

***Reconstructing Article 109(3) of the UN Charter: Towards
Constitutionalisation of the United Nations and International Law***

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ABSTRACT

By critically assessing the discourse, intent and teleology of the United Nations Charter when the text of the instrument was being finalised in 1945, this thesis argues that the majority of the world's states gathered at the UN Conference on International Organisation in San Francisco were aware of the fact that the core provisions of the treaty were being dictated by the five permanent members of the Security Council. Nevertheless, these states accepted the Charter in its current form in return for the promise of a more democratic UN in the future. This qualified acceptance was manifested in Article 109 of the Charter and, more specifically, in that article's paragraph 3, which provided for a facilitated Charter review in ten years' time.

Recognising that globalisation has outpaced fragmented state-centric global governance, and that world-wide threats in areas such as the violation of human rights, climate change, armed conflicts, and the use of conventional and nuclear weapons continue to exist, this thesis argues that elusive global governance and its instrument of international law are, in the absence of a global government, ill-equipped to deal effectively with these borderless problems.

Bridging the governmental gap, however, the UN Security Council, with its monopoly on the use of force in order to maintain "peace and security" under Chapter VII of the Charter, has demonstrated erratic and unplanned competencies. In fact, in the past 25 years, the Council has deployed its auto-interpreted expanded powers in the diverse areas of court-making, law-making, defining criminality and sanctioning non-state actors as criminals. It has even involved itself in the settlement of tort claims, awarding damages to individuals and corporations. The Council has, in effect, emerged at the apex of the legal order and has shown its capacity to legislate globally.

The founders, when drafting the Charter, were aware of the democratic and legitimacy deficiencies of the Council and, in order to redress them, and to apply the experiences learned during the UN's first years of operation, provided for a revisions process, including the holding of a Charter review conference, as enshrined in Article 109.

Why the UN has never in its 70-year history held such a review conference, and whether paragraph 3 of Article 109—neglected by researchers and politicians—is still in force, are at the core of this thesis's analysis. It will be argued that, if such a review conference is convened now, it would most likely trigger the process of UN constitutionalisation, and thus help transform the UN, so it can ultimately fulfil the objectives set out in the Charter's preamble—including guaranteeing and the protecting the fundamental rights of "we the peoples".

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I would also like to thank my other advising professor, Dr. Harm Schepel, whose incisive comments and perspicacity were of tremendous value.

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TABLE OF ABBREVIATIONS

Am. J. Int'l L.	American Journal of International Law (AJIL)
ASEAN	Association of South-East Asian Nations
AU	African Union
Big-3	US + UK + USSR
CUP	Cambridge University Press
CIL	Customary International Law
CTC	Counter-Terrorism Committee
DESA	UN Department of Economics and Social Affairs
DO	United Nations Dumbarton Oaks Proposal
ECOSOC	UN Economic and Social Council
Eur. J. Int'l L.	European Journal of International Law (EJIL)
FAO	Food and Agriculture Organisation of the UN
GA	UN General Assembly
GG	Global Governance
HR	Human Rights
HRC	UN Human Rights Council (also known as UNHRC)
IAEA	International Atomic Energy Agency
ICESCR	International Covenant on Economic, Social and Cultural Rights
IL	International Law
ILC	International Law Commission
ILO	International Labour Organisation
IMF	International Monetary Fund
IO	International Organisation

IPCC	Intergovernmental Panel on Climate Change
ICCPR	International Covenant on Civil and Political Rights
ITU	International Telecommunications Union
MAD	Mutually Assured Destruction
MEA	Multi Environmental Agreements
NGO	Non-Governmental Organisation (civil society)
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
OAS	Organisation of American States
OHCHR	Office of UN High Commissioner for Human Rights
OSCE	Organisation for Security and Co-operation in Europe
OUP	Oxford University Press
P3	China + Russia + US
P4	Big-3 + China (also known as the UN sponsoring governments)
P5	Permanent Five
PIL	Public International Law
R2P	Responsibility to Protect
RECA	Radiation Exposure Compensation Act
ROL	Rule of Law
S5	Small Five States
SC	UN Security Council
SG	UN Secretary-General
UDHR	Universal Declaration of Human Rights
UN	United Nations; also known as UNO (United Nations Organisation)
UNAIDS	Joint UN Programme on HIV and AIDS
UNCC	UN Compensation Commission
UNCIO	UN Conference on International Organisation
UNCLOS	UN Convention on the Law of the Sea

UNDG	UN Development Group
UNDP	UN Development Programme
UN-DPI	UN Department (Office) of Public Information
UNEP	UN Environment Programme
UNGA	UN General Assembly
UNHCR	Office of the UN High Commissioner for Refugees
UNPA	UN Parliamentary Assembly
UNSC	UN Security Council
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WFP	UN World Food Programme
WHO	World Health Organisation
WMD	Weapons of Mass Destruction
WMO	World Meteorological Organisation
WTO	World Trade Organisation

TABLE OF COURTS AND CASES

COURTS AND TRIBUNALS

DSBA	Dubai-Sharjah Border Arbitration (Ad hoc Tribunal)
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EGC	European General Court (former Court of First Instance)
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IUSCT	Iran-US Claims Tribunal
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
WTO	WTO Dispute Settlement Institutions (Panels and Appellate)

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Application, ICJ Reports 1993. March-August 1993.

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (1962–1970), Judgment, ICJ Reports 1970, 5 February 1970.

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, ICJ Reports 1986, 27 June 1986.

Certain Expenses of the United Nations, Advisory Opinion, ICJ Reports 1962, 20 July 1962.

Corfu Channel Case (UK v. Albania), Judgment, ICJ Reports 1949, 9 April 1949.

Fisheries Jurisdiction (United Kingdom v. Iceland), *Jurisdiction of the Court, Judgment*, ICJ Reports 1973, Judgment, 2 February 1973.

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Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, 20 December 1980.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, 16.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 114, 8 July 1996.

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Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Application, ICJ, 2014; Order and Proceedings, ICJ, 2015.

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Request for Advisory Opinion By World Health Organisation: Legality of the Use by a State of Nuclear Weapons in Armed Conflict, WHO Application for Advisory Opinion, ICJ Docket, 3 September 1993.

European Courts

ECJ, case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, ECR 1 1963, Judgment, 5 February 1963.

ECJ, case 6/64, *Costa v. ENEL*, Judgment, ECR 585 1964, Judgment, 15 July 1964.

ECJ, cases C-402/05P and C-415/05P, *Kadi and Al Barakaat International Foundation v. Council of the EU and Commission of the European Communities*, ECR I-6351, Judgment, 3 September 2008.

ECJ, Joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v. Yassin Abdullah Kadi*, ECR 2013-0000, Appeal Judgment of the Court (Grand Chamber), 18 July 2013.

General Court (EGC), case T-85/09, *Yassin Abdullah Kadi v European Commission*, Judgment, 30 September 2010.

Other International Courts and Tribunals

Dubai-Sharjah Border Arbitration, (British Year Book of Int'l Law, 65; 103-133), Ad hoc Tribunal, 1981.

ICTY, *Prosecutor v. Dusko Tadic a/k/a "DULE"*, Decision on the Defiance Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72, Appeal Chamber, 2 October 1995.

Iran-US Claims Tribunal, (British Year Book of Int'l Law, Vol. 83; 534), Arbitral Award, 15 June 1990.

WTO, Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Case DS/58/AB/R, 12 October 1998.

PROLOGUE

Peace Requires Justice,

Justice Requires Law,

Law Requires Government,

World Peace Requires World Government

This simple logic for the global rule of law and, more specifically, the establishment of a permanent international criminal court was the basis of a message that I had the opportunity to deliver personally to Senator George McGovern. The year was 1984. The venue was the National Convention of the US Democratic Party, being convened in San Francisco. The Democrats were deciding whom to elect on their ticket to run in the presidential race against the incumbent Republican President, Ronald Reagan. I was then a recent university graduate working in the field of computers and systems engineering. As a side interest, and as a volunteer, I was a member of a group of activists affiliated with two different NGOs with common goals: the mostly US-based Campaign for United Nations Reform, and the more international World Federalist Movement.

What we were advocating was “world peace through world law”. More specifically, we had a 14-point plan for the democratisation and strengthening of the UN. This plan included democratisation of the Security Council, a permanent peacekeeping force, a permanent international criminal court, and a non-state-dependent source of funds for the UN.

Our hope, with the help of Senator McGovern, was to enshrine some of our ideals within the Democratic Party platform. Senator McGovern was the Democratic presidential nominee who, in 1972, had lost to Richard Nixon (the year of the Watergate Scandal that ultimately toppled Nixon). Senator McGovern, together with a couple of Democratic Congressmen who also genuinely believed in the “world Peace through world law” objective, were our sympathisers and one of the few political conduits that we had at the Convention.

Thirty years have now passed. Of our 14-point UN reform plan, only one item has come to fruition: the International Criminal Court—albeit that the ICC deals only with large-scale international crimes and is unable to exercise universal jurisdiction. Senator McGovern has passed away. The Campaign for UN Reform has ceased to exist. The World Federalist Movement has become more conservative and, with its limited resources, now has narrower, more focused objectives, being mostly an NGOs’ coalition convenor for the ICC and R2P. As for me, after a long absence involved in the business world, and after undertaking a five-year research programme at the University of Kent (culminating in this thesis), the journey continues.

PART I

GLOBAL GOVERNANCE AND THE ROLE OF THE UNITED NATIONS

CHAPTER 1

INTRODUCTION: THE MYSTERY OF GLOBAL GOVERNANCE, THE ROLE OF THE UN, AND THE CONSTITUTIONALISATION OF INTERNATIONAL LAW

1.1 Introduction

The use or threat of use of coercion (by such means as bombs, tanks, missiles, drones, and the threat of use of weapons of mass destructions) as a way of resolving conflicts under the current international legal order, or—more arbitrarily—in the name of justice, religion, or democracy, is commonly deployed by states and non-state actors in daily global affairs.

Seven decades ago, the United Nations was created primarily with the mission of providing global security and the pacific resolution of conflicts. Its main organ, the Security Council (SC), was entrusted with this mission, and was intended to be the exclusive broker of global conflicts and the enforcer of peace.

The SC has generally failed in its mandate of maintaining peace and security (Section 1.2). On the other hand, it has, since the beginning of the new millennium, increasingly carved out a new role for itself: as auto-interpreter of the Charter, and as the law-making and the quasi-government of the global system.

When I started my research on Council reforms five years ago, I was seeking answers to the following questions: In view of the unsuccessful UN reform attempts, why does the UN

Charter seem to be frozen? Why, despite a Charter review and revision process enshrined in Article 109 – which refers to a “general” review conference – has the UN never in its history conducted such a review? More specifically, whatever happened to paragraph 3 of Article 109? According to its legislative history, the paragraph sought to impose a 10-year expiration date on the supremacy and special privileges conferred on the permanent five members (P5) of the SC by the 1945 Charter. Finally, taking account of the fact that the absence of constitutionalisation appears to be the major deficit in global governance, if such a Charter review were to be held, could it trigger the process of transforming and constitutionalising the UN and international law?

The thesis is in three parts. Part I concentrates on global governance and the role of the UN, focusing on the UN’s most powerful organ, the Security Council. I then examine the newly practised (since the 1990s) law-making, court-making, and legislative functions of the Council, showing that the Council, regardless of the original intent of the Charter and the *intra/ultra vires* argument presented below, assumed under Chapter VII a quasi-governmental function. I further demonstrate that this quasi-world governmental role affects not only sovereign states but in certain instances applies also to individuals, and that this has a direct effect on non-state actors and citizens globally.

In order to discover the original intent of the Charter, Part II examines the teleology and legislative history of the treaty, particularly in respect of the veto and the superior status accorded to the P5. Furthermore, in Part II, by examining the original sources relating to execution (operation) of Article 109(3), from 1955 until 2015, I consider the status of paragraph 3: are its provisions obsolete or do they still have legal force. If the latter, have these provisions been violated?

Part III focuses on the legal and constitutionalisation aspects of the Charter. First, the legitimacy of the Charter is critically reviewed, and then the good faith performance of Article 109(3) is assessed. The last chapter in Part III is devoted to normative issues and through that lens conceptualises the constitutionalisation of the UN and international law.

With paragraph 3 having particular significance both when it was drafted and when it was implemented in 1955, and with UN Reform at a gridlock, the last chapter ends with an assessment of the legal means of activating the review, together with an examination of the dynamics of such a review conference. In particular, if the review were to take place, would it trigger a constitutional moment?

It is hoped that this thesis will contribute to the field of international law in several areas. In Part I, some readers might find the shortcomings of global governance and the “fuzzy” international law concepts introduced—with the Council as global adjudicator and legislator—convincing and critical. However, there I have essentially drawn on the work of others, and perhaps expanded and reformulated their ideas to fit the thesis. One exception is my focus on the Council’s role as, essentially, a tax collector in the creation of the UN Compensation Commission (UNCC) in regard to Iraq (Section 3.6). According to the analysis presented, it seems that, for roughly a quarter of a century, the UNCC has adversely affected the Iraqi people. In retrospect, it appears to have been a contributing factor in the perpetual turmoil that Iraq has suffered since the First Gulf War.

