The Participation in the Security Council of an 'Aggressor' Permanent Member: What About Good Faith?

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On Wednesday 2 March, for the first time since the creation of the United Nations, the General Assembly "deplore[d] in the strongest terms the aggression" committed by a permanent member of the Security Council against another UN member. Certainly, permanent members have violated the prohibition of the use of force before, but this is the first time that the General Assembly recognizes an aggression. The legal effects of this declaration have never been triggered, and they prompt reflections on legal issues that until last week were considered as immovable, such as the rights of membership of a permanent member of the Security Council, including the so-called veto. Jennifer Trahan, in her recent post, already commented on the narrow paths to limit the right to veto of a permanent member. Larry Johnson called a "rabbit hole" the possibility of preventing Russia from casting its negative vote. I believe that the unprecedent resolution of the General Assembly should play a central role in this debate, at least for exercising pressure on all members of the Security Council, if only for the legitimacy of the institution.

The Obligation of Good Faith

A new legal pathway opens through the application of the obligation enshrined in article 2(2) of the UN Charter that "all Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the Charter", also mentioned in the preamble of the GA resolution on the aggression against Ukraine. Scholars have already analyzed how the obligation of good faith could limit the use of the veto when a permanent member acts contrary to the functions entrusted to it by the Charter (See, for instance, here at 166, here at 40, here at 38 and here at 510-517). The International Court of Justice (ICJ) also relied on the good faith of permanent members in the Advisory Opinion on Conditions of Admission (at 63). Judges Basdevant, Winiarski, McNair, and Read, in their dissenting opinion, recalled that

"there is an overriding legal obligation resting upon every Member of the United Nations to act in good faith (an obligation which moreover is enjoined by paragraph 2 of Article 2 of the Charter) and with a view to carrying out the Purposes and Principles of the United Nations, while at the same time the members of the Security Council, in whatever capacity they may be there, are participating in the action of an organ which in the discharge of its primary responsibility for the maintenance of international peace and security is acting on behalf of all the Members of the United Nations. That does not mean the freedom thus entrusted to the Members of the United Nations is unlimited or that their discretion is arbitrary."

Good faith also plays an important role in the Ukrainian application before the ICJ, in which it claimed that the legal arguments advanced by Russia to justify the invasion was contrary to a good faith implementation of the 1948 Genocide Convention. The Court, by granting provisional measures and ordering the immediate suspension of the military operation, also stated (*prima facie*) that Russia did not implement the Convention in good faith. Indeed, it claimed that the acts undertaken by a state to prevent and punish genocide must be in conformity with the purposes of the United Nations and that, in this case "the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide".

Moreover, the obligation of permanent members to act in good faith is particularly relevant in case of aggression. As Rebecca Barber recently claimed in her blogpost, states have an obligation to cooperate to bring to an end a serious breach of a peremptory norm of international law, such as the prohibition of the use of force. For the International Law Commission, the United Nations is the preferred framework for cooperative action:

"The obligation of States to act collectively to bring to an end serious breaches of peremptory norms of general international law (jus cogens) has particular consequences for cooperation within the organs of the United Nations and other international organizations. It means that, in the face of serious breaches of peremptory norms of general international law (jus cogens), international organizations should act, within their

respective mandates and when permitted to do so under international law, to bring to an end such breaches. Thus, where an international organization has the discretion to act, the obligation to cooperate imposes a duty on the members of that international organization to act with a view to the organization exercising that discretion in a manner to bring to an end the breach of a peremptory norm of general international law (jus cogens). A duty of international organizations to exercise discretion in a manner that is intended to bring to an end serious breaches of peremptory norms of general international law (jus cogens) is a necessary corollary of the obligation to cooperate […]".

Permanent members of the Security Council maintain a political discretion in their decisions, but they do have obligations deriving from the Charter and from international law.

Consequences

Until now, references to the obligation of good faith have proved ineffective for imposing substantive changes in the practice of the Security Council. However, the case concerning the Russian aggression against Ukraine is different. In the past, member states and the secretariat could not rely on the recognition of aggression issued by the plenary organ of the United Nations. By condemning the legal justification advanced by Russia and calling it an aggressor state, the General Assembly opened the possibility of recognizing a violation of its obligation to act in good faith. Moreover, the ICJ, in its *prima facie* jurisdiction on provisional measures, reiterated that the Russian justifications constitute a bad faith implementation of the Genocide convention.

In terms of legal consequences within the Security Council, we are in uncharted waters. It is a new situation and there is not a clear answer on whether the violation of good faith by an aggressor permanent member should lead to severe consequences in terms of membership rights. As Larry Johnson contended, it is a rabbit hole that may lead nowhere, but the Security Council should also consider the reputational costs of 'business as usual'. There are at least three legal arguments that can be put forward to sustain that a permanent member is no longer entitled to stymie the Security Council on the specific circumstances concerning the aggression it committed.

First, a legal argument is based on the general principle of *abus de droit*, under which an aggressor permanent member is not entitled to block subsequent Security Council resolutions seeking to fulfill the primary purpose of the organ against the interest of the permanent member. The use of veto would configure an abuse of procedure for impeding the fulfilment of the primary responsibility of the Security Council, and it should be considered as irrelevant.

Second, the violation of an obligation established by the rules of an international organization, such as good faith for the UN, leads to international responsibility and its consequences. Reparation in the form of restitution means to reestablish the situation which existed before the wrongful act was committed and could lead to the irrelevance of the negative vote (article 35).

Third, a narrower path concerns the notion of countermeasure adopted by the international organization for the violation of a rule of the organization committed by its members. However, under article 22 ARIO, an international organization is entitled to take countermeasures against a member for the violation of a rule of the organization only if those rules allows it. This limit does not reflect a rule of customary law, but it was included to stress the close cooperation (sic) that should exist between an organization and its member states. One could claim that the breach of good faith by the permanent member impeded cooperation and the irrelevance of the negative vote as a countermeasure should not be precluded because of the lack of a rule of the organization.

Conclusion

The ICJ provisional measures issued yesterday may soon end up before the Security Council. Even if orders of the Court cannot be considered as judgments that fall under Article 94 of the UN Charter, the Court is obliged to notify them, and the Council may take further action, as it did in the past (para. 114). This circumstance could be the first occasion in which to test the argument of good faith, at least to put pressure on the Council members.

The General Assembly Resolution concerning the aggression against Ukraine opened new legal pathways, its consequences still to be defined. In the last couple of weeks, many certainties on which the international community was based have started collapsing leaving space for future developments. The time may have finally arrived to reconsider the rights of membership of the permanent members of the Security Council, including the right to veto.