.

States are then left exploring what the UN General Assembly may be able to achieve, within the powers granted to it by the UN Charter. One of the first, and politically important, actions that the General Assembly can do is to condemn the crimes and/or aggression being committed.[21] In the situation of Syria, the General Assembly also created an investigative mechanism (the IIIM)[22] for investigating and compiling evidence of core international crimes (genocide, war crimes, and crimes against humanity) in the absence of ICC jurisdiction. While the ICC has jurisdiction over those crimes in the case of Ukraine,[23] the present situation highlights the glaring jurisdictional gap that exists at the ICC, leaving it unable to investigate and/or prosecute the crime of aggression in the current situation.

The General Assembly's focus now should be on ensuring that the crime can be prosecuted, by recommending the creation of a tribunal for the crime of aggression in the situation. There is precedent for this: the General Assembly was involved with establishing the Extraordinary Chambers

[17] *See* TRAHAN, *supra* note 4, Ch. 1 (background on veto use).

[18] UN Charter, Art. 24(1) (conferring on the Security Council primary responsibility for the maintenance of international peace and security).

[19] SC Res. 2623 (Feb. 27, 2022).

[20] Harry Reicher, *The Uniting for Peace Resolution on The Thirtieth Anniversary of Its Passage*, 20 COLUM. J. TRANSNAT'L L. 1, 34 (1981), quoting Remarks of Mr. Spender (Australia), 5 UN GAOR, C.1, 364th Mtg., at 134, para. 63, UN Doc. A/C.1/SR. 364 (1950). *See also* Reicher at 48 ("The Uniting for Peace Resolution was a constitutional landmark in the history of the Charter—not in the sense of creating *new* powers, but in the sense of revealing a latent potential in the Charter itself, and setting it on a firm foundation."). "It 're-legitimized' what was already there." *Id. See also* Juraj Andrassy, *Uniting for Peace*, 50 AJIL 563, 572 (1956) ("The Resolution grants the Assembly no greater powers than those it has under Article 10 and 11, paragraph 2."); Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SEC. L. 453, 469, 476 (2013) ("[T]he resolution serves to reveal the latent potential of the Assembly already residing within the UN Charter, and constructs a procedural framework for its exercise.").

[21] *See, e.g.*, GA Res. ES-11/1 (Mar. 2, 2022); GA Res. ES-11/L.2 (Mar. 21, 2022) (condemning Russia's aggression).

[22] The full title is The International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes Under International Law Committed in the Syrian Arab Republic Since March 2011.

[23] *See* International Criminal Court, Ukraine, Situation in Ukraine, ICC-01/22, *at* https://www.icc-cpi.int/ukraine (two Article 12(3) declarations accepting jurisdiction). Ukraine could further express its full support for the ICC and the rule of law by acceding to the Rome Statute.

in the Courts of Cambodia (ECCC).[24] Existing precedent further shows that such an international tribunal may be created by bilateral agreement between the UN and the affected country (as was the Special Court for Sierra Leone).[25] An amalgamation of these proven processes should be follow for creating a STCoA for the situation of Ukraine—that is, recommendation by the General Assembly, followed by creation of the tribunal by agreement between the UN and Ukraine.[26] Establishing an international tribunal through the UN would have many advantages over national or regional initiatives. To name just one, a tribunal established through the UN would be able to avoid personal immunities from attaching and shielding top Russian leadership from accountability.[27]

Another way to approach the problem of abusive vetoes, is, as Mexico and France have shown with the French/Mexican initiative,[28] by asking for voluntary veto restraint. This approach is also taken in the ACT Code of Conduct[29]—that the veto should not be used in the face of genocide, crimes against humanity or war crimes. Or, put differently, every state has a positive obligation to vote for a resolution trying to prevent those crimes.

While these initiatives have been gathering widespread support among member states, the events of this past year show, however, that they have left one crime off their list: the crime of aggression. A state should not use its veto to shield its own aggression, as was done with Russia's February 25, 2022 veto of a Security Council resolution that would have condemned Russia's aggression and mandated a host of other measures to restore international peace and security and respect for international law.[30] I say international law, not just the UN Charter, because aggressive use of force is not only a UN Charter violation but also a violation of *jus cogens*.[31]

[24] The ECCC was ultimately formed within the Cambodian court system, although initially added options were explored.

[25] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Residual Special Ct. Sierra Leone (Jan. 16, 2002). The Special Court was created after the Security Council issued a resolution, S.C. Res. 1315 (Aug. 14, 2000), but it was not one under Chapter VII. If the STCoA were created after the recommendation of the General Assembly, it would involve a combination of the processes used to create the ECCC and the Special Court.

