

Removing Russia from the Security Council: Part Two

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Remedy for the Breach: Seating Ukraine

Part One of this blogpost proposed that the anomaly of Russia’s presence as a Security Council Permanent Member be addressed through Rule 17 of the Provisional Rules of Procedure of the Security Council. To recall, Rule 17 provides that “[a]ny 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.” The issuance of credentials for purposes of representation of a State in the Security Council therefore is not entirely self-judging. In the normal course, each State’s representative, duly credentialed by that State, sits without incident. However, Rule 17, indicating a procedure for objection and decision, acknowledges that a controversy as to credentials might arise and affirms the authority of the Security Council to settle the matter when one does.

Rule 17 limits its application to no particular set of substantive problems. All that is needed for Rule 17 to apply is that there have been an objection made to the credentials of a representative on the Council. In identifying a decision-making process to address such an objection, Rule 17 entails the remedy (for, without a remedy, such a process would be without effect): the Council decides either that that representative—the one objected to—may stay; or that he must go; and, if go he must, which other representative, if any, has presented proper credentials to take the seat vacated. In short, under Rule 17, the Security Council may reject the credentials of Russia's representative; and it may affirm the credentials that another State's representative presents.

As suggested above, it would be open to Members of the Security Council to object under Rule 17 to Russia's representative, then vote that representative off the Council with no replacement. However, as also suggested, it would sit more comfortably, both with the Security Council credentials procedure and with the constitutional status of the USSR Security Council seat, to accept credentials from another State. For reasons found in the history of both the USSR and the UN, the appropriate replacement for the Russian representative in the USSR Security Council seat is a representative credentialled by Ukraine.

As to the USSR history, Ukraine had been a Union Republic of the USSR, a status indicated in Article 71 of the USSR Constitution of 1977 and Article 13 of the USSR Constitution of 1936. A further Constitutional Law had provided that, as a Union Republic, Ukraine "Russia itself noted when the settlement of Russia's post-Soviet future was being agreed, Ukraine also had been an "original Member" of the UN. That is to say, Ukraine had been one of the original parties to the UN Charter and a founding UN Member State. Ukraine and Belarus held a special position in this regard. No other USSR Union Republic was an original Member of the UN. Ukraine's original membership (and Belarus's) resulted when Josef Stalin demanded UN representation for *all* the Union Republics and was bargained down at the Yalta Conference to two. Sensitive that great losses had taken place in those territories (though not inquiring much into Stalin's role in causing them), the United States and other States accepted Ukraine and Belarus as Original Members, and their status as such was affirmed at the Conference on International Organization at San Francisco in 1945.

When the USSR dissolved in 1991, nobody pursued the possibility at the time, but two UN Members besides Russia thus were also, in principle, claimants to the USSR Security Council seat. Both already were present at the UN in 1991, and both had been there for the entirety of the UN's history. Both were USSR Union Republics, Russia's constitutional equals in that system. Their agreement to the transfer of USSR rights and assets to Russia, including the Security Council seat, was pivotal to the overall settlement of affairs at the time. With Russia now having vitiated the settlement, the matter returns to where it stood in December 1991: a USSR Security Council seat remains, but there is no USSR representative to fill it.

Unlike December 1991, however, two of three UN Member States that might credential a representative to fill the USSR seat have disqualified themselves. The case of Russia speaks for itself. As for Belarus, its complicity in Russia's war of aggression is well-established (see too A/Res/ES-11/1, paragraph 10). Ukraine is thus the only Original Member of the UN that has remained faithful to UN principles and was also a constituent of the USSR. Taking those circumstances together with the suffering and cost Russia has imposed on Ukraine through Russia's atrocities and other unlawful acts, Ukraine presents itself as the appropriate replacement for Russia in the USSR seat.

Security Council Headcount: How to Get to Nine

If Ukraine were to issue credentials to one of its own diplomats to fill the USSR's Security Council seat, no doubt Russia's representative would present himself and insist that he continue to hold that seat. Other Council Members, however, would be free to object to Russia's presence in the Council. And they should, given Russia's unprecedented violations of the UN Charter. If they were to object, then this would give rise to a matter needing settled before the Security Council continued its work. Here, the Security Council's seldom-noted credentials rules would enter the picture in the way described.

Deciding which representatives—Moscow's or Kyiv's—will fill the Article 23(1) USSR seat on the Council would be under the Council's procedural majority. That is to say, the matter would be decided by a majority of nine not subject to Permanent Member veto. A headcount suggests that, while it is by no means sure that the Council would oust Russia from the USSR seat, it is very much possible that it would.

In its current composition, which it retains until January 1, 2023, the Council includes twelve Members that voted in favor of General Assembly resolution ES-11/1 on March 2, 2022 deploring and condemning Russia's aggression against Ukraine. General Assembly resolution EC/11/ of October 12, 2022 attracted affirmative votes from twelve Security Council Members as well. These are no ordinary General Assembly resolutions but resolutions adopted under the "Uniting for Peace" procedure—that is to say, in an emergency special session called by the Security Council. Security Council resolution 2623 (2022) of February 27, 2022, the resolution by which the Council called the session, is the first to call a new emergency special session in forty years. It is not unrealistic to conjecture that a State's affirmative vote on GA resolutions ES-11/1 and ES-11/4 reflects a more carefully considered decision than its votes on resolutions of the Assembly in ordinary session. Be that as it may, an overwhelming majority of the current members of the Security Council gave their affirmative votes to the resolution—Albania, Brazil, France, Gabon, Ghana, Kenya, Ireland, Mexico, Norway, the United Arab Emirates, the United Kingdom, and the United States of America. On August 24, 2022, India joined those twelve to support inviting Ukraine's President, Volodymyr Zelenskyy, to address the Council. So, if not more than four of these thirteen States resile, then there would be enough votes to switch the USSR seat from Moscow to Kyiv.

