

Agata Kleczkowska, PhD
Institute of Law Studies
Polish Academy of Sciences

Judging its own case – the abuse of the veto power by Russia*

Abstract:

After 24 February 2022, the international community expressed unprecedented solidarity with Ukraine and condemnation for Russia. With one exception however: the United Nations Security Council (UNSC) did nothing to address the flagrant violations of international law committed by Russia, continuing its pattern of inaction since 2014. In its capacity as a UNSC permanent member, Russia has been able to paralyze the organ's work by exercising its right to veto. This short comment seeks to answer the question about the legitimacy of the veto power today, as well as to search for alternative solutions which would allow the UNSC to act despite the abuse of this power by one of the UNSC's permanent members. The paper starts with a discussion of the origins of the right to veto and its practice, paying special attention to the use of this right by Russia against resolutions concerning the armed conflict in Ukraine. Next, the paper examines whether Russia's right to veto could be circumvented by analysing plans for UNSC reform; suspension and expulsion procedures within the UN; the use of credentials to exclude Russia from the UNSC works; and shifting to the UN General Assembly powers.

Keywords: right of veto, Russia, Ukraine, United Nations Security Council

About the Author: dr Agata Kleczkowska is an Assistant Professor at the Institute of Law Studies of the Polish Academy of Sciences.

In the aftermath of the escalation of the armed conflict in Ukraine on 24 February 2022, the international community expressed unprecedented solidarity with Ukraine and condemned Russia. The scale of sanctions imposed on Russia, especially by the EU,¹ and the supply of

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¹ See European Commission, 'EU sanctions against Russia following the invasion of Ukraine' <https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en> accessed 15 September 2023.

weapons to Ukraine provided by a number of States² left no doubt about which State is the aggressor and which one deserves support from the democratic world. With one exception however: the United Nations Security Council (UNSC), the most important worldwide organ responsible for international peace and security, again did nothing to address the flagrant violations of international law committed by Russia, continuing its pattern of inaction since 2014. In its capacity as a UNSC permanent member, the aggressor State has been able to easily paralyze the organ's work by exercising its right of veto. Based on the example of Russia's exploitation of this power, this short comment seeks to answer the question about the legitimacy of the veto power today, as well as to search for alternative solutions which would allow the UN to act despite the abuse of this power by one of the UNSC permanent members.

In terms of the origin of the veto power in the UNSC, all rationales for distinguishing five States from among the original 51 member nations and giving them the right of veto after the Second World War came down to their position among the victorious nations at the moment the United Nations was founded.³ Moreover, they were perceived as the only member States that were able to 'secure international peace effectively,'⁴ so their role in the UNSC was supposed 'to align the realities of power with the enforcement capabilities of the system itself.'⁵ And given that they undertook 'great obligations and heavy responsibilities in the application of coercive measures',⁶ these duties were supposed to be supplemented by giving them exceptional privileges. The latter is visible not only in the right to veto non-procedural decisions of the UNSC (Article 27 (3)),⁷ but also in several other provisions of the UN Charter, including Articles 47 (2), 106, 108, 109 (2) and 110 (3).⁸

But first and foremost, the drafters of the UN Charter assumed that the USA, UK, France, China and the USSR would become permanent members, with all the privileges and

² See e.g. 'NATO's response to Russia's invasion of Ukraine' <https://www.nato.int/cps/en/natohq/topics_192648.htm> accessed 15 September 2023.

³ See more about the discussions on the veto power during the preparatory works on the UN Charter in Stephen C Schlesinger, *Act of Creation: The Founding of the United Nations* (Westview 2003) 193-207, 217-23 among others.

⁴ Rudolf Geiger, 'Article 23' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (OUP 2012) 751, 753.

⁵ Lori Fisler Damrosch, 'Enforcing International Law Through Non-forcible Measures' (1997) 269 *Collected Courses of the Hague Academy of International Law* 1, 32.

⁶ Documents of the United Nations Conference on International Organization, Suggestions of the Turkish Government Concerning the Proposals for the Maintenance of Peace and Security Agreed on at the Four-Power Conference at Dumbarton Oaks, Doc 2 G/14 (e), 3.