[26] *See* Hans Corell, *A Special Tribunal for Ukraine on the Crime of Aggression – The Role of the U.N. General Assembly,* JUST SEC. (Feb. 14, 2023), *at* https://www.justsecurity.org/85116/a-special-tribunal-for-ukraine-on-the-crime-of-aggression-the-role-of-the-u-n-general-assembly [https://perma.cc/D8UG-DKAE]; Oona A. Hathaway, Maggie Mills & Heather Zimmerman, *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly*, JUST SEC. (May 5, 2023), *at* https://www.justsecurity.org/86450/the-legal-authority-to-create-a-special-tribunal-to-try-the-crime-of-aggression-upon-the-request-of-the-un-general-assembly.

[27] *See* Astrid Reisinger Coracini & Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-applicability of Personal Immunities*, JUST SEC. (Nov. 8, 2022), *at* https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/ [https://perma.cc/8R6Q-FPLX]; Jennifer Trahan, *Why a "Hybrid" Ukrainian Tribunal on the Crime of Aggression Is Not the Answer*, JUST SEC. (Feb. 6, 2023), *at* https://www.justsecurity.org/85019/why-hybrid-ukrainian-tribunal-on-crime-of-aggression-is-not-the-answer.

[28] *See* 70th General Assembly of the United Nations, Political Statement on the Suspension of the Veto in Case of Mass Atrocities, Presented by France and Mexico, open to signature to the members of the United Nations, *at* http://www.globalr2p.org/media/files/2015-07-31-veto-political-declaration-final-eng.pdf [hereinafter French/Mexican Initiative].

[29] ACT stands for Accountability, Consistency and Transparency. *See* GA Res. 70/621–S/2015/978, Annex I to the Letter Dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations Addressed to the Secretary-General, Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes (Dec. 14, 2015), *at* http://www.globalr2p.org/media/files/n1543357.pdf [hereinafter ACT Code of Conduct].

[30] S/2022/155 (Feb. 25, 2022) (vetoed by the Russian Federation).

[31] "[A]n overwhelming majority of scholars view the prohibition [of aggressive use of force, i.e., use of force contrary to the UN Charter] as having a peremptory character." James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT'L L. 215, 216 (2011). For a lengthy list of scholars recognizing the peremptory norm, see *id.* at 216 n. 4 (compiling authority); *see also* Katie A. Johnston, *Identifying the* Jus Cogens *Norm in the* Jus Ad Bellum,

Furthermore, the International Law Commission (ILC) makes clear that states must not render aid or assistance in maintaining a serious breach of a preemptory norm of international law.[32] It is difficult to defend a reading of the UN Charter that the veto can be used to aid and assist in maintaining a *jus cogens* violation. I have a law review article questioning the legality of a veto that aids and assists in maintaining the vetoing permanent member's aggression, to which I refer you.[33]

Yet another noteworthy approach is Liechtenstein's resolution, number 76/262, which mandates discussion within the UN General Assembly within ten days of a veto being cast in the UN Security Council.[34] This is an important step in shedding light on abusive vetoes and putting the vetoing permanent member in the position of having to defend its veto. While not stopping such vetoes, it provides a useful moral and political avenue for UN Member States to express their views on the particular veto and against inappropriate veto use more generally.

Another idea is to challenge directly the use of the veto in the face of genocide, crimes against humanity, war crimes, or even aggression, in terms of questioning the legality of such veto use, as discussed further below. Marshalling such a legal challenge—that the UN Charter must be read in a way that is in line with the mandates of international law[35]—would be an important step toward Security Council reform.

Does the current geopolitical context weigh in favor of reform or the status quo?

It is difficult to see how the international community can bear the status quo. There have been vetoes in the face of genocide—potentially one of the vetoes related to the situation of Myanmar[36]—and there certainly would be a veto if China's crimes against the

70 INT'L & COMP. L. Q. 29, 42 (2021); Ulf Linderfalk, *The Source of* Jus Cogens *Obligations – How Legal Positivism Copes with Peremptory International Law*" 82 NORDIC J. INT'L L. 369 (2013). One judge serving on the International Court of Justice (ICJ) has stated that: "[t]he prohibition of the use of force . . . is *universally recognized* as a *jus cogens* principle, a peremptory norm from which no derogation is permitted." Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, 254 (sep. op. Elaraby, J., July 9) (emphasis added) [hereinafter *Wall* Advisory Opinion]. The International Law Commission's list of peremptory norms is as follows:

(a) *The prohibition of aggression;*
(b) The prohibition of genocide;
(c) The prohibition of crimes against humanity;
(d) The basic rules of international humanitarian law;
(e) The prohibition of racial discrimination and apartheid;
(f) The prohibition of slavery;
(g) The prohibition of torture;
(h) The right of self-determination.