My substantive and original contribution to the field of international law and UN law, however, is focused more in the following three areas.

First, in rediscovering the intent and possible effects of Article 109(3), the “promised” Charter review, and in demonstrating its legal force. The neglect of this subject can be attributed to the scarcity of resources on the topic. Those that do exist refer to secondary sources that can be traced back to the same three or four American scholars of the 1950s and 1960s, who, enveloped in their Cold War-era beliefs of a fixed bi-polar world and an immutable Charter, prematurely declared paragraph 3 to be obsolete (Section 7.8). However, by examining the 22 volumes of UNCIO documents—fully compiled and released to the public more than seven years after the end of the San Francisco Conference, but still a library rarity and difficult to access in their entirety—I was able to assess the legislative history of paragraph 3. Again, I relied on original UN sources to trace the operation of the paragraph in 1955, as well as searching for any related topic or activity in regard to the paragraph for the following 60 years, up to 2015. This year-by-year research was dictated partly by a lack of other sources and partly to ensure authenticity in interpretation. Consequently, my finding that the paragraph has been partially breached (by the P5) but is still legally in force represents both an important (re)discovery and a challenge to those legal scholars, policy makers and politicians who have neglected this topic and its applicability to UN reform on the assumption that the paragraph is in fact obsolete.

The second original feature of this thesis relates to the legitimacy of the UN Charter at the time of its conclusion (Section 8.3). In investigating the reasons for the acceptance of the Yalta formula (governing SC voting procedures) dictated by the P5, I examine the impact that the global conflicts of 1945 had on treaty-making activities—before, during and after the Conference. I concluded that the majority of the UN founding states at San Francisco were subject to the influence of the P5 and thus were not acting independently in matters of foreign

policy when they concluded the Charter. Some of these states were in fact under direct military occupation (friendly or otherwise) or subject to the colonial rule of the P5 and therefore acted under duress. This critical question of the Charter's legitimacy is further exacerbated by what appears to be a previously undetected fact: that the US, being the first state to ratify the UN Charter, deposited its ratification instrument in the short space of time separating the two atomic bombings of Japan, on the 6 and 9 of August 1945.

This sequence of events (Section 8.4.4), which took place within a 72-hour period, involved a powerful state formally registering its ratification of the UN instrument (with its collective security implications) between two extremely coercive displays of force. This was followed by an avalanche of other state ratifications, and may indeed have been a violation of the law of treaties in terms of securing the final consent of other states to the UN Charter (Section 8.4.4).

The third original contribution relates to the perceived invincibility and irreversibility of the P5 veto (Section 9.4). While assessing the feasibility of a review conference to revise the Charter, I observed that, in regard to all the three previous significant amendments to the Charter, one or more of the P5 had cast a negative vote, presumably vetoing the amendment. However, because of the two-phase process envisioned in Articles 108 and 109 for adopting and then later ratifying the amendments, and the typical two-year period between these two steps, in all three cases the P5 initial veto had, in effect, been overruled. This neglected finding appears to be linked to the P5 executive governments' reassessment of their vote, or, in the case of the more democratic P5 states, because of a shift in decision-making as regards the ratification procedure from their executive to their legislative branches and parliaments. In either case, the earlier negative vote was overruled and the Charter amendment was in fact

ratified. In other words, it appears that the veto, in cases where it counts the most—in situations involving Charter revisions—may not be invincible after all.

Lastly, in view of the above findings, I address the question of whether, by reconstructing Article 109(3), the UN can reinvent itself towards constitutionalisation.

1.2 Governing the World: Government, Governance or Anarchy?

The substantive question for students, academics and practitioners of international law, as well as global policymakers, politicians, and inquisitive world citizens, is: “How is the world governed?” Since the governed are governed by rules, regulations and laws, in this section, in the international context, I will use the terms international law and global governance interchangeably.

David Kennedy, in his article on “The Mystery of Global Governance”, elegantly reflects on “how little we in fact know about how we are governed”.¹ Similarly, the primary assumption of most international relations scholars, including Alexander Wendt, is that there is no effective global order and that, fundamentally, the state of the world is based on anarchy and, therefore, what states can make of it.²

Of course, for the traditional public international lawyer, there is a world order, consisting of domestic laws and international laws, with the latter comprising laws among nations, based

¹ (D. Kennedy, *The Mystery of Global Governance* 2009): 28.

² In regard to *global anarchy*, “the starting point” for many IR scholars and policymakers is the anarchic state of the world, with anarchy essentially being defined as the absence of a world state or a global supranational institution that has the monopoly on the legitimate use of coercion and is able to enforce international rules and agreements. (Verbeek 2011): 195. For a seminal work by Wendt on IR and anarchy, see (Wendt, *Anarchy is what States Make of it: The Social Construction of Power Politics* 1992).

on instruments such as treaties, and relying on customary international law (CIL), with the cardinal principle in this order being states as sovereign equals.³

For scholars such as Francis Fukuyama, who believe that democratic legitimacy can never transcend the nation-state (Fukuyama claims that this is true at least for Americans), global order is still possible.⁴ In fact, as Anne Marie Slaughter argues in her book *The New World Order*, that order already exists. Slaughter expands on this idea and, in her later works, expresses the belief that international law and governance is an organic patchwork of domestic laws and international institutions, with protocols and regulatory controls that function well but only if they are complied with. Moreover, she argues that, with the emergence of a “global community of courts”, this order is also providing for global jurisprudence and adjudication.⁵

Adopting the critical law theory approach to international law, with its focus on “why” and “how” rather than on “what” law is, it can be seen that law is not neutral or value free. Therefore, in the international context, if there is such a global order, the critical approach reveals a fundamental and omnipresent law and power relationship that makes international law inseparable from international politics, hence making international law essentially the instrument of the powerful.

In a similar fashion, many realists and rationalists, recognising the marginalisation of international law in the anarchic realm of international relations, put a higher weight on states’ relative powers and on their pursuit of self-interest. Seen through this lens,

³ On states as sovereigns and equals, which is a classic international law (IL) concept, see, for example: Hans Kelsen, 1949. “The Principle of Sovereign Equality of States as a Basis for International Organization”, *Yale Law Journal*, Vol. 53, No. 2: 207-220.

⁴ (Fukuyama 2002): A17. See also (Glennon 2003-2004): 97.

⁵ (Slaughter, *The New World Order* 2004). See also (Rajkovic 2012): 29-30.

international law decisions are based on “transaction costs” and benefits. On this view, states (especially the powerful ones) by and large base their decisions on the analysis and management of the cost-benefit of the consequences of their actions, which in turn dictates whether or not they choose to comply with a particular international law.⁶

What of international institutions and organisations (IOs)? What part do they play in international law and governance? The most universal of these international organisations (both in terms of membership and scope), the UN, considered this subject in 2006, through its specialised International Law Commission (ILC), which then produced its latest, most authoritative report on the status of international law: *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. The ILC report, and other scholarly commentaries based on it, tell us that we have a fragmented international law, with consequential conflicts in norms and jurisdictions, leading to legal indeterminacy. This hints at a dysfunctional global governance.⁷

Many legal scholars of different orientations take problems inherent in international law to mean that international law is not “real” law, at least as we experience it in our national models of jurisprudence. It is asserted that international law is not based on the concept of democracy (the global populous and the demos, or, in its multi-state form, “demoi-cracy”),

⁶ For IL as an instrument of the powerful, see (Nijman 2011): 71-77 and 90-91. See also (Cryer, Hervey and Sokhi-Bulley 2011): 59-60 and 71-73. For the argument that IL, as it stands, is not legalistic and is not intended to achieve a set of values or goals but is rather a tool for states to gauge the cost-benefit of their different foreign-policy decisions, see (Goldsmith and Posner 2005). See also (Nijman 2011): 75.

⁷ (Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission 2006*). On legal indeterminacy, see (Koskenniemi, *The Politics of International Law- 20 Years Later 2009*). On conflict of norms, see (Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law 2003*). For an opposing view to IL fragmentation, where “convergence” is claimed, see (Andenas and Bjorge 2015). Andenas and Bjorge primarily argue that this convergence is being led by the ICJ reasserting itself as the “center of the international legal system”. Ibid: 2 and 33.

and that there is insufficient transparency, accountability and legitimacy in law-making.

Moreover, it is generally believed that international law significantly lacks adjudication and enforcement powers.⁸

Adopting this *non-law* view, and taking into account the critical and transaction-cost approaches, we can infer that we do not in fact enjoy global governance, but, at best, are subject to international hegemony, and, at worst, global anarchy.⁹

Indeed, with the exception of some trade laws and regimes, and global regulatory and administrative laws, it appears that global governance has failed—at least in terms of substantive issues, such as global democracy, fundamental rights, prevention of armed

⁸ A legal theoretical argument doubting IL as a “legal system” is found in H.L.A Hart’s *The Concept of Law* (second edition, 1994). Hart describes the legal system as having both primary rules, which are essentially rules of conduct, and secondary rules, which are power-conferring rules and all rules other than primary ones. The secondary rules govern the primary rules and have three main components: rules of recognition (determinacy), rules for adjudication, and rules of change (how to change the law). Hart characterises IL as *primitive*, since it lacks the secondary rules component. See also (Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart* 2011): 969-977. For Hans Morgenthau’s views on the nexus of IL and politics, and on the UN being essentially the international government of the P5 super-powers, see his classic book *Politics Among Nations* (7th edition, 2005). See also (Liste 2011). Eric Posner argues that perils of global legalism besiege global governance and are the outcome of the “idealist belief that law can be effective even in the absence of legitimate institutions of governance” (Posner, *The Perils of Global Legalism* 2009). For a summary of some of the doctrines referred to here, see Wade Mansell and Karen Openshaw (Mansell and Openshaw, *International Law: A Critical Introduction* 2013): 234-237. Mansell and Openshaw also cover some other perspectives on IL, such as the Third World Approach to International Law (TWAAIL). Ibid: 11-14. On the constitutional and the democratic deficiency of current IL, see Chapter 9.

⁹ Hegemonic International Law (HIL), according to Detlev Vagts and Jose Alvarez, is characterised by IL indeterminacy, which benefits the super-powers (hegemons) and is manifested in the hegemons’ failure to participate in treaties (or to circumvent existing treaties by the creation of new ones) or by a lack of submission to global forms of dispute settlement (Alvarez, *International Organizations as Law-makers* 2005): 199-216. See also (Vagts, *Hegemonic International Law* 2001). Special privileges granted to hegemons in certain treaties, such as the P5 privileges in respect of the SC, make those international organisations or organs instruments for hegemons and their “best little helper”; *ibid*: 644.

In fact, these hegemons’ privileges either take direct effect through treaties, as with the preferential voting structures at the UN, World Bank and IMF, or may be conferred in a more indirect way, through implicit or explicit linkages in subsequent treaties: for example, the SC’s interventionist and special relationship with the IAEA, NPT, and ICC treaties.

On *global anarchy*, see n 2 above.

conflicts, nuclear disarmament, global poverty, and global warming. Furthermore, in the area of international peace and security, it has failed miserably.¹⁰

In conclusion, may I suggest the following: “global governance” is not about how, in the absence of formal government, such governance is “working” to solve the negative effects of globalisation, or is addressing the lingering substantive global issues, such as protection of fundamental rights or protection of the earth’s environment; nor is it about ending armed conflicts and outlawing war; but is rather about how it is “not working” to eradicate or solve

¹⁰ Despite the formation of the UN and other multinational security arrangements, hundreds of international armed conflicts have taken place since 1945, claiming millions of lives. A partial summary of violent conflicts that occurred while this chapter was being researched and written, during June and July 2014, follows. In Afghanistan, despite the scheduled departure of the US and the UK by the end of 2014, and after more than 12 years since the invasion of the country by the US and their NATO allies, the conflict is still ongoing. In Iraq, June saw the military successes of the Islamic State of Iraq and Syria (ISIS), which captured Iraq’s second largest city, Mosul. Iraq has become the battle ground for multinational, state and non-state combatants, with the 2014 year-to-date monthly average of deaths reported reaching 1,000, most of these civilians. The UN reported in July 2014 that Syria, in its first three years of civil war, had already reached 170,000 deaths, again mostly civilian—and the conflict continues, causing the displacement of millions of refugees. Over the same two-month period, the ongoing Ukraine civil war claimed hundreds of civilian and combatants’ lives. In one incident alone, on 17 July 2014, the shooting-down of a Malaysian civilian plane over Ukrainian airspace led to all 298 passengers and crew being killed. Also in July, in Libya, in one day alone, 59 deaths were reported, mostly in the battle between the different factions seeking to take control of Tripoli Airport.

Over the same period, North Korea threatened to use nuclear weapons against its adversaries, and the armed conflicts in Central African Republic (CAR), South Sudan, Somalia, Nigeria, Mali, Yemen, and the Democratic Republic of Congo (DRC) continued. The latter conflict, dubbed “Africa’s World War”, has lasted for five years and is in fact a proxy war between Angola, Namibia and Zimbabwe on the one side, supporting the government forces, and, on the other, the rebels, backed by Uganda and Rwanda. Another catastrophic armed conflict that once again erupted (in July 2014) involved the Israeli invasion of Gaza, which, up until 28 July, had taken close to 1,100 lives, mostly Palestinian civilians, including over 200 Palestinian children. It has also inflicted devastating economic and material loss and hardship on Gaza’s citizens. On the Israeli side, 45 soldiers died.