⁷ Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 16 UNTS 1.

Article 27 (3): '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; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.'

⁸ Geiger (n 4) 753.

obligations stemming from this position because they ‘have the will and ability to work together’.⁹ The drafters knew that cooperation among these States would contribute to the success of the Organization, but at the same time they were also aware that a breach between permanent members ‘would undermine its foundation.’¹⁰ As stated by USA Senator Tom Connally during the meeting of the Commission III of the UN Conference on International Organization:

[A]s has been well observed, the responsibility of the five permanent members of the Security Council is momentous; it is tremendous. It may have the effect of shaking the very foundations of the earth. I cannot conceive of any one of the great powers that shall be a member of the Security Council considering lightly that sense of responsibility. It is our theory that they will be sensible of that sense of responsibility and that they will discharge the duties of their office not as representatives or their governments, nor as representatives of their own ambitions or their own interests, but as representatives of the whole Organization on behalf of world peace and on behalf of world security.¹¹

Hopes that the UNSC permanent members would use the veto power ‘with caution and with discretion, with moderation’¹² were quickly shattered during the Cold War. The first veto was cast by the USSR on 16 February 1946 regarding the withdrawal of foreign troops from Lebanon and Syria.¹³ Many of the ensuing Cold War vetoes were cast ‘to block the admission of a new member state due to concerns about the composition of the General Assembly.’¹⁴ While it is true that after the USA cast its first veto on 17 March 1970¹⁵ it became the inglorious ‘leader’ in this practice at least up until the end of the Cold War, today the statistics look quite different. It is the Russian Federation which has vetoed the largest number of resolutions – 123 (including 90 as the USSR). The USA has exercised its privilege under Article 27 (3) of the UN Charter 82 times; the UK – 29; China – 17; and France – 16.¹⁶

⁹ Documents of the United Nations Conference on International Organization, Comment of the Norwegian Government on the Dumbarton Oaks Proposal, Doc 2 G/7 (n), 2.

¹⁰ *ibid.*

¹¹ Documents of the United Nations Conference on International Organization, Verbatim Minutes of Fourth Meeting of Commission III, Doc 1149 III/11, 29.

¹² Documents of the United Nations Conference on International Organization, Verbatim Minutes of Fourth Meeting of Commission I, Doc 1186 I/12, 15.

¹³ UNSC Verbatim Record (16 February 1946) UN Doc S/PV.23, 367.

¹⁴ Security Council Report, ‘The Veto’ <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf> accessed 15 September 2023 (hereinafter: The Veto).

¹⁵ UNSC Verbatim Record (17 March 1970) UN Doc S/PV.1534, 20.

¹⁶ ‘UN Security Council Meetings & Outcomes Tables’ <<https://research.un.org/en/docs/sc/quick/veto>> accessed 15 September 2023.

Given the UN preparatory works and the reasoning behind Article 27 (3), it could seem that such broad use of the veto power by Russia goes hand in hand with its role as the guardian of international peace and security. None of the UNSC permanent members has acted impeccably during the 78 years of the functioning of the UN. All five States have breached international law; and used their veto power to protect themselves and their allies from responsibility in the face of accusations made against them.¹⁷ However, what the international community has been witnessing since 2014 is without precedent in the history of the UN. A State with a privileged position in the UN due to the obligations it undertook as a guardian of international peace and security has not only been flagrantly violating all fundamental principles of international law but also rendered the UNSC completely paralysed. The Security Council's role has been partially taken over by individual States and regional organizations, especially the European Union and NATO, but there is still a major gap in the system of international security.

Since 2014, Russia vetoed four draft resolutions concerning the situation in Ukraine.¹⁸ None of them even attempted to establish sanctions against Russia, and two of them did not mention 'Russia' at all. What the statistics will never show, however, is the number of the so-called 'hidden vetoes' or 'pocket vetoes', i.e. 'cases in which draft resolutions are not formally tabled because of the threat of veto by one or more permanent members.'¹⁹ Hidden vetoes may have no less devastating effects on the humanitarian situation and global security than formal ones, as for instance it is alleged that due to the hidden vetoes of France and the USA, the UNSC failed to effectively act during the Rwandan genocide in 1994.²⁰ Having regard to this situation, those who block the UNSC should be aware of the consequences their practice may lead to.