The Security Council itself called the emergency special session by a vote of 11 to 1, a majority greater by two than that required for a Rule 17 procedural decision. This majority is further evidence that a political constellation exists for holding Russia to account. Pointing toward the increasing chance of a vote against Russia, a number of fence-sitting States have shifted in favor of Ukraine since February 27, 2022 when the Security Council called the emergency special session. India's shift, reflected in its August 24 support for inviting Ukraine's President to address the Council, is an example. Other examples are visible in certain States' international relations, including India's. Narendra Modi, India's prime minister, gave a remarkable cold-shoulder to Russian President Vladimir Putin at the Shanghai Cooperation Organization (SCO) summit at Samarkand on September 16. Turkey's president, Rəcəp Tayyip Erdoğan, on August 23, gave a high-profile address affirming that Crimea is part of Ukraine's national territory (reaffirming the matter on September 19). In the second half of September, Kazakhstan, Vietnam, Uzbekistan, and Turkey blocked Russia's "Mir" payment system cards. Even China, one might infer from Putin's acknowledgement of China's "questions and concerns" about Russia's invasion of Ukraine, might not be supportive, which is not to suggest that China will lend its Security Council vote to oust Russia; China practically beyond peradventure would not do that. However, a chill in its relations with Russia does suggest that China might refrain from using its leverage on other Members of the Council in Russia's favor. So the evidence illustrates a trend, and the trend is against Russia. No doubt, too, Russia's serious reversals on the battlefield affect countries whose prudential (or opportunistic) calculations might earlier have counselled reticence.

After January 1, 2023, current Security Council Members Kenya, India, Mexico, Ireland, and Norway will be replaced by Mozambique, Japan, Ecuador, Malta, and Switzerland. The forthcoming new composition of the Council would seem still more propitious for Ukraine. On GA resolution ES-11/3 of 7 April 2022, suspending Russia from the Human Rights Council, Kenya, India, and Mexico abstained; of the soon-to-be-vacating Members, only Ireland and Norway voted in favor of the resolution. By contrast, among the in-coming five Members, only Mozambique abstained. Japan, Ecuador, Malta, and Switzerland voted in favor –i.e., in favor of Russia's suspension. In other words, the new composition of the Security Council in January 2023 will supply a net gain of two members who already have favored discontinuing Russia's participation in a UN organ.

Conclusion

The presence of Russia on the Security Council rested on an agreed settlement of Russia's affairs reached when the USSR came to an end. The settlement benefited Russia in material as well as symbolic terms. Having launched an unprecedented war of aggression, Russia has destroyed the settlement and, thus, has deprived its presence on the Security Council of the basis on which it rested. Russia's continued presence on the Council is an anomaly—and an affront to the principles that animate the Organization of which the Council is part.

Except, possibly, for Iraq's war of aggression against Kuwait in 1990, no violation of international law since World War Two approximates the magnitude of Russia's aggression against Ukraine today. Unlike Iraq, however, Russia wields a veto in the Security Council and thus has thwarted UN action. The continued presence in the UN of a State that has forcibly seized territory, destroyed cities, slaughtered tens of thousands of civilians, and used food as a weapon in pursuit of the annihilation of a country and ethnic identity that it declares have no right to exist undermines the credibility of the UN. The travesty of Russia's participation in the UN finds new examples almost by the day. Russia's abusive motion to get the Security Council to resolve against Ukraine's self-defense was an attempt to derail the body from condemning Russia's concentration camps. Saccharine calls by Russia's foreign minister from the dais of the General Assembly for "peaceful and harmonious development," followed immediately by the same Russian representative's threats in the lobbies to wage nuclear war, further confirm that Russia is unfit to continue in its current role at the UN.

The General Assembly in March already had identified Russia's invasion of Ukraine to be an act of aggression. The Assembly expelled Russia from the Human Rights Council in April. The Council of Europe, Europe's chief human rights and rule-of-law body, for its part expelled Russia in March and suspended relations with Belarus, Russia's accomplice in aggression. The International Court of Justice, also in March, adopted provisional measures ordering Russia to cease all military activities in Ukraine—and successfully resisted the Chinese judge's pressure to address the two States as if "complicated circumstances... gave rise to the conflict," a form of words that would have suggested the "conflict" to be something other than a blatant assault by Russia on international order. The United Nations' Independent International Commission of Inquiry on Ukraine last week reported in detail on heinous crimes that Russia has perpetrated in Ukraine. The Commission in its report, like the International Court in its provisional measures, showed no trace of relativism or false equivalency. These examples illustrate that international institutions are able to act within the scope of their responsibilities to hold Russia to account. The General Assembly, a half century ago, acted against a Member that it judged to have breached the Charter. The Security Council, in a step in accord to the letter with its own procedure, can act as well today.