This list is by no means exhaustive nor is it atypical. The creation of the UN at the end of World War II was supposed to put an end to international violent conflicts, but this has not been the case. The last 70 years have witnessed a substantial deficiency in global governance relating to peace and security, despite the existence of the UN, NATO, NPT, African Union, Arab League, OSCE and other related security regimes and governances, which, individually and collectively, have been unable to prevent these catastrophic deaths, injuries, displacements and losses, and the associated material and environmental destruction.

(Information on the above conflicts was gathered from various news sources: in particular, the *Guardian*, over the period June and July of 2014, with the exception of the multi-state character of the DRC conflict, which was reported by the BBC: <http://www.bbc.com/news/world-africa-13283212> , accessed 28 July 2014.

For a view of security governance “malfunction”, see (Hale, Held and Kevin 2013): 84-112.

global problems, and is, at best, reduced to administering and managing their negative effects. In that sense, global governance is not a *mystery* but perhaps more of a *myth*.

1.3 Constitutions, Constitutionalism and Global Governance

Constitutionalisation: the Terms of Reference

Can we constitutionalise global governance? Is having a constitution the same as constitutionalisation? What do we mean by international (global) law and UN constitutionalisation?

First, it is necessary to start with a definition of global governance. From a strictly legal perspective, it seems global governance refers to the existing, fragmented state of international law: the various corpuses of, for example, international, public, criminal, humanitarian and economic law, including their *lex specialis* varieties, such as the specialised ICC regime, or the law of the sea (UNCLOS), as well as self-contained regimes, such as the trade laws of the WTO.

In the universal application of global governance, we have UN law, particularly that of the Security Council, generating hard law in its precedent-setting legislative and criminal-law-making role (to be discussed in Chapters 2 and 3). We also have the mostly *soft* and regulatory laws of the UN system's other organs and associated international organisations, via their declarations, conventions, and legal regimes.

Global governance also includes global administrative and regulatory laws, which, regardless of whether universal or not, continue to proliferate and, directly or indirectly, are increasingly impacting upon individuals, corporations and other non-state actors.¹¹ I will not go so far as

¹¹ The administrative and regulatory rule-making powers of international organisations, largely within the UN system and the economic and financial IOs, are continually expanding. (Zumbansen 2013): 510-511. These

to include as international law the decisions and agreements made “behind the scenes” by high-level intergovernmental organisations, such as the G-8 and G-20, unless they are published and made transparent (possibly a wishful assumption).¹² Last, but not least, we should be mindful of the law emanating from traditional international law sources, and therefore part of global governance, as mentioned in Article 38(1) of the ICJ Statute, including customary International law and judicial decisions.

Attempts to define global governance in the legal context become further convoluted when trying to determine how such rules are made, who has the power to make them, how they are adjudicated, what compliance mechanisms exist, and how they may be enforced. This opacity, either intentional or just unresolved, leads to a substantial democratic deficit and indeterminacy in international law and global governance.¹³

rules, whether legally binding hard laws, or so-called soft law, and whether for the public good (such as the WHO regulations) or regulating private interest (such as some of the World Bank and IMF rules), are increasingly impacting non-state actors and are, by and large, followed uncontested by the weaker states. (Alvarez, *International Organizations as Law-makers* 2005): 244-257.

¹² For global decision-making in a mode of *inter-state oligarchy*, see Anne Peters’ argument in (Peters, *Dual Democracy* 2011): 286-294. On the shortcomings of the G-7 and G-8 type of governance, see (Weiss and Thakur, *Global Governance and the UN, an Unfinished Journey* 2010): 192-193.

¹³ For a more recent view on the fragmentation of IL and its indeterminacy, see (Koskeniemi, *The Politics of International Law- 20 Years Later* 2009). On the democratic deficit of global governance, see (Peters, *Dual Democracy* 2011): 267. For the argument that in fact this fragmentation of IL and its indeterminacy is intentional and is a tool for powerful states’ hegemony, see Eyal Benvenisti and George Downs, in *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*. Benvenisti and Downs argue that:

Powerful states labor to maintain and even actively promote fragmentation because it enables them to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to opportunistically break the rules without seriously jeopardising the system they have created.

...

[B]y suggesting the absence of design and obscuring the role of intentionality, fragmentation frees powerful states from having to assume responsibility for the shortcomings of a global legal system that they themselves have played the major role in creating. The result is a regulatory order that reflects the interests of the powerful that they alone can alter.

(Benvenisti and Downs 2007): 595-628 at 595.

Examples of international law indeterminacy can be found in some environmental cases, where at least three legal regimes—the WTO, UNCLOS, and the Multi Environmental Agreements (MEAs) —can all claim to exercise some form of jurisdiction.¹⁴

Owing to the absence of hierarchy and judicial review in international law, this fuzzy legal logic applies even in areas where exclusive and universal competencies are claimed. This is particularly evident in the case of the Security Council, which presumably has exclusive powers to deal with global peace and security issues (Chapter 3, especially Section 3.7).

In the case of SC decisions, indeterminacy is more intertwined with the democratic deficit of the Council (in terms of representation and the inequality of its members) and is particularly problematic in so far as any member of the P5 can defy a decision reached by a majority of the other member states by exercising its veto power. For example, in relation to life-and-death situations, such as whether a military intervention constitutes self-defence under Article 51, or amounts to unlawful aggression, or in situations where responsibility-to-protect (R2P) or humanitarian-type intervention and prevention need to be triggered, the Council has been acting erratically or not at all.¹⁵

Since global governance lacks a hierarchical structure, and given the indeterminacy of its procedures and outcomes, not to mention the opacity of how its rules are made, how it

¹⁴ For an example of the World Trade Organisation, a trade regime, making judgments on environmental issues, see the *Shrimp-Turtle* case (United States - Import Prohibition of Certain Shrimp and Shrimp Products 1998). See also (Ulfstein, *The International Judiciary* 2011): 140.

¹⁵ The humanitarian intervention and R2P doctrines are explained in n 102 below.

On Council efficacy in these matters, while this chapter was being written, on 21 August 2014, the outgoing UN High Commissioner for Human Rights, Navi Pillay, in her last report to the SC, formally criticised the P5 for their behaviour: "Short-term geopolitical considerations and national interest, narrowly defined, have repeatedly taken precedence over intolerable human suffering and grave breaches of—and long-term threats to—international peace and security". Pillay further told the Council, in her final briefing after six years in the role: "I firmly believe that greater responsiveness by this council would have saved hundreds of thousands of lives"; <http://america.aljazeera.com/articles/2014/8/21/pillay-slams-securitycouncil.html>; accessed 23 August 2014.

operates, and how it is held accountable, it is not surprising that the concept eludes precise definition.

Consequently, rather than ponder the difficulty of providing an agreed definition of global governance, and notwithstanding the wide usage of the term since the 1990s by politicians, technocrats and academics (but not by the average citizen),¹⁶ I will present below my selected definition—from among the array of the wide and the wild—for the purposes of this thesis.

Accepting, therefore, that global governance is a “mystery” and lacks a common definition, I select Richard Weiss and Ramesh Thakur’s encapsulation as one of the better ones, encompassing both international law and international relations. They define global governance as:¹⁷

[T]he sum of laws, norms, policies, and institutions that define, constitute, and mediate trans-border relations between states, citizens, intergovernmental and nongovernmental organizations and the market.

In spite of the generality and ambiguity associated with the concept of global governance—in terms of its actors, agencies, and legality, and notwithstanding the fact that it means different things to different people—this international law and international relations phenomenon does at least have one critical common denominator. As expressed by Nobel Economics

¹⁶ On the elusiveness of global governance as a concept when it first began to emerge in the early 1990s, see (Rosenau 1992):2. On it still being, by and large, illusory, see (Klabbers, *Setting the Scene* 2011): 5.

¹⁷ (Weiss and Thakur, *Global Governance and the UN, an Unfinished Journey* 2010): 31-32.

The different definitions and understandings of global governance have proliferated wildly. Benedict Kingsbury et al, in *Governance by Indicators: Global Power through Classification and Rankings*, define the concept simply as “governance beyond a single state”, and argue that “indicators and other quantitative ways of representing social phenomena can serve as technologies of governance”. For example, “military action” can be one of these “technologies” of governance. (Davis, Kingsbury and Engle Merry 2012): 11-13.

Laureate Joseph Stiglitz this is, “unfortunately”, global governance “without global government”.¹⁸

Joseph Weiler adds to this common understanding with the observation that in fact global governance is characterised not only as “without government” but also “without the governed.” This, he notes, makes it challenging to legitimise and democratise this type of governance, since “democracy presumes demos and presumes existence of government.”¹⁹

In view of this democratic deficit, and given the known negative effects of globalisation, can we regulate and put a leash on this “unfortunate” global governance?

¹⁸ One of the earlier works suggesting that global governance can function reasonably well without a government was James Rosenau and Ernst-Otto Czempiel’s *Governance without Government: Order and Change in World Politics*, published in 1992. In it, Rosenau and Czempiel argue that governance does not require “legal competence”, and that “governments exercise rule” whereas “governance uses power”. Therefore, in global governance, exertion of power, balance of power, and deterrence become important elements in making governance work. As an example, they cite the mutual deterrence of the Cold War era and the role of NATO as a system of “governance par excellence”. (Czempiel 1992): 250-251.

Joseph Stiglitz, on the other hand, recognises that globalisation (free trade and the removal of barriers) has occurred before in world history: in particular, in the Europe and US of the late nineteenth and early twentieth centuries, prior to World War I (see (Rodrik 2011): 24-46). Stiglitz, in *Globalization and its Discontents*, cites the US experience as a success, with the US federal government’s active intervention, regulation, and management of nineteenth-century inter-state free trade at the domestic level (analogous to the global) having strengthened both the US economy (relative to the rest of the world) and the federal system itself. In short, Stiglitz characterises the current shortcomings of global governance as follows:

*Today, with the continuing decline in transportation and communication costs, and the reduction of man-made barriers to the flow of goods, services, and capital (though there remains serious barriers to the free flow of labor), we have a process of ‘globalization’ analogous to the earlier processes in which national economies were formed. Unfortunately, we have no world government, accountable to the people of every country, to oversee the globalization process in a fashion comparable to the way national governments guided the nationalization process. Instead, we have a system that might be called **global governance without global government** ... [Emphasis in original]; (Stiglitz 2003): 21-22.*

Although global governance is generally understood not to function under the command and control of governments, Dani Rodrick, in *The Globalization Paradox: Why Global Markets, States, and Democracy Can’t Coexist*, reminds us that when global governance was unable to prevent the economic crash of 2008, some governments did have a role to play, and it was the intervention of governments that finally came to the rescue. (Rodrik 2011): 207-208. For the argument that there is in fact a “resurgence” in the idea of world government, see Campbell Craig, *The Resurgent Idea of World Government*, see (Campbell 2010): 397-408.

¹⁹ (Weiler, *Geology of International Law – Governance, Democracy and Legitimacy* 2004): 560.

International law constitutionalisation might be the answer. This could transform global governance—whatever that is—into *good governance*. And, in addition, it might provide the kind of universal, fundamental rights’ protection and collective security which form the normative constructs of this thesis, and that could signal an end to armed conflict: the promised but as yet unfulfilled goal of the United Nations.

Since the term constitutionalism is, according to Nicholas Tsagourias, value loaded, and with the term and its derivatives being “at the apex of political and legal aesthetics or virtues”,²⁰ what then is meant by constitutionalism and constitutionalisation, particularly in the international context?

Although constitutionalism is the ideology and the driving factor in the constitutionalisation process, to conceptualise the latter we must first make a distinction, recognising that the existence of a written constitution does not necessarily mean that the normative and structural concepts of constitutionalisation have been addressed or realised.²¹

In fact, while most states possess a written document called a constitution as the embodiment of the overarching legal order (with the written form being preferred for the sake of transparency), there can be such an order and constitutionalisation without a written instrument, as is the case in the UK.

At the multinational level, the same can be presumed of the EU, where, after “The Treaty Establishing a Constitution for Europe” was defeated, most of the main features of that

²⁰ (Tsagourias 2007): 1.

²¹ (Besson 2009): 385-386. See also, (Tsagourias 2007): 2-3. In the case of international organisations, some IOs, such as the ILO, ITU and UNESCO, without necessarily possessing any *constitutional* elements or objectives, formally name their statutes “constitutions”. For an example of a national constitution in written form, without constitutionalisation, see Alex Magaisa’s analysis of Zimbabwe (Magaisa 2010): 52, 58-59.

constitution were incorporated into the existing and new treaties, essentially giving them the same functionality.²² But then some criticise the EU, that the European Union “constitution”, while in the Union’s aspirations and perhaps informal agenda, however, as being insufficiently grounded in constitutionalism.²³

To avoid circularity, and to provide a basic understanding of, and a link to, these derivatives of the constitutional terms in the international context, and to provide the basis to this thesis, I propose the following definition:

***Constitutionalisation** is the process by which the ideals of **constitutionalism** are translated into a **constitution**, as the supreme legal order, with the necessary structure, primary rules, and secondary rules and procedures to achieve those **constitutional** ideals, and, further, guarantee its adaptability and dynamism.*

The primary and the secondary rules mentioned above essentially follow H.L.A Hart’s concept of law covered earlier.

