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The war in Ukraine and legal limitations on Russian vetoes

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ABSTRACT

A veto exercised by a permanent member of the UN Security Council to shield that state’s own manifest and prima facie aggression from condemnation and collective action by the Council is legally flawed. The UN Charter can be reasonably interpreted as prohibiting such a veto and depriving it of legal force. This follows from Article 27(3) of the Charter, in conjunction with the prohibition of the abuse of rights, as a manifestation of the principle of good faith, and the obligation to respect the right to life, against the background that the prohibition has the status of jus cogens. These norms generate a legal responsibility of all Security Council members to treat such vetoes as abusive and therefore as an abstention.

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KEYWORDS

UN Security Council; aggression; veto; abuse of law; good faith; right to life

1. Introduction

In its war against Ukraine, ongoing since 2014, and reaching a new level of aggression since 2022, Russia has repeatedly vetoed draft UN Security Council resolutions that concerned its activities in the neighbouring state.¹ In this context, the US ambassador to the United Nations stated that ‘any Permanent Member that exercises the veto to defend its own acts of aggression loses moral authority’.²

This article argues that a veto exercised to shield that state’s own act of manifest and prima facie aggression not only lacks moral authority but is
moreover legally problematic. The UN Charter can be reasonably interpreted as prohibiting such a veto and depriving it of legal force. This argument can be based on Article 27(3) of the Charter (section 2), in conjunction with the prohibition of an abuse of rights as an application of the general principle of good faith (section 3).

Additionally, two procedural strategies to end abuses of the veto have recently been espoused. First, over 100 states—including the three permanent members of the Security Council—have, in different variants, committed themselves not to exercise the veto in certain situations, notably in the face of mass atrocities (the ACT Code of conduct, the French-Mexican initiative, and the recent US-American pledge). Second, the UN Security Council recently adopted a resolution that imposes a mandatory General Assembly meeting in which the state that had cast its veto must explain it before the entire UN membership (section 3). The failure of the Council to adopt such a resolution to stop Russian aggression, as Georgia deplored in a recent General Assembly debate, is a clear sign that the Council should have its veto restricted in cases of mass atrocities. The failure of the Council to adopt a resolution to stop Russian aggression, as Georgia deplored in a recent General Assembly debate, is a clear sign that the Council should have its veto restricted in cases of mass atrocities. The failure of the Council to adopt such a resolution to stop Russian aggression, as Georgia deplored in a recent General Assembly debate, is a clear sign that the Council should have its veto restricted in cases of mass atrocities.
to be blatantly ignored. It is imperative that clear proceedings be introduced for operationalizing and properly implementing this Article.

Following this clue, the scope and content of the said Charter provision and its potential to remove the illegitimate blocking of the Security Council will be explored. Article 27(3) UN Charter foresees an obligatory abstention for all members of the Council when the decision is not procedural, when there is a ‘dispute’, when that state is a ‘party’ to the dispute, and when the decision falls under Chapter VI or VIII (not under Chapter VII).11


The practice is inconsistent and scarce. 12 A recent example of non-application of the provision is the draft Security Council resolution of 15 March 2014 that sought to condemn the attempted annexation of the Ukrainian peninsula Crimea by Russia. The draft characterised the constellation as a ‘dispute’, and did not contain any reference to Chapter VII, which means that the resolution was proposed under Chapter VI, and not under Chapter VII or VII of the UN Charter.

The practice on Article 27(3) is inconsistent and scarce. 13 This state practice might count as a ‘tacit agreement’ facing the clause,16 or Article 27(3) of the Charter might have fallen into desuetude.17 The long-lasting non-abstentions might also count as subsequent practice in terms of Article 31(3) lit. b) of the VCLT that has manifested an interpretative agreement to construe the Charter provision in an excessively narrow fashion.

Assuming that such a reductive interpretationbordering on an informal amendment of the UN Charter had any legal force, it can again be asked why the affirmative vote of a single state is sufficient to block a resolution when nearly all states have abstained, whereas a negative vote of a single state is not sufficient to block a resolution when nearly all states have voted in favor.