The fact that the UNSC has failed to take any action with regard to the situation in Ukraine due to Russia's veto has met with reactions on the part of other Council members. States spoke openly about the abuse of the veto power by Russia and expressed their resentment towards the attitude it adopted.²¹ When Russia vetoed the resolution condemning its actions in

¹⁷ For instance, the USA blocked numerous resolutions which would be against the interest of Israel, e.g. in 2006 the USA vetoed two resolutions which called Israel, *inter alia*, to halt its military operations which endanger the Palestinian civilian population and to withdraw its forces from the Gaza Strip (Qatar: draft resolution, UN Doc S/2006/508, para 3; Qatar: draft resolution, UN Doc S/2006/878, para 1). See UNSC Verbatim Record (13 July 2006) UN Doc S/PV.5488, 2; UNSC Verbatim Record (11 November 2006) UN Doc S/PV.5565, 3.

¹⁸ See draft resolution UN Doc S/2014/189; UN Doc S/2015/562; UN Doc S/2022/155; UN Doc S/2022/720.

¹⁹ The Veto (n 14) 3.

²⁰ Céline Nahory, 'The Hidden Veto' (*Global Policy Forum*, May 2004) <<https://archive.globalpolicy.org/security-council/42656-the-hidden-veto.html#8>> accessed 15 September 2023.

²¹ See e.g. statements made by the USA (UNSC Verbatim Record (15 March 2014) UN Doc S/PV.7138, 4), France (ibid 5), Lithuania (ibid 6), Luxemburg (ibid 10) and Albania (UNSC Verbatim Record (25 February 2022) UN Doc S/PV.8979, 7).

Ukraine in February 2022, the representative of the USA stated that ‘Russia can veto draft resolution S/2022/155, but it cannot veto our voices. It cannot veto the truth. It cannot veto our principles. It cannot veto the Ukrainian people. It cannot veto the Charter of the United Nations. And it will not veto accountability.’²²

Looking at the case dispassionately however, Russia has not ‘vetoed the Charter’, as it is only using the privilege the Charter grants it without imposing any constraints on the grantee. If Russia did not forbear from violating international law, why shouldn’t it block States which attempt to condemn its actions? States did, do, and will violate international law, and that also includes UNSC permanent members. The question is how to revamp the UN system so these violations do not hamper the work of the UNSC in bringing them to justice.

Reforming the UNSC, particularly by expanding the Council’s membership, has been discussed in the UNGA since 1979.²³ The debates entered into a new phase in 1993, with the passing of Resolution 48/26, in which the UNGA decided ‘to establish an Open-ended Working Group to consider all aspects of the question of increase in the membership of the Security Council’.²⁴ In 1997 the chairman of a Group presented a draft resolution to the UNGA ‘in which he proposed increasing the SC from fifteen to twenty-four by adding five permanent and four non-permanent members. (...) the new permanent members would not have the right to veto.’²⁵ However, at the end of the day, due to the differences of opinion between States, the draft was not voted on.²⁶ Since 2009, discussions about UN reform have been held within the framework of inter-governmental negotiations,²⁷ but it does not seem that any conclusions will be reached soon.

At the same time, States or groups of States have submitted different proposals concerning the changes needed in the functioning of the UNSC. Some of them (including the proposals of S5;²⁸ the International Commission on Intervention and State Sovereignty; France and Mexico; The Elders; as well as the Accountability, Coherence and Transparency Group)

²² S/PV.8979 (n 21) 7.

²³ Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2017) 214-15. It should be highlighted here that originally, the UNSC was composed of six non-permanent members, in addition to five permanent ones. By the 1963 amendments to the UN Charter, the number of non-permanent members was increased to ten, establishing a total of fifteen UNSC members (Amendments to Articles 23, 27 and 61 of the Charter of the United Nations, adopted by the General Assembly of the United Nations in resolutions 1991 A and B (XVIII) of 17 December 1963 (adopted 17 December 1963, entered into force 31 August 1965) 557 UNTS 143).

