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CHALLENGES TO ILLEGAL VETOES: WFM-CANADA'S CALL FOR JUSTICE THROUGH INTERNATIONAL LAW



Bill Pearce

Bill Pearce was called to the bar in 1968. Since then he has had a varied career as a barrister. He is currently retired and living in Victoria, while continuing to serve as President of the World Federalist Movement – Canada (WFM-Canada) Victoria branch.

The veto power of the United Nations Security Council (UNSC) is arguably among the most contentious aspects of the UN system, reflecting a power dynamic in place at the Charter's drafting in 1945, with great powers victorious in the Second World War enshrined as the five permanent members or "P5." Discontent about the inadequacy and lack of equability of the current system has waged for decades. Today, increasingly, legal scholarship is meeting advocacy toward veto reform. This article examines one case study of an initiative to delimit the use of the veto based on sound legal reasoning coupled with strategic domestic advocacy. The proposal is to seek an Advisory Opinion (AO) of the International Court of Justice ([ICJ](#)) on the limitations of the veto power in cases of alleged and suspected atrocity crimes under international law.

THE PROPOSAL

World Federalist Movement – Canada ([WFM-Canada](#)) has taken up a leadership role in support of a project to request the Government of Canada to call on the UN General Assembly (UNGA) to seek an AO from the ICJ. The purpose is to affirm the existence under international law of limitations on the use of the veto for UNGA draft resolutions.

VETO POWER: DEBATES & HISTORICAL USAGE

The veto is often exercised out of self-interest by a permanent member of the UNSC. It has previously been deployed even in situations where there are reasonable grounds to believe a state or non-state actor is committing the crime of genocide, crimes against humanity, war crimes, and the Crime of

Aggression. The WFM-Canada proposal was sparked by the Russian Federation's veto on February 25, 2022, of the UNSC draft resolution ([SC/14808: US, Albania](#)). Made under Chapter VI of the Charter, the resolution was submitted by Albania and the United States and garnered support from 11 UNSC members. The draft included a call for the immediate cessation of Russia's use of force against, and withdrawal of its forces from, Ukraine as well as granting immediate access for the delivery of humanitarian relief.

Peace and security resolutions of the UNSC are frequently vetoed by the P5 when they, or an ally, are in breach of peremptory norms. Examples include Iraq, Syria, Georgia, Crimea, eastern Ukraine in 2014, and Myanmar. Trust in, and respect for, the UN has been diminished by each abuse of the veto privilege.

In a noteworthy development, the UNGA held their first ever formal debate on the veto in April 2023. France proposed that the permanent members voluntarily and collectively suspend the use of the veto in cases of mass atrocities. The US delegate also made remarks that were encouraging. He said that the P5 must exercise their veto responsibly, stressing that any permanent member that uses this right to defend its own act of Aggression should be held accountable and that the United States will refrain from the use of the veto "except in rare, extraordinary situations." However in reality, since 1970, the US has used the veto 83 times, far more than any other permanent member.

In a debate on peremptory norms that occurred in the General Assembly on March 9, 2022, it appeared that most

countries had no difficulty accepting the proposition that resolutions and other acts of the UN cannot conflict with peremptory norms of general international law (*jus cogens*). Austria put it best when it referred to an earlier report it had made, which concluded that “**the Security Council does not operate free of legal constraint, which means that the Council’s powers are subject to the Charter of the UN and norms of *jus cogens*.**”

The AO process of the ICJ offers a means for pacific means to resolve this issue, not led by States with vested interests where diplomacy has failed, but by a third-party judicial body with the mandate, under the UN Charter, to answer such questions. An AO is not a contentious dispute but a request for legal clarity on an issue – ideally, before the situation escalates. Current AOs request include a unanimous referral by the UNGA to consider the *Obligations of States with Regard to Climate Change*, as well as AOs concerning labor protections and diplomatic protections. The ICJ recently released a seminal AO on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including in East Jerusalem*.