Int'l L. Comm'n, Report of the International Law Commission: Seventy-First Session (Apr. 29–June 7, July 8–Aug. 9, 2019), Chapter V Peremptory Norms of General International Law (*Jus Cogens*), Draft Conclusion 23 and Annex (adopted), UN Doc. A/74/10, *at* https://legal.un.org/ilc/reports/2019/english/chp5.pdf (emphasis added).

[32] *See* Int'l L. Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (adopted), Art. 41.2, UN Doc. A/56/10 (Dec. 12, 2001) (hereinafter ARSIWA) ("No State shall recognize as lawful a situation created by a serious breach [of a peremptory norm of international law] . . . nor render aid or assistance in maintaining that situation.").

[33] Trahan, *supra* note 5 (vetoes and aggression).

[34] GA Res. 76/262 (2022).

[35] For a detailed exposition of such arguments, see TRAHAN, *supra* note 4, Ch. 4. Trahan, *supra* note 5 (vetoes and aggression).

[36] The veto occurred in 2007. *See* SC Res. S/2007/14 (Jan. 12, 2007), *at* http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2007/14 (vetoed by China and Russia) (sponsored by the UK and US, the resolution would have called on "the Government of Myanmar to cease military attacks against civilians in ethnic minority regions and in particular to put an end to the associated human rights and humanitarian law violations against persons belonging to ethnic nationalities, including widespread rape and other forms of sexual violence carried out by members of the armed forces"). The obligation to prevent

Uyghurs[37] were ever put to the UN Security Council. There have been vetoes in the face of large-scale war crimes and crimes against humanity including chemical weapons use, with the many vetoes cast related to the situation in Syria.[38] And, most recently, we have seen a veto shielding aggression (the February 2022 veto by Russia).[39]

A Charter amendment is quite difficult to achieve due to the high number of state ratifications (not to mention the agreement of all permanent members) that would be necessitated;[40] additionally, the potential exists that if one section of the Charter were opened, there would be demands to reopen other parts as well. Therefore, the veto appears to be here to stay. Thus, the challenge is how to ameliorate situations where the veto is used abusively, contrary to the dictates of international law.

As mentioned, the French/Mexican initiative, ACT Code of Conduct, and now Liechtenstein's new resolution make important strides to try to voluntarily curb vetoes in the face of genocide, war crimes or crimes against humanity and force a spotlight on veto use. But, thus far, three permanent members[41] have failed to endorse voluntary veto restraint, so there appears to be a limit to what such measures can achieve.

It is time for states to go further by questioning the *legality* of veto use in the face of genocide, crimes against humanity, or war crimes, as I do in my book, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (2020).[42] These arguments can also be expanded to cover aggression.[43]

In the book, I argue that the veto must be seen in the context of other obligations of international law. These include respecting: (1) *jus cogens*; (2) the remainder of the UN Charter, including the UN's Purposes and Principles;[44] and (3) treaty obligations[45] such as the obligation to "prevent" genocide found in Article 1 of the Genocide Convention,[46] and the obligation to "ensure respect for" the 1949 Geneva Conventions found in their Common Article 1.[47] I do not claim the Security Council's actions are subject to all treaty law requirements, because we have the ICJ's *Lockerbie*

genocide is triggered as soon as there is a "serious risk" of genocide occurring. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 ICJ Rep. 43, para. 431 (Feb. 26, 2007).

[37] The Global Accountability Network, "A Multi-Generational Effort to Eliminate The Uyghurs: An Ongoing Genocide," Sept. 2022, *at* https://www.globalaccountabilitynetwork.org/_files/ugd/a982f0_6b218a6e88324ca385b3b0d044e1770f.pdf. The author was a principal drafter of that report.

[38] For full analysis of the Syria vetoes and the crimes occurring on the date of each veto, see TRAHAN, *supra* note 4, Ch. 5.1.

[39] S/2022/155 (Feb. 25, 2022) (vetoed by the Russian Federation).

[40] *See* UN Charter, Art. 108.