The clock can be turned back, as Russia’s blocking has already been


17 Ibid, 231.
It is in legal terms perfectly possible to return to states' and scholars' proposals to read the clause broadly and extensively, in order to avoid the paralysis of the Council against blatantly unlawful P5 behaviour, as it had indeed been widely assumed in the first decades of the life of the United Nations. 19

Article 27(3) can be read broadly, relying on textual, systematic, and teleological interpretation. First, the wording of the provision allows some leeway, because the distinction between 'dispute' and 'situation' is fluid. 20 For example, the occupation and attempted annexation of Crimea by Russia was qualified as a 'dispute' over territory by the sponsors of the resolution. 21 Canada stated that the 'Russian Federation is the party committing the aggression of 2022. 22 Nothing prevents such disputes being tabled under Chapter VI of the Charter.

Second, the historical analysis demonstrates that the authors of this Charter provision intended to exclude from voting those states that were involved directly in a matter whose continuance might endanger international peace and security. 23 The voting procedure in the future Security Council, i.e. the content of what later became Article 27 of the UN Charter, was agreed upon at a conference of the heads of state of the big three powers (USA, Soviet Union, and UK) in Yalta, Crimea, in February 1945. Here, the statesmen, inter alia, discussed the project of a new World Organization. The so-called 'Yalta formula' already encompassed the right of veto, except for procedural matters, and also the duty to abstain under certain conditions. 24 The sponsors of the Yalta formula, to which China and France later subscribed, highlighted their duty to abstain from voting as follows: they mentioned that the League Council had been stymied.
because parties to a dispute was interpreted narrowly. Thus, the relevant League member did not have to abstain and was therefore always able to block a decision by the Council of the League. In their 1945 statement on the Yalta formula, the four sponsoring states mentioned the blockade of the League Council as a counterexample in order to demonstrate that their new (Yalta) formula would not lead to a similar blockade as in the era of the League of Nations.

Third, besides wording and historical motivation of the abstention clause, its object and purpose is relevant. The underlying rationale of the provision of Article 27(3) is the general principle that no one may be judge in their own cause. It is submitted here that this rationale should govern not only the narrow situation of litigation before a judge, but also conflicts before a body like the Security Council, which after all represents the world community.

The abuse of a right and/or bad faith has been regularly invoked by states in the context of certain types of vetoing. The US commented on the Russian veto against a Security Council draft resolution on cross-border troops. The abuse of a right and/or bad faith has been regularly invoked by states in the context of certain types of vetoing.

3. Abuse of rights and bad faith

The second line of argument is that the exercise of the veto to shield one’s own manifestly illegal action constitutes an abuse of right, and – relatedly – a violation of the general principle of good faith.}

3.1. State practice

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humanitarian assistance in Syria that
there is no question that, in vetoing a
draft resolution authorizing humanitarian aid to the most vulnerable Syrians,
one Council member
abused its veto.

The argument of abuse and the irre-
concilability of specific vetoes with the UN Charter was also invoked expli-
citly or implicitly by several states in the context of a Security Council draft
resolution to condemn intercontinental missile launches by the DRNK that
was vetoed by Russia and China in 2022. Norway deplored vetoes
"preventing the Council from ful-
filling its mandate for the maintenance of inter-
national peace and security.

Germany stated:
"If two Council members
refuse to act on that responsiblility, they do so in opposition to the purposes
and principles of the UNGA, the main goal of which is to maintain peace and security,
which is its core duty. The veto power by Russia and China – two permanent members of the Secur-
ity Council – is a threat to this goal.

Peru stated that
"According to a systematic interpretation of the Charter, the veto cannot be used
in situations in which its exercise might have a negative impact on the maintenance of inter-
national peace and security.

Lithuania was
"Concerned that the misuse of the veto power by Russia and China
– two permanent members of the Secur-
ity Council – has prevented the Council from acting in ful-
fillment of its responsibility to maintain peace and security.

And in the General Assem-
bly debate on remedy and reparation for the war damage inflicted upon
Ukraine, the Ukrainian delegate highlighted that the emergency special
session of the General Assembly, within the Uniting for Peace framework,
was designed for instances just like this, when a country like Russia
abuses its veto power.