RATIONALE

This WFM-Canada proposal is not a call for a reform of the [UN Charter](#) *per se*; rather it asks the government of a Member State – in this case, Canada – to submit a request to the ICJ for an AO. If the use of the veto is confirmed by the court as illegal – for example, when a permanent member has committed the Crime of Aggression – the opinion would confirm the state of international law, whether grounded in treaties, customary law, or peremptory/[jus cogens](#) norms, as discussed below.

The General Assembly is a body whose good efforts are frequently thwarted. Unlike the Security Council, the UNGA does not have the authority to compel member states to enforce UN resolutions. The frequent, often well-publicized defeat of UNGA resolution drafts by the Security Council enables states to violate international law with an increased measure of impunity. Since the formation of the UN in 1945, the P5 veto has been a strategic tool used by competing global interests. The proposal supported by WFM-Canada would challenge what we believe to be ‘illegal’ vetoes in the Security Council. By this, we seek to address and correct a glaring democratic deficit at the UN.

EXPERTISE WITHIN CORRIDORS

Among numerous supporting advisors to the WFM-Canada proposal is Jennifer Trahan, a Clinical Professor and Director of the Concentration in International Law and Human Rights at the NYU Center for Global Affairs. Trahan is the author of the award-winning book *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*. Trahan presents three main arguments on the illegality of

veto resolutions. The first relates to peremptory norms, which include genocide, crimes against humanity, war crimes, and the Crime of Aggression. She concludes that a P5 veto cast in the face of violations of these peremptory norms, or where there is a serious risk of these crimes occurring: “(a) is at minimum inconsistent with the respect due to these highest level norms; (b) more aggressively formulated, may facilitate the commission of the crimes, thereby violating [jus cogens](#); and, (c) also violates what has been identified in its *Articles on the Responsibility of States for Internationally Wrongful Acts* (ARSIWA) as the duty of **all states** (all bold text author’s emphasis) to ‘cooperate to bring to an end through lawful means any serious breach of an obligation arising under a peremptory norm of international law’ ([ARSIWA Art. 41.1](#))” by the International Law Commission, the body of experts established and elected by the UNGA to codify international law.

Importantly, Art. 41.2 of ARSIWA requires states not to “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.**” As an example: Israel’s war on Gaza following the deadly incursion on October 7, 2023, by *Hamas* and other fighters into Israel. If the allegations are found to have merit and Israel’s bombardment is indiscriminately killing non-combatant Palestinians in contravention of the laws of war, then the United States, having been made aware, would be obligated under law to cease the provision of lethal aid to Israel. This ICJ AO could act as an effective deterrent, and as another tool in the application and enforcement of international law to hold perpetrators of the worst crimes in war legally responsible.

Similarly, if Canada is supplying arms or parts to Israel which assists Israel in the commission of war crimes, it too would be under obligation to immediately cease the export of such materials. The Netherlands Court of Appeal on [February 12, 2024](#), enjoined the Netherlands from exporting F-35 parts to Israel on the basis that it was “not plausible that this destruction was inflicted exclusively on military targets or constituted legitimate ‘collateral damage’” and that there was a “clear risk that the F-35 parts to be exported will be used in committing serious violations of international law.”

Jennifer Trahan’s second argument is based upon the UN’s “Purposes and Principles” found in Articles 1 and 2 of the UN Charter. Article 24(1) provides that one of the purposes of the UN is “to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace.” Another Purpose is to act in conformity with international law. Article 2 further includes a provision that requires members to act in “good faith” in fulfilling their assumed obligations.