That said, the international constitution must have a supranational architecture accommodating multi-level governments with vertical and horizontal relationships, incorporating the cardinal sovereignty-sharing principles of subsidiarity, proportionality and

²² (Tsayourias 2007): 2-3. See also (Walker, Reframing EU Constitutionalism 2009): 149.

²³ (Tsayourias 2007): 2-3. See also Joseph Weiler, *European Neo-constitutionalism: In Search of the Foundations of the European Constitutional Order*; Ibid: Note 5.

direct effect,²⁴ with its ultimate subjects being natural persons (“we the peoples”), safeguarded by the legal protection of judicial review.²⁵

The global constitution should not only be constructing the normative and axiological values prescribed by constitutionalism, such as the protection of universal and fundamental rights, but should also be sensitive to change and “continuously read politico-legal spaces.”²⁶

²⁴ In the EU, subsidiarity refers to when the union should intervene, based on the political philosophy of self-government, and in keeping with the objective of EU member states (in the Treaty preamble) of being “resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizens in accordance with the principle of subsidiarity”. (EUR-Lex 2015): Treaty Preamble, see: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN> . The principles of subsidiarity and proportionality are primarily defined in Article 5 of the EU Treaty. Ibid. See also: http://www.europedia.moussis.eu/books/Book_2/2/3/2/?all=1 . According to Chalmers, Davies and Monti, subsidiarity has two central logics: first, that the supranational government should not intrude on national, regional and local political and cultural identities. In the EU context, the principle is therefore directed at “policing, and limiting the reach and levels of EU legislation.” In common with most federalism models, the second logic is concerned with the mediation of the relationship between federal-supranational and local governments. In other words, “when it is appropriate for the central federal authorities to intervene and when it is not”. (Chalmers, Davies and Monti 2010): 361-365. The proportionality principle, in a multi-government structure, simply requires that the scope of action applied by the EU, or supranational government, in order to achieve a desired goal should be proportional and should “not exceed” that which is necessary to achieve the objective. See Chapter 9, Section 9.2. The concept of “direct effect” as it has evolved in EU jurisprudence is touched on in Section 9.2 and n 25 below.

²⁵ On the EU foundational period and its “pre-federal” and “constitutionalisation” stages, see Joseph Weiler’s 1991 seminal work *The Transformation of Europe*. Of particular relevance is his discussion of the cardinal constitutional rules potentially applicable in any supranational setting, such as the doctrines of *Direct Effect*, *Supremacy*, *Implied Powers*, *Human Rights* and *Judicial Review*. It should be noted, however, that the European experience and the evolution of its constitution has, from the outset, been more driven by *judicial constitutionalism* rather than treaty provisions. (Weiler, *The Transformation of Europe* 1991): 2403- 243. See also (Walker, *Reframing EU Constitutionalism* 2009): 149-176. On the institutionalisation of IL and the construction of the international legal system as a constitution, see (Paulus 2009): 69-73. On the empowerment of individuals and the globalisation of citizenship in international constitutionalisation, see (Peters, *Dual Democracy* 2011): 297-302. For an “EJIL Talk!” debate on “translation” of some of the domestic law concepts into international constitutionalisation, see (Ulfstein, *Empowerment and Constitutional Control* 2010). On “cosmopolitanism” ideals of multi-level citizenship and a world parliament, see (Held 2010): 101, 116, 239-252.

²⁶ (Tsagourias 2007) : 3. According to Weiler, constitutionalism is ‘an intellectual construct by which one can assign meaning to, or even constitute, that which is observed’; *ibid*: n 9. In these abstract terms, Neil Walker, in his article on EU and WTO constitutionalism, discusses some of the shortcomings attributed to non-state legal entities, such as legitimacy, democratic deficiency, accountability, equality and security. In general terms, he defines constitutionalism as an idea that “seeks to provide an organizing framework of practical reasoning for the application and balancing of the particular political values.” (Walker, *The EU and the WTO: Constitutionalism in a New Key* 2001): 33. Walker also points out that the process and achievement of constitutionalisation should not be viewed in “all-or-nothing” terms, but is a question of degree and “gradation”. *Ibid*: 31-34.

In setting the terms of reference for this thesis, I should clarify that, in referring to international or UN constitutionalisation, I am not prescribing a centralised unitary world state. As with the existing models of multi-constitutional states with multi-level governments, the ultimate global constitution will take away from states some of their sovereignty, granting them in exchange collective global rights. As a result, the constitutional model could draw on the experience of federal states—such as Brazil, Canada, Germany, India, Switzerland and the US—or on that of a less integrated but still supranational structure, such as the European Union.²⁷

According to Samantha Besson, constitutions are of two types: “thin” and “thick”. The “thin” constitution is an ensemble of secondary rules that organise the law-making institutions and processes in a given legal order.” Besson further explains that a thin constitution, in her opinion, implies any “autonomous legal order” with secondary rules of self-maintaining procedural clauses for change, such as revisions and amendments. A “thick” constitution for Besson, being comprised of “superior legal norms”, is a thin one to which substantive or “material” elements have been added.²⁸ Therefore, a thick constitution would always contain the material elements, such as separation of powers, checks and balances, the rule of law, judicial review, democracy and the protection of fundamental rights.

²⁷ The sovereignty-sharing hierarchical structure suggested here, whether in a federal or in a less integrated supranational setting, may take a more domestically acceptable political turn. See, for example, Kalypso Nicolaidis and Robert Howse, *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*. While examining the lessons learned from the subsidiarity concept in both the US and the EU, Nicolaidis and Howse suggest that a “federal vision” which is “freed from the hierarchical paradigm” of a “federal state” is possible. This “federal vision” can be accomplished by focusing more on “mutual tolerance and empowerment”, which is applicable not only to the US and EU systems, but is also relevant as a “global subsidiarity” model in global governance. (Nicolaidis and Howse, *The Federal Vision: Legitimacy and Levels of Governance in the United States and The European Union* 2002): 476-479.

²⁸ (Besson 2009): 385-386. See also (Tzagourias 2007): 2.

This recognises that constitutionalisation, as Mattias Kumm refers to it, is a cognitive process and a “cosmopolitan paradigm”,²⁹ or, as Koskenniemi describes it, a “mindset”.³⁰ Above, I was not attempting to give an exact definition of the term and its derivatives. Rather, the global or UN constitutionalisation that I refer to in this thesis is a “thick” constitution (in writing, for the sake of transparency and precision), which defines an autonomous legal order establishing a hierarchy of norms, and having the necessary structure and processes to guarantee the protection of the substantive constitutional attributes mentioned earlier as “material”.

1.4 International Law Constitutionalisation and the Role of the United Nations: UN Constitutionalisation

At this juncture, it will be useful to conceptualise some of the key principles and characteristics of international law were it to undergo a process of constitutionalisation and compare this with the current situation. A constitutionalised public international law would, in addition to the material elements outlined above, most likely remedy, in design or function, some of the fuzzy or unenforceable concepts in the current international legal regime. For example, *jus cogens* norms (peremptory principles or norms from which no derogation is permitted),³¹ and which constitute *erga omnes* obligations “toward all” states,³² would

²⁹ (Kumm 2009): 320-323.

³⁰ (Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization* 2007): 9.

³¹ (Brownlie 1998): 517. For the purposes of this thesis, it is assumed that peremptory norms certainly exist in positive international law. However, jurists are in agreement that *jus cogens* obligations are not precisely defined or categorised. Ibid. These higher obligations have not been defined or enumerated in the VCLT, or by the ICJ, although “peremptory rules basically pursue a *deterrent effect*.” (Cassese, *International Law* 2005): 209. In fact, the ICJ has carefully avoided pronouncing on the matter, or has used “elusive language” when referring to peremptory norms. Ibid.

³² The *erga omnes* and *jus cogens* concepts appear to be two sides of the same coin, since *jus cogens* norms are applicable to all states and “flow” into *erga omnes* obligations (or rights). However, M. Cherif Bassiouni argues that such a circular depiction is too simplistic. In citing the ICJ *Barcelona Traction* case, Bassiouni argues that, in spite of occasional attempts, the ICJ has failed to define precisely what meaning it attaches to the phrase “obligations of a state towards the international community as a whole.” Bassiouni further argues that:

become superfluous, since any supreme and compelling norm would be codified and included within the constitution.³³

Similarly, another fuzzy principle of current international law that might be expected to disappear is customary international law. In domestic legal orders, customs are often adopted and codified into existing laws.³⁴ With the generally accepted principle of equality before the law, the old concept of derogations and exceptionalism will, most likely, also disappear (for example, there would be no longer long lists of reservations at the end of a treaty, by which states unilaterally exempt themselves from parts of the law).

Further, since constitutionalisation will elevate the legal status of peoples vis-à-vis states, perhaps the governance model will—although initially founded on states’ consent—ultimately adopt a more egalitarian and majoritarian decision-making process (probably involving a qualified majority of states and populations). It will, therefore, be independent of the consent of any single state.³⁵ In fact, this empowerment of the states’ citizens at the supranational level was exactly what the US and the EU experienced in their constitutional “moments” and history.

Another continuing problem that constitutionalised international law might help to alleviate is the de-constitutionalisation of states’ domestic constitutions, which are increasingly affected

The relationship between jus cogens and obligation erga omnes was never clearly articulated by the PCIJ and the ICJ, nor did the jurisprudence of either court explicitly articulate how a given norm becomes jus cogens, or why and when it becomes erga omnes and what consequences derive from this.

(Bassiouni 1996):72-73.

³³ (Klabbers, Peters and Ulfstein, Epilogue: Debate on EJIL Talk! Blog 2011): 393.

³⁴ (Peters, Membership in the Global Constitutional Community 2011): 159-161.

³⁵ Ibid; see also (Klabbers, The Genre of Constitutionalization? And Constitutionalization and Law-making 2010); For a debate of the subject, see, (Klabbers, Peters and Ulfstein, Epilogue: Debate on EJIL Talk! Blog 2011): 355.

by current global governance issues. This phenomenon stems from the fact that some of the international law decisions that affect individuals and impact on domestic legislation, such as trade, health, labour and economic regulations and agreements (not to mention the legislative decisions of the SC, discussed in the next two chapters), frequently have a negative impact on the democratic processes of domestic and municipal law-making. Unless based on a formal treaty—which, according to most domestic constitutions, normally requires formal parliamentary ratification—these rules are usually made as international agreements solely by the states’ executive branches, and therefore do not require their parliaments’ ratification or their citizens’ consent.

Consequently, these laws (externally imported rules) are often made in circumvention of, and contrary to, the states’ domestic constitutional principles.³⁶ In a federal or supranational model of world governance, these decisions would be made in a global parliamentary setting, or would at least incorporate remedies such as universal judicial recourse, which would provide for more direct effect and therefore offer compensatory measures to domestic de-constitutionalisation.³⁷

Constitutionalisation would also avoid the perceived perils of global governance and international law, which are largely associated with the current absence of a global government, being instead designed to govern in a responsible and accountable manner.

Therefore, in addition to the benefits mentioned above, perhaps a constitutionalised

³⁶ The impinging of global governance on domestic constitutional systems will be discussed in more detail in Chapters 3 and 9. For a “Foreign Affairs” periodical view of the subject, see *The War of Law: How New International Law Undermines Democratic Sovereignty* in (Kyl, Feith and Fonte 2013).

³⁷ For the “compensatory” effect that post-constitutionalised IL will have on domestic constitutions, see Anne Peters (Peters, *Dual Democracy* 2011): 295, 296 and 347.

international law could address the current opacity of a global governance seemingly guided by an invisible hand.

Thus, to make global governance more transparent, prone to determinacy, democratic, accountable, and ultimately more just, is it feasible to opt for its constitutionalisation, either by creating a new global government institution or perhaps by constitutionalising one of the existing international organisations?

Assuming that a constitutionalised global governance is desirable, how might this be achieved? Would it be possible to hold a global constitutional convention, where every state would send its visionary representatives, who, after some months or years, might draft a world constitution?

Recent history tells us that, unless there is a major global calamity, such as another world war, or a sudden environmental apocalypse, or perhaps even a limited nuclear war, we cannot expect urgent global action in the convening of conferences similar to that which led to the creation of the League of Nations or the UN. Therefore, without global calamities, one cannot expect a new constitutionalised legal order to be invented from scratch.

Such a scenario is neither foreseeable, nor, because of its dire preconditions, desirable.

Consequently, are there any substantial and higher legally-ordered international organisations already in existence, covering the largest number of states and affecting the largest populations of the world, from which we can take that agency's main core component and build on it to make such a constitutional transformation?

In fact, the answer depends on our degree of conviction that, in the current international law regime, there is no hierarchy and no one law or rule that is superior to the others. However,

what about the UN and its Article 103 “supremacy clause”? (Chapter 3, Section 3.1, especially n 112).