[41] China, Russia, and the United States endorse neither the French/Mexican initiative nor the ACT Code of Conduct, although the United States has made commitments to be restrained in its veto use.

[42] TRAHAN, *supra* note 4.

[43] *See* Trahan, *supra* note 5 (vetoes and aggression).

[44] UN Charter, Arts. 1–2.

[45] The third argument does not apply regarding aggression, where the author's second and third arguments merge because the treaty being breached by aggression is the UN Charter.

[46] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277 [hereinafter Genocide Convention].

[47] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12 1949, 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12 1949, 75 UNTS 85; Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12 1949, 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 UNTS 287 [collectively, 1949 Geneva Conventions]. The same Common Article is found in Additional Protocols I and III but not Additional Protocol II.

ruling to the contrary,[48] but a veto shielding genocide needs to be seen differently given that genocide is prohibited at the level of *jus cogens*.[49]

I have a short one-page document describing my ideas that I am happy to share,[50] as well as a slightly longer version.[51]

My basic proposition is simple: assume genocide is occurring and states serving on the Security Council have a plan to try to stop the genocide. To cast a veto maintains the *status quo*—it helps perpetuate the commission of genocide. That is not permitted under international law. Among other things,[52] it is a violation of the ARSIWA, which, as mentioned, specifies that states may not render aid or assistance in maintaining a situation where a serious breach of a peremptory norm of international law is occurring.[53] Moreover, that obligation was recognized as binding in the ICJ's *Wall* and *Chagos* Advisory Opinions.[54]

States should consider these arguments and (1) make statements on the record at the UN and other *for a* that the veto should not be used in a way that is at odds with obligations of international law and the UN Charter; (2) consider issuing a UN General Assembly resolution reflecting these obligations; and (3) consider having the UN General Assembly make a request for an Advisory Opinion from the International Court of Justice on the question.

[48] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), Order of 14 April 1992, Request for the Indication of Provisional Measures, 1992 ICJ Rep. 3; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Order of 14 April 1992, 1992 ICJ Rep. 114, 175 (dismissing the provisional measures request on the grounds that, under Article 103 of the UN Charter, the obligations of the Montreal Convention on airline safety were outweighed by obligations created under Security Council resolution).

[49] *See* note 31 *supra* (the ILC listing the prohibition of genocide as a peremptory norm); *see also id.* (including crimes against humanity and basic rules of international humanitarian law as peremptory norms).

[50] *Concept Note: Legal Limits to the Use of the Veto*, *at* http://www.legislatingpeace.com/vetoes/note.pdf.

[51] *Concept Note: Legal Parameters to the Veto Power in the Face of Atrocity Crimes*, *at* http://www.vetoesinitiative.com/longernote.pdf.

[52] Such a veto is also contrary to the UN Charter's Purposes and Principles, as well as the obligation in the Genocide Convention to prevent genocide. For full exposition of these arguments, see TRAHAN, *supra* note 4, Ch. 4.2–4.3.

[53] ARSIWA, *supra* note 32, Art. 41.2.

[54] In the *Wall* Advisory Opinion, the ICJ applied Article 41 when it stated: "All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation . . . ." *Wall* Advisory Opinion, *supra* note 31, at 200, para. 159. In the *Chagos* Advisory Opinion, after determining that "the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination"—which it recognized as an *erga omnes* obligation—and that "the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State," the ICJ held that "the United Kingdom has an obligation to bring to and end its administration of the Chagos Archipelago as rapidly as possible, and that all Member State must co-operate with the United Nations to complete the decolonization of Mauritius." Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95, paras. 177, 182 (Feb. 25).

When Permanent Members of the UN Security Council Breach International Peace and Security: The Way Forward?

*By Dr. Alain Germeaux**

Russia's aggression against Ukraine constitutes perhaps the most serious challenge to the international order since the creation of the contemporary multilateral system. The resurgence of armed conflict in Europe through the aggression by a permanent member of the Security Council (P5) against another sovereign state shakes the normative foundations of the system of collective security based on international law and the central role of the United Nations. The design of the UN Charter affords the P5 greater rights, but with those rights come expectations of greater responsibilities, notably in the maintenance of international peace and security.

The legal framework[1] is set by Article 2(4) of the Charter, which contains the well-known requirement that "[m]embers shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." According to Article 24(1) in turn, "[m]embers confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." Finally, by virtue of Article 25 of the Charter "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council."

Even though the Security Council is the principal political organ of the United Nations, with—arguably—a self-consciously political rather than legal role,[2] the current situation places the collective security architecture under strain with regard to both its efficacy and legitimacy.

