



Partly adapted from extempore remarks

REMARKS BY MR. NIRUPAM SEN, PERMANENT REPRESENTATIVE, DURING
NEGOTIATIONS ON THE 'QUESTION OF THE VETO' AT THE INFORMAL GENERAL
ASSEMBLY PLENARY ON MARCH 16, 2009

Mr. Chairman,

Let me join my colleagues in thanking you for your circular letter, for holding this meeting and for conducting this negotiating process.

The veto was not god-given. It is part of what the ancient Greek historian Herodotus called "ta genomena ex anthropon" or "things that result from human action" and therefore can be modified by human action. As the distinguished Permanent Representative of Algeria pointed out, the veto was exercised on behalf of political formations that no longer exist. States and empires have broken up and decolonization has brought into the General Assembly the majority of its membership. World War-II and the Cold War are both over and the Permanent Members can no longer either manage the world economy or world peace. The veto effectively keeps significant areas of interest outside the ambit of the UN which is inadmissible. After the massive failure of governance, represented by the collapse of the financial system, any absolute claim to governance is mere hubris. The Charter is a kind of treaty. The Vienna Convention on the Law of Treaties sees a change of circumstances as "autonomous ground of non-application" of the treaty (supported by the International Court of Justice).

There is a school of thought that says that no restrictions can be placed on the use of veto. There is another that says that restrictions should be placed. Let me point out that there already are at least two restrictions on the veto in the Charter – one explicit and one implicit. The first significantly is in the very article that enunciates the veto namely 27.3. This very article states that Permanent Members who are party to a dispute cannot vote (and therefore cannot veto) decisions under Chapter 6 (specific settlement to disputes) and under article 52.3. In actual fact, Permanent Members have mostly violated this article and this restriction. Unless there is the peer pressure of new Permanent Members held accountable through reviews, how do we ensure implementation of this Charter restriction? Incidentally, US Senator Tom Connally, US delegate to the GA of November 15, 1946 had said that the purpose of this restriction was to "prevent a party to a dispute being judge of its own cause, to establish in the Charter a principle of justice which is elementary in every legal system. We would not permit a party to a lawsuit to sit as a member of the jury." This is the

old principle of Roman jurisprudence: "*nemo debet esse iudex in propria sua causa*". What we have just heard would leave this principle and the restrictions to continue to be breached. Similarly the spirit of articles 31 & 32 is that once the Security Council has the view that a member state's interests are affected, that member state has to be heard; a Permanent Member should not veto such a majority view; in actual fact the veto or the threat of veto has been often used in such cases. Without new Permanent Members, how is this restriction to be implemented? Apart from the veto, there are articles like Article 39 (threat to peace and security) which have been amended de-facto by Permanent Members to redefine threats to peace and security or articles like Article 44, under which TCCs should take part in debate and decision making on peace keeping mandates, which have never been used.

There is a school of thought that says that the veto cannot be amended and a school of thought that says that it should be amended. The short point is that the veto has been amended but the amendment has been informal and therefore legally infirm. Article 27.3 of the Charter clearly speaks of "the concurring votes" of permanent members. Therefore, Charter commentaries of 1946 make it amply clear that abstention was the equivalent of a veto. It is not treated as such any longer. The Charter can only be amended by procedures set out in Articles 108 and 109. Therefore, this informal amendment is really law making by law breaking. What is more it is to the detriment of the General Assembly. The legal principle of estoppel prevents the GA from challenging a UNSC decision with an abstention by a permanent member as illegal or invalid because of acceptance over a fairly long period of time. But it cannot even demand further continuation of the practice. The permanent members can give it up any time and go back to the earlier interpretation, without legal problem. Thus it is they who are amending the Charter, not the General Assembly. There were to permanent members who were represented at Deputy Minister level at the meeting in Rome on February 5, 2009. His Excellency Foreign Minister Frattini, summing up the discussion, stated "we should also realistically review the question of the veto". Since they hold the principle of consensus, it would be useful to know if these Permanent Members agreed to have their vetos realistically reviewed.