We also know that some of the international legal regimes are more legally-developed and effective than others, as is apparent, for example, in comparing the WTO with human rights regimes. Is it then not possible to take the most legally sophisticated and effective of these international organisations and gradually constitutionalise it until it becomes the optimal global constitutional agent?

Could the WTO, a relatively effective self-contained regime,³⁸ which some argue can be constitutionalised, be the catalyst, or perhaps the platform, for even further constitutionalisation, so that it becomes *the* global governance institution?³⁹

John Jackson reminds us that 90 per cent of international law is related to international economic law.⁴⁰ With its legal regime overseeing a large volume of international trade, and with its powerful Dispute Settlement Understanding (DSU), the WTO has already become a central hub in many of the overlapping international law corpuses, so perhaps the “buck” could stop there.

Soon after the transformation of the General Agreement on Tariffs on Trade (GATT) into the WTO, the new organisation became a forum for settling cases beyond mere trade law disputes. In its role as a linchpin in global trade, it has taken the opportunity to link *other rights* to its free trade rules and rights. The WTO regime, by simply allowing “exceptions” to

³⁸ (Simma and Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law* 2006).

³⁹ For the argument that functional treaties can go beyond their original scope and become rights-based, see Ernst-Ulrich Petersmann (Petersmann, *International Trade Law, Human Rights, and the Customary International Law Rules on Treaty Interpretation* 2009): 69-90.

⁴⁰ (J. Jackson 1995): 596.

some of its rules and “enabling” some other rules, has allowed its member states to take unilateral and multilateral measures at both the domestic and international level to promote and protect human, labour and environmental rights.⁴¹

The WTO’s success in enforcing non-trade rights has led Ernst-Ulrich Petersmann to call for the expansion and formal “rights based” constitutionalism of the WTO. Furthermore, Deborah Cass suggests that this “judicial norm generation constitutionalism” of the WTO could eventually lead to something bigger—as was the case with the transformation of the European Community into the EU.⁴²

However, few liken WTO constitutionalism to domestic or global constitutionalism.⁴³ The WTO has been successful in protecting and effectively enforcing some of the “other” rules of the fragmented international law system where enforcement has been difficult or non-existent, in such fundamental areas as health and labour rights and the environment.

However, being primarily a trade regime, the WTO cannot be expected to regulate or to adjudicate on international criminal law, or handle collective security situations and armed

⁴¹ The evolution of the WTO dispute settlement system to expand its competency in the constitutional direction—from the rigid, free-trade-only interpretations that characterised its earlier years, such as in the *US-Tuna-Dolphin* case, to encompass *other* rights in IL—is evident in its later adjudications. Examples include the *EC-Asbestos* and *US-Gambling* cases, in which the non-trade domestic policies of the member states, encompassing such areas as environmental and human rights, as well as other laws and forums in IL, were taken into consideration by the Court. (Howse 2009): 42-45. For a general discussion of the WTO’s role as a limited harmoniser of conflicting norms in current IL, as well as more details on the above DSB cases, see my LLM essay, *Conflicting Norms in a World of Fragmented International Law and the Role of World Trade Organization: Constitutionalization or Linkage Facilitation?* (Sharei, *Conflicting Norms in a World of Fragmented International Law and the Role of World Trade Organization: Constitutionalization or Linkage Facilitation?* 2010).

⁴² (Petersmann, *The WTO Constitution and Human Rights* 2000): 22. See also (Cass 2005): 49. For a counter-argument, see Philip Alston: <http://www.ejil.org/pdfs/13/4/1562.pdf>, last accessed 29 October 2014.

⁴³ (Cass 2005): 49, 203; and, (McGinnis and Movsesian 2000): 514.

conflicts. Nor can it be expected to have power over the more than 30 states which are not members of the organisation.

There is but one other prominent and self-contained regime that possesses dispute settlement and enforcement mechanisms, enjoys almost universal membership, and has a charter that is general enough to conform most closely to a quasi-world constitution which can be considered a candidate for international constitutionalisation.

This thesis proposes that to counter the negative effects of globalisation, and to protect global citizens' fundamental rights, as well as to elevate peoples' sovereignty at the global level (global democracy), constitutionalisation of global governance is necessary. I would also argue (and as my research illustrates) that the United Nations already possesses some features of quasi-world government. These are present both in the UN Charter and its architecture, and can also be observed in the way that the UN operates in practice. It is, therefore, the most appropriate of the international organisations to be transformed and constitutionalised.

Some aspects of the UN Charter point to the organisation's ability to function as the supreme layer of global governance, and perhaps its usefulness in this respect. These characteristics include its supranationality (Chapter 3, especially Section 3.7), its legal supremacy over other treaties, and its universality, reinforced by the SC's tendency over the past two decades to adopt an increasingly legislative and adjudicative role. The specific Charter provisions that enable some of these quasi-world-government features, together with actual UN practice (regardless of whether this is sanctioned by the Charter or not) are discussed in Chapters 2, 3, and 8. The *intra/ultra vires* debate is mostly presented in Chapter 3.

Bardo Fassbender and some other UN scholars argue that the Charter as it currently stands already amounts to a constitution for the world.⁴⁴ Michael Doyle, citing the fact that the UN is a legal personality independent of any single state, with no option for state withdrawal, and pointing to the Charter's specific supranational wording, argues that both legally and in practice, the UN is already a supranational institution.⁴⁵ In this regard, examples of supranational references in the Charter can be found in Articles 2(6), 24(1), 25, 48(1) and 103, as explained in Chapter 3, especially Section 3.7.

However, as pointed out earlier, the existence, or the writing, of a constitution for an international organisation does not necessarily make it constitutionalised.⁴⁶

The principal features of constitutionalisation, and the way in which these are used in the context of UN constitutionalisation in this thesis, include the following: democracy (or “demoi-cracy” of the world citizenry in the context of international multi-level governance), protection of fundamental rights, separation of powers, and the due process of law, always under the rule of law, including global adjudication and legal review.

With this focus on UN Constitutionalisation throughout this research, the following phenomena are analysed: the UN Charter as a treaty, and the fact that it is of the “general” type; the founders' intent and the legitimacy of the Charter; and the concepts of supra-nationality, expanded capacity, and transformation, as they pertain to the UN Charter and the

⁴⁴ On the UN Charter as a constitution, see, among others (Fassbender, *The United Nations Charter as the Constitution of the International Community (Legal Aspects of International Organization)* 2009); see also, in the context of international constitutionalisation, (Fassbender, *Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order* 2009): 133-147. On some of the supranational features of the UN, see (Doyle, *The UN Charter -- A Global Constitution?* 2009): 113-116, 131; and (Schwindt 2000). See also (Corner 2010): 97-99; and (Paulus 2009):69-70, 76.

⁴⁵ (Doyle, *A Global Constitution? The Struggle over the UN Charter* 2010): 2-23.

⁴⁶ See n 21 above.

international legal system. An elaboration of the concepts of constitutionalisation as they may apply to the transformation of the UN, and the legal strategies to trigger the “constitutional moment” are presented in Chapter 9, the concluding chapter of the thesis.

1.5 Research Methodology and Chapter Structure

Michel Foucault is reported to have said: “Do not ask who I am and do not ask me to remain the same.”⁴⁷ Similarly, in respect of the theoretical approach of this thesis, do not ask what methodology I have used, and why I have changed my approach in different chapters. Not being a believer in adopting a single methodology in conducting legal or international relations research, I have adopted the approach of dynamically employing different methodologies—as seem to fit best—to analyse a chapter topic or the subject at hand.

That said, in the chapter introductions that follow, and using “theory”, “methodology” and “approach” synonymously,⁴⁸ I will identify the methodological approaches for those chapters or parts of the thesis.

The thesis is in three parts. Part I, *Global Governance and the Role of the United Nations*, consists of the first three chapters (inclusive of this one).

The next two chapters in the thesis highlight the role of the SC in global governance. Chapter 2 examines the SC’s role as court-maker and global adjudicator, while Chapter 3 focuses on the global legislative functions of the SC. These Council mandates include criminalisation resolutions (which have a legislative effect) and the sanctions-listing of individuals, corporations and other entities that are exclusively non-state actors. In addition, the Council’s

⁴⁷ Foucault, M., *the Archaeology of Knowledge*, in (Cryer, Hervey and Sokhi-Bulley 2011): n 125.

⁴⁸ (Cryer, Hervey and Sokhi-Bulley 2011): 5.

abstract resolutions are examined: that is, resolutions that are not specific to any particular situation or named state, but nevertheless have some effect—for example, in relation to the movement of goods, peoples, and money—on world citizens. Further, Council decisions that resemble domestic tort legislation, taxing and redistributing wealth, where the primary beneficiaries are multinational corporations, individuals and other non-state actors, are examined. These new interpretations of the SC's competencies, regardless of being *intra/ultra vires*, reveal the Council to be the closest (unplanned, but nevertheless *de facto*) global legislator with universal jurisdiction.

As far as methodology is concerned, the above two chapters draw on the realism school of international relations and on critical legal theory.

Part II, *The UN Charter: Teleological and Original Intent*, consists of Chapters 4 to 7, and, through the lens of legal positivism, examines the legislative history of the UN Charter in connection with the SC's powers, structure and voting procedures. The Charter's revision scenarios and its mutation trigger are also addressed. Chapters 4 and 5 deal with the San Francisco Conference. First, the anti-veto rebellion in response to the Yalta formula dictated by the sponsoring governments is considered. The compromise reached was to provide for the probable revision of the Charter within a maximum of 10 years in order to make the UN, and particularly the Council, more equal and democratic. This *original intent* and the *promise* of San Francisco were embodied in Article 109(3) of the Charter, which calls for a special review conference.

Chapter 6 focuses on the near paralysis of the SC when the UN began to operate, examining the procedural attempts to correct its structural problem. It was recognised by a majority of states, including the P5 (and the US in particular), that the Charter needed amending. The

chapter also recounts the attempts of earlier years to carry out a review of the Charter by invoking Article 109(1)—which provides for a general rather than special review of the Charter. The differences between paragraph 1 and paragraph 3 of Article 109 in terms of convening a Charter review (both symbolically and in effect) is made clearer in the legislative history section, contained in Chapters 4 to 7.

Following the same legal positivist and legislative history approach, Chapter 7 examines the 1955 General Assembly Resolution 992(X) and its related SC resolution invoking Article 109(3). The chapter focuses on the work of the Arrangements Committee, created by this resolution, to convene the review.

Chapter 7 also covers the “constitutional” discussions and the member states’ intent prior to and during the adoption of Resolution 992(X). By examining the fact that the Arrangements Committee has been “kept in being” but remains dormant, and the fact that the UN has never in its history held a review conference—in defiance of the spirit of the paragraph and the intention of the founders—the chapter concludes that the provisions of Article 109(3) have effectively been breached.

Part III, *Legal and Constitutional Aspects*, contains the last two chapters of the thesis, Chapters 8 and 9, and adopts the legal critical approach. Chapter 8 is a substantive chapter on the legal aspects of the UN Charter and its Article 109 review and revision process. The chapter first critically examines the characteristics and the type of the UN Charter⁴⁹ and its apparent multi-functionality. The legitimacy of the Charter as a treaty is then examined while

⁴⁹ The UN Charter, according to Article 1 of the VCLT, can as an “international agreement”, and regardless of “whatever its particular designation”, formally be recognised as an international treaty. (Vienna Convention on the Law of Treaties (with Annex) 1969): Article 1. See also Chapter 8, Section 8.2. Therefore, in this thesis, depending on the context and the legal significance, the term “treaty” may have been used instead of the more common “charter” to designate the constitutive instrument of the UN.

it was in the process of being negotiated and concluded. Applying the rules of the Vienna Convention on the Law of Treaties (VCLT), as a codification of customary international law, reveals serious flaws in the conclusion of the Charter. The legitimacy issue and the failure to perform in good faith the review and possible reform of the Charter envisioned in Article 109(3), resulting in that provision being partially breached and not fully implemented, is considered. The chapter ends with the question of whether a new UN-type global governance treaty should be concluded, or whether the existing UN Charter should be reformed and constitutionalised.

Taking into account the fact that the existing UN and its Charter are accepted as legitimate by a great majority of its member states, and the fact that the UN is the only “general-purpose” international organisation that can claim universal jurisdiction, in the thesis’s final chapter, Chapter 9, I argue for revision of the Charter in the direction of its constitutionalisation. A constitutionalised UN, as the major component and agent of global governance, enjoying universality and situated at the apex of the international legal hierarchy, could then address some of globalisation’s shortcomings and borderless global problems, as well as effectively maintaining global peace and security, always under the rule of law. Thus, and in harmony with the majority of the founders’ wishes, such constitutionalisation could then transform the dysfunctional UN, enabling it to function properly, particularly in the areas of human rights and peace and security.

The feasibility of the constitutional path, given the fear of the veto and its potential to torpedo any proposed Charter changes (when they face P5 ratification), is examined in the last chapter. The potential of overturning vetoes in respect of Charter revisions and amendments is discussed, particularly by considering past cases that in fact had such an outcome.