The legal merits of these political statements will
be examined in the following sections.

3.2. Legal limits to the exercise of the Charter-based voting rights

The prohibition of the abuse of rights is one manifestation of the broader
principle of good faith. As the WTO Appellate Body put it:
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principle of good faith.

See in detail, and with references to the case law, Guillaume Futhazar and Anne Peters,
Good Faith in Jorge E Viñuales (ed), The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental
Principles of International Law (Cambridge University Press, 2020) 189–228, 200–32. See on abuse of
rights as a general principle and as part of customary law, and as
an element of the good faith require-
ment, with numerous references to the older case law, Yuval Shany,
One application of this general principle of good faith, the application widely known as the doctrine of abus de droit, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right impinges on the field covered by a treaty obligation, it must be exercised bona fide, that is to say, reasonably.

An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. The Appellate Body’s legal reasoning concerned the exercise of treaty rights under the GATT by WTO members. The same principle has been applied to other international treaties. For example, the 2023 arbitral award in the interstate dispute over the Iraq-Turkey Pipeline Agreements held:

International law places good faith performance obligations on State parties to a treaty (…). Good faith also requires the parties to a treaty to act honestly, fairly, refrain from taking unfair advantage and to honour legitimate expectations. This finding is relevant for Russia in its role as a party to the UN Charter that it must apply in good faith.

The idea has been applied to the exercise of voting rights by UN member states. This finding is relevant for Russia in its role as a party to the UN Charter. It may not be applied to the UN Charter in a way that violates the principle of good faith and the legal prohibition of an abuse of rights. However, the proposition that good faith and abuse of rights limit the exercise of the veto does not deny that political and self-serving considerations may legitimately motivate a veto, but merely registers that the legal principle of good faith and the legal prohibition of an abuse of rights constitute relevant benchmarks to assess the lawfulness of political action. When voting in the UN (both in the General Assembly and in the Security Council), each state is legally entitled to make its consent dependent on any political consideration which seems to it to be relevant, to quote the dissenting opinion of Judges Basdevant, Winiarski, Sir Arnold McNair, and Read in the ICJ advisory opinion on the UN membership admission conditions of basketball. The majority in the ICJ advisory opinion of the UN membership admission conditions of basketball held that any political considerations are still governed by the legal principle of good faith, including the principle of non-interference with the internal affairs of a state. The participation in such voting is a treaty-based right granted to the members of the Security Council by the UN Charter. It may not be abused.

The proposition that good faith and abuse of rights limit the exercise of the veto does not deny that political and self-serving considerations may influence the exercise of the veto. However, these political considerations are still governed by the legal principle of good faith. Voting in the United Nations allows the member states to take into account any factor which it is possible reasonably and in good faith to connect with the legal conditions laid down in the relevant charters or treaties, or to do so in a way that is consistent with the principle of non-interference with the internal affairs of a state. This principle has been applied to the exercise of voting rights by UN member states.
The dissenting judges expressed this point in more legal terms:

'In the exercise of this power [the voting power], the member is legally bound to have regard to the principle of good faith.'

Put differently, the legal principles of good faith and abuse of rights mark the (admittedly blurry) line between the lawful exercise of discretion and unlawful arbitrariness in voting, as Judge Lauterpacht once explained in another case.41

3.3. Abuse of the veto to shield one's own aggression

When one of the P5 uses its veto power arbitrarily or excessively, it does not act in good faith. This applies all the more when a veto is cast to shield one's own aggression.

 voltae, 9. Judge Lauterpacht once explained in another case: 19. Between the lawful exercise of discretion and unlawful arbitrariness in the exercise of this power [the voting power], the number is legally bound to be a principle of good faith.

The inadmissibility of such a veto flows from the law as it stands. All members of the Security Council, and especially the P5, are bound to observe the principle of good faith. Undoubtedly, the degree of application of good faith in the exercise of full discretion does not lend itself to rigid legal appreciation. This fact does not destroy altogether the legal relevance of the discretion thus to be exercised.

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The combination of legal commitments following from both the UN Charter and the ICCPR generates the obligation not to violate the right to life and not to commit an aggression. The corollary is the obligation not to veto a credible Security Council draft resolution that demands the aggressor to cease this unlawful action.