²⁴ UN GA Res 48/26 (3 December 1993) UN Doc A/RES/48/26.

²⁵ Geiger (n 4) 757.

²⁶ *ibid.*

²⁷ See ‘Security Council Reform’ <<https://www.un.org/securitycouncil/content/faq#reform>> accessed 15 September 2023.

²⁸ ‘S5’ refers to 5 States: Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland.

have recommended that permanent members should consider refraining from using a veto to block Council actions in cases where the UNSC is acting to prevent or end international crimes²⁹ or other mass atrocities³⁰ or to authorize ‘military intervention for human protection purposes for which there is otherwise majority support’.³¹ Thus this last set of proposals does not even require formal or institutional changes, but rather the adoption of a certain informal code of conduct. What remains indispensable however is – no more, no less – the goodwill of the UNSC permanent members. Needless to say, none of these proposals was ever adopted in practice.

Hence it seems clear that no reform of the functioning of the UNSC, whether formal or informal, will succeed in the near future, which means that Russia will remain a judge in its own case and continue to block the UNSC. The question thus arises: Given the current regulations in the UN Charter, what can be done to stop Russia from paralysing the UNSC?

The most far-reaching measure in cases of the violations of international norms by a UN member is triggering the suspension or expulsion procedures. However, none of these options may be effectively used with respect to a UNSC permanent member. Both Articles 5 and 6 allow the UNGA to make a decision about suspension or expulsion only ‘upon the recommendation of the Security Council’. Thus, the UNSC recommendation must come first, and only after such a recommendation is issued can the UNGA decide about suspension or expulsion.³² If the UNSC fails to adopt the recommendation, e.g. due to the veto of one of the permanent members, the UNGA has no competence to act by itself.³³ Thus once again the vicious circle closes – Russia would never allow the UNSC to adopt such a recommendation.

Due to these requirements, which make triggering the suspension or expulsion procedures very difficult, the credentials have been (ab)used in the past to sanction the conduct of UN members. According to Rule 13 of the Provisional Rules of Procedure of the Security

²⁹ ‘Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland: revised draft resolution Enhancing the accountability, transparency and effectiveness of the Security Council’ (15 May 2012) UN Doc A/66/L.42/Rev.2, 5, para 20; ‘Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes’ (14 December 2015) UN Doc A/70/621–S/2015/978, Annex I, para 1.

³⁰ ‘Political statement on the suspension of the veto in case of mass atrocities, presented by France and Mexico’ <<https://www.globalr2p.org/wp-content/uploads/2020/01/2015-Political-Declaration-on-the-Suspension-of-the-Veto-En.pdf>> accessed 15 September 2023; The Elders, ‘Strengthening the United Nations’ <<https://theelders.org/programmes/strengthening-united-nations>> accessed 15 September 2023.

³¹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre 2001) xiii.

³² *Competence of Assembly regarding admission to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 7-8. Vs. Dissenting Opinion by M. Alvarez, *Competence of Assembly regarding admission to the United Nations*, 19-21. See Christian Tams, ‘Article 5’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (OUP 2012) 362, 367; idem, ‘Article 6’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (OUP 2012) 374, 378-9.

³³ Tams ‘Article 6’ (n 32) 380.

Council (hereinafter: Rules of Procedure), UNSC members (including permanent members) are represented at the Council's meetings by an accredited representative.³⁴ The Head of State or Government or Minister of Foreign Affairs do not have to present their credentials,³⁵ but when the UNSC member is about to be represented by another official, or when there are changes made in the representation,³⁶ the credentials of the UNSC member representative have to be submitted to the Secretary-General 'not less than twenty-four hours before he takes his seat on the Security Council.'³⁷