Chapter 9 is therefore a prescriptive chapter. The chapter adopts a functionalist approach as to what the UN's general constitutional features should be and in regard to the best legal strategy for implementing the *letter* and the *spirit* of paragraph 3, by re-starting the work of the Arrangements Committee, and therefore convening the review of the Charter, which would most likely trigger the mutation. The end result may then be a new UN *construct*.

As to methodology, the last chapter incorporates both functionalist and constructivist approaches.⁵⁰ Or perhaps the methodology follows the newly devised and “modern” constitutionalism approach, as described by Robert Cryer et al.⁵¹

An alternative way of approaching this thesis is to view it as an examination of the constitutionalisation of the UN as a *question of law*, and the execution and performance of Article 109(3) as a *law question*.

Policy recommendations are not in the scope of this thesis. However, the last chapter, if only conceptually and in abstract terms, touches upon some of the desired constitutional features and characteristics of a transformed UN.

The need for UN reform is literally as old as the UN itself (in fact, it predates it, as will be seen in the chapters on the organisation's founding). In that respect, the policy research and

⁵⁰ Dunoff and Trachtman, in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, clearly state, in a section entitled *A Functional Approach to International Constitutionalization*, that their approach to constitutionalism is the “functionalist” method (Dunoff and Trachtman 2009): 9-11. Jan Klabbbers, Anne Peters, and Geir Ulfstein, however, cite the “constructivism” approach in *The Constitutionalization of International Law*, pointing out that it is important not only to determine how the law functions or should function, but also that the law should have a valid “source”. They therefore suggest a possible “constitutional” approach in the theoretical research that can be conducted in IL. (Klabbbers, *Setting the Scene* 2011): 99-101, 385-389. Perhaps my approach in the last chapter is more in tune with this latter view.

⁵¹ (Cryer, Hervey and Sokhi-Bulley 2011): 20, 50-52.

recommendations for the UN's transformation is a work in progress, and is mostly left to others as a collective effort.

However, I have attempted in this thesis to reiterate and expand on the perhaps *not-so-new* critical role of the UN in global governance, as well as conducting first-hand research in analysing raw UN data, rediscovering old facts so far neglected by most research efforts. The reconstruction of my findings, in providing new legal grounds, should be able to serve as the basis for future research, and will also be of use to leaders and policymakers perhaps as a game-changer in taking the bold steps required to achieve the much-needed constitutionalisation of the United Nations.

CHAPTER 2

THE UN SECURITY COUNCIL AS THE GLOBAL ADJUDICATOR: THE WORLD'S COURT MAKER AND PROSECUTOR?

2.1 Introduction

As explained in the previous chapter, what has come to be known as *global governance* lacks a hierarchical legal structure. It has neither a world legislature nor a global administrator. It has no separation of powers and no formal adjudicative system with global jurisdiction. How, then, can our “international criminalisation and adjudication” work? To what extent do practices of global law exceed the conventional doctrine of international law?

The Security Council was not intended to legislate or adjudicate. However, after almost five decades of existence, soon after the end of the Cold War, in the early 1990s, the UN seemed to mutate—with its most powerful organ, the Council, assuming with great speed and agility a new role for itself as adjudicator and legislator for the world.⁵²

These unforeseen SC powers are examined in this chapter and the next. This chapter considers the Council’s role as adjudicator, maker of international criminal law, global prosecutor, and creator of international criminal courts. It also reviews the Council’s role as

⁵² With regard to the UN not being designed as a world government, and on its “legal perspective”, see Jose Alvarez (Alvarez, *Legal Perspectives* 2008). For the first substantive analysis and suggestion that “The Security Council Starts Legislating”, see Paul Szasz (Szasz 2002).

enforcer in bringing international criminals to justice. In carrying out these functions, the Council not only intrudes upon the domain of domestic courts and jurisdictions, but also interferes in the workings of the International Criminal Court (ICC)—by invoking Articles 13(b) and 16 of the Rome Statute, which confer on it referral and deferral powers in respect of the Court. As will be explained later in this chapter (especially in Section 2.3), this SC “stop-and-start” utilisation of the ICC has occurred since the Court began to function, even though the majority of the P5 are not themselves parties to the Rome Statute. This raises an intriguing case of the “power of legality”⁵³ as an instrument in international politics.

Chapter 3 focuses on the “legislative” functions of the SC, which have also been apparent since the end of the Cold War, and have blurred with its adjudicative function.

The Council’s “legislation” often involves defining the circumstances and nature of international crimes—the types of acts and transactions considered criminal, and the identification of individuals, corporations and non-state actors as criminals or potential criminals. Thus, in the case of the SC, we have an organ made up of only 15 member states that has begun carrying out both legislative and judicial functions in global governance. But, in doing so, is the SC actually acting *ultra vires*?

I argue in the next chapter that the Council may, in fact, not be acting *ultra vires*—that, although this was not the original intent, the Council has indeed in practice expanded its powers and competency.

⁵³ The term is borrowed from a workshop entitled “The Power of Legality: Practices of International Law and their Politics” held in 2013, and organised by the Global Governance Programme at the European University Institute (EUI).

These newly exercised SC powers were presumably granted in Article 24(1) and Article 25 of the Charter, as well as through a new and “auto-interpretation” of Chapter VII of the Charter. This is especially the case in relation to Article 48(1) and Article 41, which enable the Council to create international laws in the name of “peace and security” that in turn affect domestic laws and impact on individuals’ rights, including freedom of movement, due process and property rights, instantly and universally. These legislations, created through Council resolutions, do not seem to have been isolated cases, but rather have been used continually over the past 20 years, particularly after 9/11.

With the UN Charter’s “supremacy” clause (Article 103), the Chapter VII Council resolutions become powerful enactments, with binding effect on all states. They are not subject to opt-out or derogation, and they are incontestable, even while often infringing upon domestic constitutions.

No domestic court has so far challenged the Council’s global legislative powers. In fact, in the landmark case of *Kadi*, the ECJ did not dispute the SC’s competency or its Resolution, but rather overruled the Court of First Instance’s interpretation of how the resolution should be implemented. The judgment essentially required the lower court to reconsider the “Community measure to give effect to such a resolution” (ECJ *Kadi*: 2008, Para. 288).⁵⁴

⁵⁴ (ECJ, cases C-402/05P and C-415/05P, *Kadi and Al Barakaat International Foundation v. Council of the EU and Commission of the European Communities* 2008): Para. 288. For a full text of the judgment, see also (EUR-Lex). Later, in July 2013, the *Kadi-II* case was decided by the European Court of Justice (ECJ). In this landmark decision, the EU Council, the Commission and the UK, in a joined case in December 2010, appealed the second round of the General Court *Kadi-II* judgment of Case T-85/09 of 30 September 2010, which had basically delisted Mr. Kadi from the EU’s “target” list, appealing essentially to the Court for Kadi to remain on the EU-incorporated SC list as part of the Council Regulation (EC) No 881/2002 sanctions list. Despite the fact that the joined appeal was supported by the governments of many of the member states through their formal intervention in favour of the appellants, it was dismissed by the Grand Chamber of the Court in its ruling of 18 July 2013 (cases C-584/10 P, C-593/10 P and C-595/10 P).

While SC legislation is not made consensually by all states or democratically, it is nevertheless, by virtue of Chapter VII, both binding and non-derogable. Therefore, constitutionalising the UN Charter may provide protection from the SC's infringement of fundamental rights and provide the type of judicial review often granted in domestic constitutions. This constitutional deficit of the UN Charter is the subject of the last chapter.

2.2 Security Council: The Court Maker and the Prosecutor Global

The 1990s witnessed two major developments in international law and global governance—the creation of the World Trade Organisation (WTO) in 1994 and the birth of the ICC, which originated from the Rome Statute, and was opened for signature in 1998. Whereas the UN was framed primarily by the three victor countries of World War II, there was extensive member-state participation in the creation of the WTO and the ICC every step of the way, with equal sovereignty and no weighted voting. In the case of the ICC, even the NGOs, albeit with no voting privilege, had an active, official and participatory role in the creation of the Rome Statute. Thus, to some degree, the will of the peoples of the world, as expressed by lobbying bodies, was reflected in the making of the ICC.⁵⁵

Both the WTO and the ICC benefited from previous UN work in their domains, and, in the case of the ICC, its birth can be traced to GA resolutions. However, both are independent international organisations, separate from the UN. Nonetheless, in the case of the ICC, this

Both *Kadi-I* and *Kadi-II* were essentially about fundamental rights, and particularly the judicial protection of those rights vis-à-vis the SC sanction regimes, constituting a significant achievement for judicial protection at the EU level. However, the Court, in acknowledging the UN legal order, did not directly challenge the SC's authority or the scope of its power in respect of decisions affecting non-state actors and individuals. Further, the scope of judicial protection that this ruling provides is geographically limited, affecting only citizens of the EU and not the rest of the globe. For the *Kadi-II* ruling of the ICJ Grand Chamber, see: <http://curia.europa.eu/juris/document/document.jsf?docid=139745&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=155332>, accessed 21 November 2013. For a summary of the judgment, see the ECJ press release: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-07/cp130093en.pdf>, accessed 21 November 2013. See also (Tzanakopoulos 2013).

⁵⁵ (Glasius 2002): 137-165.

independence from the UN and the SC is less apparent and more contentious. Although the Council has no links to the WTO and does not pursue international economic and environmental crimes, on the other hand, the Council has the option and has pursued other international criminals at the International Criminal Court, by intervening in the ICC's jurisdiction, utilising the enabling referral and deferral clauses of the ICC statute, which are explained later.

However, at this point it suffices to observe that the main judicial body of the UN, according to the Charter, is the International Court of Justice. With the ICJ's jurisdiction not being compulsory and generally requiring voluntary submission of cases by contending states, historically there has been little interaction between the Council and the ICJ. Although the Council can ask the World Court for an "advisory opinion", it has done so only once in the past 70 years, in the 1970 *South Africa in Namibia* case.⁵⁶

With the Council having no "referral" type capacity in respect of the ICJ, and the World Court having no judicial review mandate over the SC, the interaction between the Council and the ICJ has been minimal.⁵⁷

⁵⁶ (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) 1971).

⁵⁷ As well as the SC, as an organ of the UN, being permitted to obtain advisory opinions from the ICJ, it also interacts with the World Court in the selection of ICJ judges, owing to its approval role. Perhaps this approval process is the main reason why, traditionally, all the P5 members have always had a sitting judge on the World Court. There is also an indirect way in which the Council and the ICJ can interact. This is when the losing state to a contentious case decided by the Court fails to comply with the judgment. In these rare cases, the state with the favourable judgment can request enforcement by the SC. This has occurred only once: in *Nicaragua v. United States (Military and Paramilitary Activities in and against Nicaragua)*, when the Court, in 1984, ruled in favour of Nicaragua, and held that the US had violated international law by supporting the Contra rebels and mining Nicaragua's harbours. The Court also held that Nicaragua was entitled to reparations. Nicaragua's attempt to enforce the Court's decision at the Council, in 1986, was rejected, when the US cast a veto. This outcome was to be expected and is indicative of the fact that any ICJ decision against a P5 state taken to the SC will most likely be impossible to enforce. For the ICJ judgment, see (Military and Paramilitary Activities in and against Nicaragua 1984); for analysis, see Fred Morrison, *The Legal Issues in the Nicaragua Opinion Judgment* (Morrison 1987): 160-166.

This chapter will therefore focus on the SC's adjudicative role in relation to aspects of international criminal and humanitarian law involving non-state actors, where the Council, through auto-interpretation of the Charter, has at times assumed competency in the adjudication of international crimes. This is even though, for the last decade or so, it is the ICC that is presumed to be the main agency mandated to deal with these cases. However, as will be seen below, after nearly 14 years in operation, the jurisdiction and competence of the ICC continues to be significantly manipulated and affected by the Council and its permanent members.

What is the legal relationship between the ICC and the UN? What was the spirit behind the inclusion of the "deferral" and "referral" clauses in the Rome Statute? Can the SC define the ICC's jurisdiction? Is the UN, or its most powerful organ, the Council, providing financial and enforcement support to the cases it refers to the ICC? What role do the permanent members, and particularly the US (as the most powerful of the P5), play in legitimising the ICC? Is the Council making international criminal law, as well as adjudicating it? If the answer to the last question is in the affirmative, does the Council in fact have the power to do so?

In attempting to answer these questions, I will first investigate the role of the SC as the adjudicator of international criminal law, by citing examples of the ad hoc, wide-ranging and powerful courts and tribunals set up by the SC since the 1990s. This practice seems to have continued even after the ICC became operational, in 2002.

I will then examine the role of the Council via its interventions in the workings of the ICC—the only permanent international criminal law court—and the seemingly precarious relationship between the two organisations. I will also assess whether the Council's financial

and enforcement support to its own commissioned courts and tribunals is comparable to that which it extends to the ICC for Council-referred cases.

Furthermore, through an evaluation of several SC resolutions, I will reveal the manipulative behaviour of three of the most powerful permanent members (P3) of the Council: China, Russia and the US. These states selectively refer cases to the ICC, through the Council, when it suits them, while striving to remain beyond its jurisdiction themselves. The referral of the Darfur situation in 2005 and the Libya situation in 2011 will be assessed to illustrate that, in effect, while the US, Russia and China are not member states and do not formally recognise the Rome Statute and its rule of law, they nevertheless make use of the Court to refer other non-member states' criminals for prosecution. This interplay between the P3 and the ICC has arguably delegitimised both the Council and the Court.