Practical restrictions that could be considered is a qualified veto i.e. confined to Chapter VII; non-use in a range of issues that have nothing to do with peace and security such as a change in how a peacekeeping operation is financed, the Council seeking the advisory opinion of the ICJ, bringing a question to the GA, electing the Secretary General, reverse veto. There is a widespread demand of civil society for non-use in cases of ethnic cleansing, war crimes, crimes against humanity. On the model of the US Constitution overriding the veto by 2/3rds votes of the General Assembly could also be considered. The demand that whenever a veto is used it should be explained is reasonable in purely legal terms: Gustav Radbruch, an authority on international law, has formulated the famous Radbruch formula. In terms of Article 25, even if a Member State disagrees, it has to implement but law requires a reason for obedience. Most important of all, even if restrictions are accepted and enacted, how would they, like the restrictions already in the Charter, be implemented without new permanent members elected and then held accountable for implementing them through reviews.

Article 27(3) requires concurrence of the permanent members – thus, once we have new permanent members, the requirement of their concurrence, or their right to veto as is commonly stated, is automatic. The concept of extension of veto to new permanent members is, therefore, misleading as Article 27(3) would have to be specifically amended if we have to deny the veto to new permanent members. In this sense, the proposal of the African Union is logical and in the spirit of the Charter. A few delegations have argued that new permanent members without veto rights will not make any difference to the functioning of the Council, and hence there should be no new permanent members. The automatic corollary of the argument is that new permanent members must be given the veto right, apart from the fact that addition of new permanent members, with their institutional memory and long-term engagement horizon, is the only way to ensure any real reform of the Council. A leading light of the UFC stated that without the veto, new permanent members cannot wield influence, and there will be no change in the working methods. On the other hand, they are happy to sell us the idea that non-permanent members, who certainly will not have the veto, and will be there for shorter terms, will be able to deliver reform. Another, at an earlier meeting, said that they had been against the veto in 1945 and continue to be. This tragically demonstrates the power non-permanent members have over the reality of UNSC decision making. Thus behind all the tall talk of equality, the UFC is deeply status quoist.

We have been told by a leading light of the UFC that “extending the veto would not redress inequality. It would aggravate it, further gum up the decision-making mechanism” and that we should have “gradual limitation of the veto”. There are three issues here: equality, efficiency and restrictions. The UFC proposal would leave the monopoly of the P-5 untouched, there would be no equality with the P-5. Without the pressure of initial election and subsequent accountability of new permanent members and their peer pressure, there would be no movement towards greater equality. As for restrictions, without new permanent members held accountable for them, how do we achieve these? As we have seen even if they were enacted in the Charter, how do we ensure their implementation? The question is legitimate – how do we ensure efficiency through extending the veto and expanding numbers? Actually we would then have real efficiency unlike the fake one that exists now. Firstly, decisions would be more optimal, widely accepted, reducing the need for force. Most important of all with more numbers and more vetos the only way to ensure efficiency is through majority voting and non-use or at least greatly restricted use of the veto. This incidentally is the only way also to empower non-permanent members and shift the balance of power. The Uniting For Consensus does not want any of this and hence its proposals. Since both efficiency and optimality favour this, the only reason for denying veto and permanence (through the interim model and the UFC proposal) could only be that this is an attempt to recreate apartheid in the UNSC on the premise that developing countries cannot handle either the veto or permanence – a continuation of the historical imperial project. Our national position has been and remains that veto should be extended to new permanent members. As a measure of our flexibility and willingness for compromise, we had agreed to deferring only the use of the veto till the Review Conference. The African Union (and this is understandable) did not wish to defer use. Now they are being absurdly offered the compromise of giving up permanence also. This is truly an attempt to impose an imperial compromise. The UFC’s leading light offers them “the possibility” that African members “unanimous negate vote” could stop

a decision which would mean that the possible veto of all the African members would be equal to a single European veto. On the other hand, he speaks of "an appeal first and foremost to the permanent members to accept significant limitations on the veto". What if they do not respond to his appeal? Thus while pretending to transcend Orwell's world, the UFC is only perpetuating it.

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