Special attention in this regard should be given to Rule 17 of the Rules of Procedure, which states as follows: 'Any representative on the Security Council, to whose credentials objection has been made within the Security Council, shall continue to sit with the same rights as other representatives until the Security Council has decided the matter.' It explicitly stems from this that an objection may be raised against the credentials of the UNSC member representative, and since Rule 17 does not make such a differentiation, that refers also to a permanent member. Rule 17 was invoked in the past in the practice of the UNSC.³⁸ What was agreed upon then was that 'if any delegation raises objections with regard to the credentials of (...) representatives in the Security Council, it goes without saying that the Security Council must take a decision on the matter,'³⁹ as well as that the representatives of the UNSC members may 'continue discharging their duties as long as their credentials were not declared invalid.'⁴⁰

How may it be used to challenge the credentials of a Russian representative in the UNSC? One of the sitting UNSC members could object to the credentials of the Russian representative. Since the issue of credentials is a procedural matter the permanent members, including Russia, are not entitled to exercise their veto during the voting. If the credentials are declared invalid, Russia would be left without a representative in the UNSC for at least twenty-four hours (provided that the Russian president, prime minister or minister of foreign affairs would not immediately fill in the seat). That could be the short window of opportunity for the remaining Council members to adopt a resolution condemning Russian actions in Ukraine or imposing sanctions on it.

³⁴ Provisional Rules of Procedure of the Security Council, S/96/Rev. 7.

³⁵ *ibid*, Rule 13. In practice, it has gradually been extended also to officials at the ministerial level other than foreign ministers, and to deputy and vice ministers (Sam Daws and Loraine Sievers, *The Procedure of the UN Security Council* (OUP 2014) 155).

³⁶ *ibid* 154.

³⁷ Rules of Procedure (n 34) Rule 13.

³⁸ Rule 17 was invoked, *inter alia*, in relation to representatives of China (Repertoire of the Practice of the Security Council 1946-1951, 15-16) and Hungary (Repertoire of the Practice of the Security Council 1956-1958, 5).

³⁹ Statement by representative of Algeria, Repertoire of the Practice of the Security Council 1966-1968, 9.

⁴⁰ Statement by representative of Cuba, Repertoire of the Practice of the Security Council 1956-1958, 5.

However, even assuming this might be a feasible plan, substantial doubts may be raised. Firstly, on what grounds can the credentials of the Russian representative be questioned? Three major credentials crises in the past occurred either because two governments claimed to represent the same State (in the case of China⁴¹ and Kampuchea⁴²), or because UN members came to the conclusion that due to flagrant violations of human rights, the government issuing credentials no longer represented its nationals (the case of South Africa).⁴³ Neither of these situations is taking place now in relation to Russia.

Some scholars have submitted that it may be possible to question the continuation of the USSR's seat by the Russian Federation in the UNSC.⁴⁴ Thus, Ukraine could trigger the procedure from Rule 17 and submit the credentials for one of its diplomats to fill Russia's seat. The UNSC would then have to take a vote on this procedural matter, so the Russian power of veto would not apply.⁴⁵ However, this idea seems doomed from the start: How can it be explained that 32 years following the breakdown of the USSR the continuation of its seat by the Russian Federation is now being questioned?⁴⁶ And why would Ukraine be entitled to take the USSR's seat, especially since Ukraine (under the name of the Ukrainian Soviet Socialist Republic) was an original UN member, independently from the USSR?

UNSC members could also attempt to question the credentials of Russia's representative by referring to the career path or post occupied in Putin's administration by a concrete person who is supposed to represent Russia in the Council, i.e. if Russia issued credentials to someone who contributed to the commitment of an international crime during the armed conflict in Ukraine. But that solution is also far-fetched, with no solid justification in the practice of the Council to date.

⁴¹ See Myres S McDougal and Richard M Goodman, *Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution* (1966) 60 (4) AJIL 671.

⁴² See Ramses Amer, *The General Assembly and the Kampuchean Issues. Intervention, Regime Recognition and the World Community 1979 to 1987* (Uppsala University 1989) 11-54.

⁴³ Simon Chesterman, Ian Johnstone and David M Malone, *Law and Practice of the United Nations. Documents and Commentary* (OUP 2016) 228-32.

⁴⁴ Joris van de Riet, 'No, Russia cannot be removed from the UN Security Council' (*Leiden Law Blog*, 22 March 2022) <<https://www.leidenlawblog.nl/articles/no-russia-cannot-be-removed-from-the-un-security-council>> accessed 15 September 2023.