This analysis of three interventions by ICC non-member states (and Council permanent members) in the Court's jurisdiction would be incomplete without an assessment of the unique role of the US, as the most powerful of the P5, which is contained in the last section of the chapter. It is observed there how the US manipulates the ICC in exercising its self-serving SC powers, undermining the Court's competency—in particular, by excluding US leaders and nationals from the Court's jurisdiction. This US exclusionism has been further pursued through bilateral legal agreements with other states to exclude US nationals from the ICC's jurisdiction.

To pose the broader question relevant to this global governance thesis: is the SC empowered by the UN Charter to perform these quasi-global-government functions, or is the Council acting *ultra vires*? At the conclusion of the next chapter, I evaluate the Council's adjudicative and legislative functions together (since they are related), and conclude that, if not by design,

then in fact and in practice, the SC is acting within its powers, and that, regardless of the *intra vires* or *ultra vires* arguments, the central issue with the quasi-global-government functions of the SC is the legitimacy of its actions, in view of the democratic and constitutional deficit of the UN.

Although not by original intent, the Charter of the UN has given the SC not only executive powers, but also, explicitly or implicitly, broad powers that allow the Council to assert new interpretations of—and to enforce—the “peace and security” provisions of Chapter VII, acquiring quasi-world government functions in the process. The Charter Articles 24(1) and 25, and the Chapter VII measures, particularly Articles 41 and 48, empower the Council to make international criminal law, to create courts, to adjudicate and to enforce decisions, and to act as the global prosecutor of international criminals, whether these be individuals, corporations, or other non-state actors.

This chapter and the next will demonstrate that, with these auto-interpretations of the Charter, the Council has, in the past, enacted global legislation, and has even taxed nations, collecting and distributing the funds (as discussed in Chapter 3), and has the potential to do so in the future. Therefore, when the SC acts in these global law-making capacities, it impacts on international treaties, modifies domestic laws, impinges on domestic constitutions, and often intrudes on the domestic protection of fundamental rights.

2.2.1 From Belgrade to Beirut

From the inception of the UN, and throughout almost the first 50 years of its existence, the Council had no direct criminal-prosecution and adjudicative functions. However, from the early 1990s and the end of the Cold War onwards, the Council has been involved in several international criminal court-creating activities, arising from various conflict situations.

These ad hoc courts and tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), established in 1993, and the International Criminal Tribunal for Rwanda (ICTR), established in 1994, were essentially set up with the purpose of bringing to justice the perpetrators of major war crimes, crimes against humanity, and genocide, but were always limited to a particular conflict and geographic location.⁵⁸

The main characteristic of these ad hoc courts was their broad judicial and enforcement powers. These powers are conferred not by an international constitution or treaty, but by means of the Council's decisions. Depending on the particular conflict, the Council has dynamically defined its competence and jurisdiction on a case-by-case basis. In fact, the *Tadic* decision held that the SC is not acting *ultra vires* in creating these types of court. The Court has authority to define its own jurisdiction and create its own appellate function, and thus these courts are in effect a "subsidiary" of the Council.⁵⁹

It was expected that, after the creation of a permanent international criminal court, the Council would leave the dispensing of international criminal justice to the ICC. However, the intermittent creation of ad hoc courts and tribunals has continued. In 2002, the UN and the government of Sierra Leone created the Special Court for Sierra Leone (SCSL)—the same year that the ICC began to operate. The SCSL Court, dealing with issues arising from the civil war in Sierra Leone—primarily atrocities committed under the regime of the former president Charles Taylor—continued its work for 11 years, until 2013. The Court can trace its

⁵⁸ (Talmon 2005): 180-181. See also (Cassese, *International Criminal Law* 2008): 325-328.

⁵⁹ *Ibid.*

origins to the Council, to SC Resolution 1315 (2000), but was in fact created and became operational two years later, in January 2002.⁶⁰

In view of the fact that the ICC Rome Statute was adopted in 1998 and entered into force in 2002, perhaps the main rationale for the Council not referring the situation in Sierra Leone to the ICC at that time was that most of the crimes it was concerned with were committed before 2002, and therefore preceded the ICC's competence.⁶¹

However, the Council's practice of creating courts did not appear to cease, notwithstanding the existence of the ICC. SC Resolution 1664 of 2006, and a follow-up resolution, SC Resolution 1757 (2007) created, in effect, another ad hoc court, the Special Tribunal for Lebanon (STL), in response to the 2005 bombing of Beirut that killed 22 people, including the former prime minister of Lebanon, Rafik Hariri.⁶² This raises the question of why the Council did not refer the case to the ICC. After all, the event and the crimes committed occurred a few years after the ICC had become operational. And the crimes in question apparently complied with the "after 2002" admissibility criteria of the ICC, and could have been "referred" to it by the Council.

The STL, a so-called "hybrid court", was supposed to be based in Lebanon, and to take into consideration the domestic criminal laws of that country.⁶³ However, the creation of this tribunal, independent of the ICC, seemed unnecessary for two reasons. First, the STL,

⁶⁰ (UN Security Council Resolutions 1946-2015): S/RES/1315(2000); See also <http://www.rscsl.org/Establishment.html> .

⁶¹ https://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx. See also the "Jurisdiction and Admissibility" web page of the same site.

⁶² (UN Security Council Resolutions 1946-2015): S/RES/1664 (2006), and, S/RES/1757 (2007).

In fact, the STL tribunal was triggered by SC Res. 1664 (2006), and became operative through an agreement between the UN and the Lebanese government in a follow-up Council resolution, SC Res. 1757 (2007). The STL tribunal was finally inaugurated in 2009. See also: <http://www.stl-tsl.org/en/about-the-stl> .

⁶³ <http://www.stl-tsl.org/en/about-the-stl/unique-features> .

although it has an office in Beirut, has its chambers located, and is headquartered, in the Netherlands, where the ICC is located. Secondly, the *complementarity* principle of the Rome Statute—both in general terms and, more specifically, in Article 17—already takes into account domestic investigation and prosecution procedures.⁶⁴ Therefore, the fact that the ICC could have taken into account Lebanon’s domestic laws, as well as the fact that both courts are situated in the Hague, appears to have made the creation of another ad hoc court as a subsidiary of the SC redundant.

In the absence of any convincing legal reason for the STL’s creation as a separate tribunal, one political explanation may be the fact that it has jurisdiction over terrorist attacks in Lebanon committed since 2005. Some P5 members may have believed that if the Lebanon situation had been referred to the ICC, then the Court would have enjoyed jurisdiction in respect of Israeli war crimes committed during the Israeli invasion of southern Lebanon in the summer of 2006. This outcome was not desired by some P5 members, especially the US.⁶⁵

⁶⁴ https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf : Article 17. See also: <http://www.iccnw.org/?mod=complementarity> .

⁶⁵ (Schabas 2009): 14-15. Note that the GA has been involved in judicial and criminal investigations, but not in creating courts. The Extraordinary Chambers in the Courts of Cambodia (ECCC), also known as the Khmer Rouge Tribunal, comes closest to a GA-created court, and was created in 2003 by means of an agreement between the UN and the Cambodian government. The ECCC is formally independent of the UN, but the UN Secretary-General has some involvement in its administration and some influence over it, such as through the appointment of judges. (Cambodian Tribunal Monitor 2013.) The Assembly, however, has conducted many fact-finding missions and investigations. One of the latest, and most controversial, was the United Nations Fact Finding Mission on the Gaza Conflict, also known as the Goldstone Report. The Mission was authorised by the UN Human Rights Council (UNHRC), a subsidiary of the Assembly. The 2009 report identified atrocities, war crimes and possibly crimes against humanity as having been carried out by both the Israelis and the Palestinians. The 575-page report particularly found Israel to be at fault, reporting that, “The mission concluded that actions amounting to war crimes and possibly, in some respects, crimes against humanity, were committed by the Israel Defense Force (IDF).” The report recommended that the case be referred to the ICC. (UN News Centre 2009). See also (United Nations Fact Finding Mission on the Gaza Conflict 2009). However, because of primarily US opposition, the Mission’s recommended SC referral never occurred.

2.3 The Council and the ICC: the SC Referrals and Deferrals

The only permanent international criminal court which is independent of the UN system, and is intended to be universal and permanent is, of course, the ICC, which has been operating since 2002. The GA and its International Law Commission (ILC), a few proactive member states, and the P5 all had important roles in the creation of the Court and its mandate.⁶⁶

During the years of negotiations leading up to the Rome Statute, the framers found it necessary to compromise with the Council to obtain the Council's acceptance of the proposed ICC as a legitimate and permanent international criminal court, and probably the only body of its kind. The compromise with the initially objecting members of the P5 that led to the finalisation and adoption of the Statute in 1998 in Rome was that the Council would "refer" cases to the ICC and would not create ad hoc courts provided the Council could suspend ICC investigations or court proceedings by invoking "deferral" of a case.⁶⁷ This authority granted to the Council to suspend a case, presumably in the spirit of "peace and security", can in effect happen for any reason and for any case. Both the referral and the deferral scenarios had to be decided by a majority vote of the SC (with the omnipresence of the P5 veto), and, with regard to deferrals, the freezing of a case can be for a period of one year, which, according to Article 16 of the Statute, can be renewed annually without limitation.

These referral and deferral loopholes built into the Rome Statute clearly permitted and reinforced the Council's continued role as a "pseudo" international criminal law-maker. The

⁶⁶ The GA, in fact, initiated the creation of the ICC. For almost 10 years—from delegating the work of preparing the draft statute to the ILC in 1989, through the subsequent creation of the Ad Hoc Committee on the Establishment of an International Criminal Court, to the convening of the conference in Rome in 1998, and the finalising of the Statute—the Assembly was actively involved. The P5 also had substantive participation in moulding the Court. However, in the end, three P5 members failed to support the Court. Of these, ultimately, China did not sign; President Bush "unsigned" President Clinton's earlier signing; and Russia signed, but has, after almost 15 years, failed to ratify the Statute.

⁶⁷ (Schabas 2009): 183-186.

referral cases, based on Article 13(b) of the Statute, in which a situation has been referred to the ICC by the SC under Chapter VII, allows the Court to expand its jurisdiction related to one or more of the subject crimes in accordance with Article 5 of the Statute.⁶⁸ Furthermore, Article 16 of the Statute allows another type of Council intervention: under Chapter VII, the SC can intervene and request the Court to suspend prosecution or investigation of a case (whether referred initially by the SC or not) and thus cause the case to be deferred for a year, with unlimited renewals.⁶⁹

The SC's ability to refer cases was considered "positive" and helpful in expanding the ICC's jurisdiction and legitimacy. On the other hand, its power of deferral was considered disruptive to the ICC's functioning and was expected to be rarely, if ever, used by the Council. So far, in the ICC's 14-year history, the SC has exercised both its deferral and referral powers twice each, as will be discussed in later sections. In all four cases, the SC's motives and the legitimacy of the intervention have been questionable, with the competence and legitimacy of the ICC also arguably undermined.

2.3.1 SC Resolutions 1422 and 1487 Deferrals—the Peacekeepers' Exemption and the ICC Jurisdictional Interventions

Although the drafters of the Rome Statute expected the referral of cases to occur frequently but the power of deferral to be used sparingly, the SC unanimously adopted Resolution 1422, a deferral, just two weeks after the Rome Statute entered into force, in July 2002. Resolution 1422 was a wide-encompassing deferral.⁷⁰ This so-called peace-keepers' exception resolution under Chapter VII made a general request to the ICC, with Paragraph 1 stating that the SC:⁷¹

⁶⁸ Ibid: 151.

⁶⁹ Ibid: 166. For the view that the referral of cases can be considered "positive", see (Berman 1999): 174-176.

⁷⁰ (Lavalle 2003): 200.

⁷¹ (UN Security Council Resolutions 1946-2015): SC Res. 1422.

Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise

In other words, the resolution exempted officials and military personnel of non-state parties to the Rome Statute (which at the time mostly encompassed US staff and military personnel active in different UN military operations, including in a number of Middle Eastern and Eastern European countries) from ICC investigation and prosecution, and thus placed them “above the law”, even if temporarily.⁷²

Several fundamental criticisms can be made of Resolution 1422. First, it seems that the SC manipulated the principle of *aut dedere aut judicare* by failing to give the opportunity to a state in which a crime took place to detain and prosecute the suspect.⁷³ Furthermore, the ICC’s complementarity principle envisages the Court exercising its jurisdiction in cases where a state is unwilling or unable to genuinely prosecute and apply *aut dedere aut judicare*, not a third state (the state of the alleged criminal’s nationality). Secondly, the resolution directly challenges the ICC’s jurisdiction and competency in an abstract and general manner, without referring to a specific instance or a case of conflict, thereby threatening the ICC’s legitimacy as a whole. Finally, these pre-emptive decisions of the Council on judicial matters had not been foreseen or granted explicitly in the UN Charter, nor had they been exercised in respect of the UN’s own judicial organ, the ICJ.⁷⁴

⁷² (Stahn 2003): 85-104.

⁷³ Ibid.