Cast in different terms, if one were to apply an economic analysis of international law, the Security Council delivers the public good of international security and when it fails to do so, it then becomes legitimate for others to act as executive agents of the international community in order to resolve the ensuing collective action problem.

Lack of action by the Security Council thus entails a higher temptation to act outside of the UN framework, which, however, carries the risk of fostering more conflict in the longer term. Nonetheless, forms of a *clausula rebus sic stantibus* argument[3] have surfaced periodically, based on the notion that a fundamental change of circumstances has occurred, with the mandatory mechanisms based on a standing United Nations force never having come into effect,[4] therefore endowing other actors to act in its absence.

The difficulties of the UN Charter system for collective security to resolve conflict or establish accountability when a permanent member is involved have canvassed the picture of a lack of effective response to imminent or on-going conflict by the Security Council. These tendencies are exacerbated by the Council's "retreat from accountability" in recent years,[5] through inconsistent action

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[1] *See also* Alain Germeaux, *The International Legal Order in Global Governance: Norms, Actors and Policy* 269–79 (2022).

[2] When determining the existence of a threat to the peace, breach of the peace, or act of aggression under Article 39 of the Charter, and deciding what measures should be taken, it is commonly accepted that the Security Council enjoys a wide degree of discretion, in which political considerations can and do make their presence felt.

[3] Vienna Convention on the Law of Treaties, Art. 62, May 23, 1969, 1155 UNTS 331.

[4] See, for example, the dissenting opinion of judge Sir Robert Jennings in the 1986 *Nicaragua* case that the UN Charter system of collective security has never come into effect: Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ Rep. 544 (June 27).

[5] Security Council Report, Research Report – The Rule of Law: The Retreat from Accountability (Dec. 23, 2019).

in upholding accountability, reduced commitment to ending impunity for the most serious crimes and inability to bring justice to victims or to seriously affect the course of armed conflict.

Despite these criticisms, only the Security Council has the ability to create binding obligations on states engaged in a conflict and on the wider United Nations membership. Notably, the Council alone can adopt coercive measures under Chapter VII of the Charter. When the Council is unable to act due to a permanent member breaching international peace and security, or committing international crimes, it creates a void that no other actor can entirely fill.

At the same time, the UN General Assembly likewise has a role to play as it represents the entirety of UN membership and thereby the international community. Its condemnation of aggression carries political weight and the UN General Assembly (UNGA) is an important vector in conferring legitimacy on the international stage, such as on the issue of accountability for the crime of aggression against Ukraine and establishment of a special tribunal to that end.

General Assembly Resolution 76/262 mandates the UNGA to meet within ten days whenever a veto is cast in the Security Council.[6] Therefore, failure of the Council to act now automatically triggers the UNGA to be concerned with the matter and have a debate, unless there is already an Emergency Special Session on the same matter.

Furthermore, there is the option of activating the General Assembly track under the "Uniting for Peace" mechanism in UNGA Resolution 377 of 3 November 1950, whereby "if the Security Council . . . fails to exercise its primary responsibility . . . the General Assembly shall consider the matter immediately with a view to making appropriate recommendations . . . ." Thereby, upon request by any nine members of the Security Council or a majority in the General Assembly, an Emergency Special Session is convened within 24 hours under the Uniting for Peace mechanism. This most recently happened in February 2022 following Russia's aggression against Ukraine.

The General Assembly may only recommend measures, however, where such action would be legitimate even absent a Security Council resolution, for instance self-defense against an act of aggression. Otherwise, the General Assembly may not recommend or even mandate the use of force for enforcement purposes. Accordingly, the General Assembly cannot act as a substitute to the Security Council in the maintenance of international peace and security.

Returning to the Security Council, the right to veto was accorded to the P5 as a precondition for the long-term viability of the United Nations system; the presence of an element of selectivity was thus always inherent in the Charter scheme. There are, however, potentially underexplored areas in the Charter that may be re-examined in order to make better use of existing instruments.

One such instance is Article 27(3) of the Charter. The first part of the sentence contains the well-known phrase that all substantive decisions of the Security Council must be made with "the concurring votes of the permanent members." Article 27(3), however, not only enshrines the veto of the P5, it also institutes a limitation to this power through the principle of voluntary abstentions, slightly tempering the scope of the veto under Chapter VI of the Charter whereby a "party to the dispute shall abstain from voting." The rationale here is that Security Council members should not be allowed to be party, judge, and jury at the same time. It could be argued that this should also apply to states providing substantial diplomatic, political and military support to another state.