Despite some scholars discussing the 'succession' of the USSR (see e.g. *ibid*), it seems that it is more correct to speak about the continuation of the legal personality of the USSR by Russia (Guido Acquaviva, 'Russia as the State Continuing the Legal Personality of the USSR – An Inquiry into State Identity or Succession' (2019) 23 (2) *Journal of the History of International Law* 310, 315-6).

⁴⁵ Thomas D Grant, 'Expelling Russia from the UN Security Council — a How-to Guide' (*CEPA*, 26 September 2022) <<https://cepa.org/article/expelling-russia-from-the-un-security-council-a-how-to-guide/>> accessed 15 September 2023.

⁴⁶ See more about the general agreement that Russia is a continuator of the legal personality of the USSR in Acquaviva (n 44) 310-53.

As the UN Charter and hitherto practices of the UNSC do not offer any solutions, maybe instead of focusing only on the UNSC one should look elsewhere for alternative solutions, especially in the UNGA? Obviously, the Charter gives the UNGA a far less decisive role when it comes to international peace and security. While the UNGA Resolution ‘Uniting for Peace’⁴⁷ was an important step forward, it did not add UNGA new competencies in this regard (because it could not do so). Nevertheless, it seems that UN members are ever more willing to look at the UNGA, rather than the UNSC, as the proper forum to discuss important international peace and security issues. It is symptomatic that after another Russian veto in the UNSC in February 2022 the representative of the USA in the Council stated: ‘We will be addressing this matter in the General Assembly, where the Russian veto does not apply and the nations of the world can, will, and should hold Russia accountable and stand in solidarity with Ukraine.’⁴⁸

Addressing questions of international peace and security which the UNSC has failed to deal with in the UNGA is today even more justified, as on 26 April 2022 the UNGA adopted Resolution 76/262, in which it stated, *inter alia*, that ‘[t]he President of the General Assembly shall convene a formal meeting of the General Assembly within 10 working days of the casting of a veto by one or more permanent members of the Security Council, to hold a debate on the situation as to which the veto was cast (...).’⁴⁹

This resolution may not be a game changer,⁵⁰ but at least it will not allow passing lightly over abuses in the exercise of the UNSC permanent members’ right to veto.⁵¹ It also affirms both the growing frustration of member States and the increasing significance of the UNGA in matters relating to international peace and security.

To sum up, the UN – and especially the UNSC – has become a hostage of the rigid framework of the UN Charter, which placed too much trust in the goodwill and reasonableness of the UNSC’s permanent members. Cases such as the armed conflict in Ukraine are, unfortunately, the best illustration of this. Even if States may always choose to shift to the UNGA in cases where the UNSC is paralysed, in a longer perspective changes in the status of UNSC permanent members are indispensable. However, to this end, a new, more creative

⁴⁷ UNGA Res 377 A (V) (3 November 1950) UN Doc A/RES/377.

⁴⁸ UN Doc S/PV.8979 (n 21) 7.

⁴⁹ UNGA Res 76/262 (28 April 2022) UN Doc A/RES/76/262, para 1.

⁵⁰ See Raphael Schäfer, ‘The Echo of Quiet Voices. Liechtenstein’s Veto Initiative and the American Six Principles’ (*EJIL: Talk!*, 10 October 2022) <<https://www.ejiltalk.org/the-echo-of-quiet-voices-liechtensteins-veto-initiative-and-the-american-six-principles/>> accessed 15 September 2023.

⁵¹ The first debate in the UNGA took place on 8 June 2022 after China and Russia vetoed the draft resolution imposing new sanctions on North Korea. See ‘General Assembly Holds Landmark Debate on Security Council’s Veto of Draft Text Aimed at Tightening Sanctions against Democratic People’s Republic of Korea’ (8 June 2022) UN Doc GA/12423.

interpretation of Charter provisions will have to suffice, because of the powers given to permanent members in the process of formal amending of the UN Charter.⁵²

⁵² See Articles 108 and 109 of the UN Charter.