A final consideration is the status of the prohibition of aggression as a peremptory norm (jus cogens). The Security Council itself is bound by jus cogens. States are also bound to respect jus cogens. The status as jus cogens signifies that the prohibition of aggression is hierarchically superior to other rules of international law. As a legal consequence, no Security Council decision and no vote leading to this decision may derogate from this norm, and these acts cannot modify the prohibition of aggression. Concomitantly, also the absence of a condemnation of an act of aggression does not per se derogate from the prohibition of aggression. However, such passivity of the Security Council in the face of an act of aggression does not preclude, from the prohibition of aggression, the Security Council from using its powers of punishment at the request of the Security Council.

The legal consequences of an abuse of the veto are significant. Jennifer Trahan has suggested that an abusive veto is void. We need not go that far, and can avoid thorny questions of legal doctrine about the legal nature of the veto by linking the questions of abuse and abstention. It would be in keeping with the rationale of Article 27(3) to treat the abusive veto as an abstention. And the elevated status of the prohibition of aggression as jus cogens offers an additional legal argument in favour of treating a veto as an abstention in order to further the objectives of the provision of Article 27(3), as explained previously.

To conclude, the legal argument of abuse (a manifestation of bad faith), as regularly pleaded by states, is apt to bar a veto that deprives the right to veto regularly pleaded by states, apart from that enjoyment of that right to veto as a manifestation of bad faith, as intended by the provision of Article 27(3), as expanded previously.

The Security Council needs to refrain from abuse of its powers and to respect the prohibition of aggression. However, such passivity of the Council risks to weaken the prohibition of aggression, as it would weaken the prohibition of non-intervention. As such, such passivity is not in keeping with the rationale of Article 27(3) to treat the abusive veto as an abstention. It would be in keeping with the rationale of Article 27(3) to treat the abusive veto as an abstention. And the elevated status of the prohibition of aggression as jus cogens offers an additional legal argument in favour of treating a veto as an abstention in order to further the objectives of the provision of Article 27(3), as explained previously.

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for a manifestly unlawful end, namely, to prevent a Security Council decision on the vetoing state’s own manifest prima facie aggression that violates jus cogens. Such an abusive veto, treated as an abstention, would thus be unable to prevent the adoption of a Security Council resolution that violates jus cogens, which is the only legal reason for abstention under Chapter VI.

The remaining question is who may decide whether a veto is indeed abusive. This power is incumbent on the UN General Assembly, especially under the Uniting for Peace procedures. It could also be decided by the ICJ in an advisory opinion. This has been recently suggested by the Council of Europe’s Parliamentary Assembly, specifically in relation to the Russian Federation’s aggression against Ukraine, ensuring accountability for serious violations of international humanitarian law and other international crimes (28 April 2022) para 12.5.2. See also Trahan (n 43) 142.

4. Conclusion

This contribution has argued that the duty to abstain from participating in a decision concerning one’s own cause (Article 27(3) of the UN Charter), in conjunction with the principle of good faith/the prohibition of abus de droit, and taken together with the obligation to respect the right to life and the overarching requirement to respect jus cogens, generate a legal responsibility of all Security Council members to treat the Russian vetoes as abusive. When such vetoes occur on draft resolutions tabled under Chapter VI (or Chapter VII, where relevant), the Security Council should, by analogy with the Security Council resolution of 27(3) of the UN Charter, seek to prevent a Security Council decision for a manifestly unlawful and, namely, to prevent a Security Council decision
However, realism is only one possible posture towards the international world in which ideational and material factors come together, and where actors, structures, and coincidence bring about changes of the law. Another posture is idealism, a belief in the power of ideas. Both postures, in varying intensity, guide human conduct and institutions-building. Therefore, the workings of the United Nations are not only governed by realism: the organization is ‘also the repository of international idealism, and that sense is fundamental to its identity.’\(^{53}\) It remains to be seen whether the legal arguments in this paper are picked up in a political momentum that strengthens rather than undermines this repository of international idealism.

**Disclosure statement**

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\(^{53}\)Ibid.