Until now, voluntary abstentions have been rare. Security Council practice has always been inconsistent and almost non-existent since the 2000s.[7] This trend can be reversed, however, especially as Article 27(3) is already inscribed in the Charter and can be raised by any Council member.

[6] UN Doc. A/RES/76/262 (28 April 2022): Standing mandate for a General Assembly debate when a veto is cast in the Security Council.

[7] Security Council Report, Research Report – The Veto (Oct. 19, 2015).

On the other hand, continued absence of invoking this provision risks not only reducing it to desuetude, but such neglect could also factually broaden the scope of the veto.

While disregard of the provision by elected Council members may have limited effects; in the case of a permanent member, should others forego to invoke Article 27(3) when applicable, nothing stands in the way of permanent member to veto a decision on a dispute to which it is a party. Especially given the difficulties associated with formal amendments to the Charter and the hurdles to clear to that effect, it is all the more important to explore the full range of options already contained in the Charter.

As the principal political organ of the United Nations, the Security Council's decisions necessarily reflect the specific set of circumstances that prevail at a given point in time. The UN Charter architecture is based on the assumption that in matters of international peace and security, the Security Council requires the collective support, or at least tacit acquiescence, of the permanent members. In this way, the Council's role is enhanced to the extent that its decisions are carried by the P5.

Reform can concern both the range of actors involved and the processes of decision making. While the Security Council may enjoy a certain discretion in discharging its mandate, the way it is exercised, or not exercised, bears upon the coherence and acceptability of the system as a whole, such as most recently seen with the aggression against Ukraine. On the question of systemic reform, such as through formal amendment of the Charter, the experience of past decades has shaped a sceptical perspective. Making Security Council membership more broad and representative has become an exceedingly difficult enterprise, given that Article 108 of the Charter requires the support of both two-thirds of the General Assembly and the concurring votes of the P5, a procedural requirement that is difficult to clear and applies to all Charter amendments.

In addition, Security Council reform has emerged as one of the most difficult issues in the wider UN system, even before the aggression against Ukraine has further polarized positions. The intergovernmental negotiations (IGN) on Security Council reform have yielded no common denominator except dissatisfaction with the status quo by the different groups involved, and are essentially going nowhere.

In the absence of formal changes to the institutional setup, progress can nonetheless be achieved, and is much more likely to be achieved, through incremental changes in the Security Council's working methods and informal arrangements, along the premise of evolution rather than revolution. This involves reinterpreting existing provisions, and making full use of the instruments already available in the Charter.

The Accountability, Coherence and Transparency (ACT) group has elaborated a code of conduct for Security Council members which, inter alia, implies voluntary refraining from the use of the veto in the face of mass atrocities.[8] To-date, two-thirds of the UN membership have signed up to the code of conduct, with a view to encourage more decisive action by the Council to respond to and prevent the crime of genocide, war crimes and crimes against humanity.

Another element in the debate is the complementary role of regional organizations.[9] The Security Council has encouraged such organizations to take on their share of responsibilities under Chapter VIII of the Charter and such organizations have significantly stepped up their

[8] Letter Dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations Addressed to the Secretary-General, UN Doc. A/70/621 – S/2015/978; similar proposals emanate from The Elders and France/Mexico.

[9] The Security Council holds annual meetings on strengthening EU-UN cooperation under the agenda item "Cooperation between the United Nations and regional and subregional organizations in maintaining international peace and security." In 2014, the Council adopted a presidential statement on EU-UN cooperation, which welcomed the EU's cooperation with the UN and its contributions toward the maintenance of international peace and security. *See* UN Doc. S/PRST/2014/4 (Feb. 14, 2014).

role. The European Union, for instance, has increasingly developed a cooperative relationship with the United Nations, and notably the Security Council.

At the same time, one should remain cautious about a substitute role for such organizations, in the sense that they could entirely replace action by the United Nations in their respective geographic spheres. The aggression against Ukraine is, again, a case in point. From the outset of Russia's invasion of Ukraine in 2022, the clear and constant message by the international community has consisted in highlighting that it is a grave violation of a peremptory norm of international law, namely the prohibition to use force contained in Article 2(4) of the Charter. This violation constitutes an *erga omnes* concern to the international community as a whole, not simply a regional problem that can be dealt with locally and in isolation. While it is important that other organizations play their part, the role of the United Nations remains crucial.