PROPOSAL ARGUMENTS

Firstly, to commit, or to fail to act to prevent, an act of Aggression constitutes a violation of a permanent member's obligations under the UN Charter. A UNSC permanent member that uses the veto to block a resolution drafted to compel an end to its illegal behavior, is thereby facilitating a continuance of its own breach of the peace. Using the veto as a shield would be deemed inconsistent with the Purposes and Principles of the Charter and place the veto option beyond reach. As Professor Trahan asserts, permanent member status was created under the Charter, **“so they cannot have been granted power to go beyond the limits of the Charter or the power granted to the Security Council as a whole; If they do, their actions would be *ultra vires*,”** or beyond their legal authority. This principle ensures that even the most powerful members of the Security Council are bound by the same rules and limitations as the rest of the international community, maintaining a balance of power and accountability by rendering such vetoes null and void under international law.

The third Trahan argument relates to treaty obligations under the Genocide Convention and the Geneva Conventions. For example, where genocide or a risk of genocide is occurring, contracting parties to the Genocide Convention, of which Canada is a member, must **“undertake to prevent and to punish”** genocide. The **“prevent”** obligation recognizes the duty to act can arise before the conduct under question becomes genocide. It might be argued therefore, that when a Member State knows, or ought to know, that there is a serious risk of a situation constituting or setting the stage for genocide, the duty to act exists then in that moment. If a permanent member commits or abets genocide, they violate treaty obligations, potentially nullifying their veto rights. This means past vetoes used to support ongoing war crimes by an ally could be challenged, arguing that the permanent member abused its veto to knowingly facilitate these crimes.

The WFM-Canada proposal centers on Canada's obligations under the Genocide Conventions, and on Canada's [joint declaration](#) with the Netherlands to the ICJ on the allegation of Russian genocide against Ukraine. Prepared by Canada's Ministry of Justice on behalf of the Ministry of Global Affairs, the declaration insists that the “state's obligation to prevent and the corresponding duty to act, arise at the instant the state learns of, or should normally have learned of, the existence of a **serious risk** that genocide will be committed”, and, “an essential first step before taking action in fulfillment of Article I is the assessment of whether there is a genocide or a **serious risk** of genocide ... This assessment should be based on all available information, in particular, from independent and credible sources, and should be guided by the definition of genocide, as outlined in Article II of the Genocide Convention.”

Common Article 1 of the 1949 Geneva Conventions is today generally seen as “quasi-constitutional.” It requires Parties to

those instruments to “respect and to **ensure respect** for the present Convention **in all circumstances.**” It is premised on the doctrine of *erga omnes*, i.e., the obligation of states towards the international community as a whole. Thus, a permanent Member State that vetoes a resolution designed to end a breach of the Geneva Conventions or the Genocide Conventions, furthers the continuance of the breach(es) of those Conventions through this act.

QUESTIONS FOR THE ICJ ADVISORY OPINION

1. Does existing international law contain limitations on the use of the veto power by permanent members of the UN Security Council in situations where there is reasonable grounds to suspect ongoing genocide, crimes against humanity, war crimes, and/or the Crime of Aggression?

2. If the court does identify situations which place limits on the use of the veto power, would that mean that Security Council members would be at liberty to treat vetoes made in such situations as being null and void?

Framing the questions generally affords the advantage of not having to rely on submitted documentary evidence or oral testimony. The hoped-for result is that the hearing can be conducted in an expeditious and relatively inexpensive fashion. This proposal anticipates the ICJ will be prepared to consider these questions on non-contested facts, and that its answers will have the effect of curtailing the current misuse of the veto power. This shift would significantly enhance the democratic integrity and effectiveness of, and restore a large measure of faith in, the UN.

The proposal recognizes there is a general perception globally, that the UNSC has been paralyzed from exercising its function due to the veto, and that an initiative aimed at curtailing the misuse of the veto would likely be well-received by the Court. There was a belief at its founding, that the five permanent members' right to veto would be curtailed over time. That time has come.



WFM-Canada is spearheading an initiative to request an ICJ Advisory Opinion through the UNGA, to call out the illegal use of the veto in the UNSC. Join us in urging the Canadian government to lead this effort for a more accountable UN.