⁷⁴ (Arsanjani 1999): 72.

A year later, in 2003, the US pushed through Resolution 1487, which, in effect, renewed Resolution 1422. The Council's adoption of Resolution 1487 did not, however, enjoy unanimous support, and faced some opposition and debate on the grounds that Resolution 1422 undermined the application of the "rule of law". A few Council members abstained, including permanent member France.⁷⁵ However, the following year, in 2004, the US was unable to garner support for the renewal of Resolution 1422 for a third year. In view of the Abu Ghraib prison scandal and the revelation of other fundamental rights abuses committed by the US military in Iraq, the US abandoned its attempt to attract support for a further resolution extending the life of the deferral. Consequently, the deferral's general and global exemption for the "peace-keepers" was lost.⁷⁶

2.3.2 SC Resolutions 1593 and 1970 Referrals—to Deliver Justice or R2P Council Style?

Throughout the ICC's 14-year history, the SC has referred cases to the Court on only two occasions. The first involved the situation in Darfur, which was referred to the ICC for investigation and prosecution under Resolution 1593, adopted in 2005, with permanent members the US and China abstaining. This occurred after years of inaction by the SC in the face of Sudanese atrocities in Darfur. The reason for the delay was mostly attributable to China's oil interest in Sudan and to the US's preference for an ad hoc tribunal under the SC's control (Section 2.3.3). The final compromise resolution contained two paragraphs that seem to be out of place, indicating that the US and the other two P3 powers had made sure that strings were attached to their ICC referral.⁷⁷

⁷⁵ (Yearbook of the United Nations 2003): 1332-1334. See also (White and Cryer 2009): 471.

⁷⁶ (Schabas 2009): 170.

⁷⁷ Ibid: 473.

The first paragraph was in the preamble to the resolution, and acknowledged the bilateral agreements that the US had been aggressively pursuing since the inception of the ICC. These bilateral agreements essentially bypassed the Court’s potential jurisdiction over US nationals. The preamble to Resolution 1593, by “taking note of the existence of agreements referred to in Article 98(2) of the Rome Statute”, implies that the ICC, in accepting the referral by the SC, also acknowledges the effect of the US’s bilateral agreements.⁷⁸ This US tactic of circumventing the ICC’s jurisdiction is further explained in Section 2.3.3.

The second, paragraph 6, explicitly and more generally undermined the jurisdiction of the ICC in exercising responsibility over foreign troops and personnel of non-state parties in Sudan,⁷⁹ with the SC deciding:

that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State

Therefore, in accepting this referral, the ICC also had to accept the US’s bilateral agreements, as well as the exemption of nationals of certain states from its jurisdiction, including those of the P3 (the US, China and Russia).

The referral lacks two other vitally important features that would have ensured its effectiveness. First, Resolution 1593 does not contain any enforcement provisions—the Council provides no assistance in tracking down Sudan’s president, Omar Al-Bashir, and his collaborators, or in executing arrest warrants. Secondly, the Resolution explicitly disclaims

⁷⁸ Ibid.

⁷⁹ (UN Security Council Resolutions 1946-2015): SC Res. 1593.

responsibility for the expenses associated with the investigation, prosecution and administrative costs related to the referral, recognising, under Paragraph 7.⁸⁰

that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily

Thus, the financial burden of investigation and prosecution, which in these cases typically runs into hundreds of millions of dollars, is shifted from the UN and the Council to the ICC.⁸¹

The second referral occurred in 2011, and concerned the uprising in Libya. Under Resolution 1970, the SC referred the Libyan situation to the ICC. While, six years earlier, Resolution 1953, relating to Sudan, had been the subject of extensive debate and some opposition in the Council, Resolution 1970 was adopted unanimously. Although Appendixes 1 and 2 of the resolution specifically named some individuals as suspected criminals (mostly family members of Moammar Gadhafi and their collaborators), Articles 4 to 8 of the Resolution referred the situation in Libya to the ICC.⁸²

As in the case of the Darfur referral, Article 6 of Resolution 1970 exempts members of the military, non-military personnel, and former and current officials of the non-member states of the ICC, from the Court's jurisdiction. Moreover, Article 8 of the resolution has identical text

⁸⁰ Ibid.

⁸¹ For example, the Special Tribunal for Lebanon (STL), a typical SC-created ad hoc international criminal court, disclosed in its 2011 annual report to the UN actual expenditures of US\$67.3 million, and requested €55.3 million (approximately US\$70 million dollars at the time) for its 2012 budget. (Special Tribunal for Lebanon (STL) 2012).

⁸² (UN Security Council Resolutions 1946-2015): S/RES/1970 (2011).

to that of Article 7 of the Darfur resolution, disclaiming responsibility for the costs associated with the referral.⁸³

The similarities between the Council's Darfur and Libyan referrals seem to signify a pattern. Both send cases to the ICC were without any planned Council cooperation or financial assistance. Furthermore, the Council offered no enforcement support, which the Court desperately needed for its investigations and prosecutions, particularly in these type of conflicts where the alleged perpetrators live in ICC non-member states.⁸⁴

As well as these two cases that the SC successfully managed to refer to the ICC, there have been other, unsuccessful attempts, which have been vetoed by one or more of the P5. The most recent attempt, in May 2014, which related to the Syrian uprising and civil war, met with negative votes from both China and Russia.⁸⁵

In retrospect, almost 10 years after the Darfur referral and five years after the Libyan one, it seems that the adjudicative impact of both these referrals has been ineffective. The lack of enforcement and material support by the Council in pursuing the Darfur case has meant that, since 2009, the ICC arrest warrants for Omar Al-Bashir and others have gone unheeded.⁸⁶

⁸³ (UN Security Council Resolutions 1946-2015): S/RES/1970 (2011). Articles 6 and 8 of Res. 1970, concerning the Libyan situation, are effectively identical to Articles 6 and 7 of Res. 1953 on Darfur.

⁸⁴ The president of the Assembly of States Parties of the ICC from 2005 to 2008, Bruno Stagno Ugarte, who was also Costa Rica's former foreign minister, has analysed the interaction of the Council and the ICC. He mentions first-hand some of the enforcement issues encountered in the Darfur and the Libyan referral cases. He also points out some practical problems encountered when two entities (the Council and the ICC) compile a list of indictees in relation to the same case. For example, Ugarte illustrates the asymmetry between SC Committee 1591 and the ICC indictees list in the Darfur referral. His 2012 report, *Enhancing Security Council Cooperation with the International Criminal Court*, was made available to the writer via an email from the President of the International Coalition of the ICC (CICC), Bill Pace, on 8 October 2012. See also (Ugarte 2012).

⁸⁵ <http://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court> .

⁸⁶ The SC referral of the Darfur situation occurred a few years earlier, in 2005 (SC Res. 1503), but the ICC arrest warrant for President Omar Al-Bashir was issued in March 2009, with seven counts of crimes against humanity and war crimes (Omar al-Bashir: conflict in Darfur is my responsibility 2011). See also (Ugarte 2012): 1-5.

As for the Libyan referral case, many of the main indictees sought by the ICC are now dead, including Moammar Gadhafi and one of his sons, who appear to have been summarily executed while prisoners of war. And although the new Libyan government has not become a party to the Rome Statute, it has interfered with and obstructed ICC investigations in Libya. In fact, in June 2012, the Libyan government arrested the ICC investigator and her staff as alleged spies.⁸⁷

In both of these referral cases, it seems that the ICC's efforts in applying the law were hindered rather than helped by the Council. This was owing to the half-hearted support provided by the Council: in particular, the inclusion of explicit clauses in the relevant resolutions exempting non-member state nationals from the ICC's jurisdiction; the lack of funding; and the refusal to help with enforcement. This failure to conduct proper investigations, execute arrest warrants, or extradite suspects has meant that neither of the two referred cases has gone to trial. These cases demonstrate that the Council's relationship with the ICC is political, P3-centric and problematic, thereby significantly hindering the ICC's mission of delivering universal international criminal justice.

The main legal objection raised here is that the spirit of Article 13(b) and Article 16 of the Rome Statute did not envisage Council interventions having conditions attached (such as the competency and jurisdictional restrictions discussed above). These articles simply allow the SC either to *refer* a new case based on the Court's competency, or, in the case of deferral, to *defer* an existing situation. However, given the Council's practice of attaching conditions to

⁸⁷ Melinda Taylor, the Australian ICC lawyer, and three of her staff, with different nationalities, were kept captive for approximately one month and then released on "humanitarian grounds" in July 2012. (*Guardian* 2012).

its interventions, it has, in effect, arbitrarily altered the jurisdictional aspects of the Rome Statute.⁸⁸

2.3.3 The US and the ICC: The Rule of Law or Not?

As mentioned in the previous section, the two deferral cases adopted by the Council after the ICC's creation in the early 2000s were primarily driven by the US in its attempts to exclude its nationals from the ICC's jurisdiction, consequently undermining the Court. Therefore, an analysis of the relationship between the SC and the ICC will be incomplete unless the role of the most powerful of the P5, the US, is taken into account.

As of December 2015, the Rome Statute had 139 signatories and 123 ratifications. Ironically, while the US, Russia and China are the most important political and military powers of the permanent members at the Council, they are not state parties to the Statute.⁸⁹

Historically, following the GA resolution requesting the International Law Commission to carry out the preparatory work for the creation of a permanent international criminal court, and during the early stages of the development of the Statute, the US was an active participant in the negotiations and was supportive of the project. However, after it became clear that most non-permanent member states (particularly India and Mexico) did not wish the Court to be controlled by the Council, and wanted it to be independent,⁹⁰ US policy

⁸⁸ In addition to the ICC allowing itself to be manipulated by the Council, the P3's failure to adopt the Rome Statute, as well as some other critical states such as Iraq, Iran, Myanmar, Saudi Arabia and Israel (which also unsigned the Statute) have been important factors in limiting its jurisdiction and the scope of its judicial activities. In fact, the Court, after 14 years, has yet to try any cases outside of the African continent: hence its nickname, the "International Criminal Court for Africa" (Posner, *The Perils of Global Legalism* 2009): 202. In summarising the interactions of the Council and the US with the ICC, Posner also notes that: "The ideal of legalism runs aground on the realities of power." Ibid: 198-206.

⁸⁹ (Coalition for the International Criminal Court (CICC) 2014). See also (International Criminal Court (ICC) 2013): Assembly of State Parties. Both accessed 19 December 2015.

⁹⁰ (White and Cryer 2009): 460-461

changed, with it adopting a more antagonistic stance. Even when President Clinton, during his last days in office, on 31 December 2000, signed the Rome Statute, it was with the reservation that: “I will not and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.”⁹¹

John Cerone, having carried out a discourse analysis of the US’s political attitude toward the ICC, assesses as variable the interest of the US in an international criminal court and dependent on leadership changes in the country. In general, however, Cerone concludes that US leaders and officials are opposed to ceding jurisdiction and authority to an independent international court. They want the Court to be linked to the Council, so that they can always apply their veto privilege to prevent an unwanted prosecution being directed towards them or one of their allies.⁹² Although China and Russia share the US’s fears in respect of one of their leaders or service members being put on trial by an international criminal court, it is the US that has been the most reactive and aggressive in its attempts to undermine the ICC’s authority.

The US’s undermining of the ICC’s jurisdiction began only a few days after the Rome Statute had come into force, on 1 July 2002. In the same month, Resolution 1422 was adopted. Introduced by the US, the resolution provided for the exemption of the US’s and other non-member states’ peacekeeping “officials and personnel” from the jurisdiction of the ICC. In fact, the US had threatened to cease all its peacekeeping operations at the time had the resolution not been adopted.⁹³

⁹¹ (Cerone 2007): 293.

⁹² Ibid: 277.

⁹³ See (Cerone 2007): 277-315.

The US also embarked upon the more aggressive and highly controversial strategy of entering into bilateral agreements with other states: in essence, preventing the transfer of US nationals to the ICC, even if the party to the bilateral agreement was an ICC member state. In this respect, the US relied on Article 98 of the Rome Statute—which states that the “Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements”⁹⁴—as a possible escape clause. This has exempted US officials and personnel from the ICC’s jurisdiction, further undermining the Court. In fact, by June 2005, the US had, by offering carrots and sticks—including the making of financial or military aid conditional upon the signing of bilateral agreements—succeeded in concluding over 100 of these bilateral agreements.⁹⁵

In a joint opinion, international law professors James Crawford, Philippe Sands and Ralph Wilde challenged the legal validity of these US bilateral agreements, concluding:⁹⁶

[I]t is our opinion that the language of Article 98(2) of the ICC Statute does not permit a State party to enter into an agreement which provides for the return to a third State of any person who cannot objectively be treated as having been ‘sent’ by the State. It’s also our opinion that the object and purpose of the ICC Statute precludes a State Party from entering into an agreement the purpose or effect of which may lead to impunity.

The US, in resisting the ICC’s jurisdiction over its nationals—manifested both in its bilateral agreements and in SC resolutions such as 1422, 1487, 1593 and 1970—has successfully protected its “past and current officials and personnel” from the Court’s jurisdiction. This two-pronged strategy appeared to be working well. But, in the wake of the Abu Ghraib scandal, and the controversies and allegations surrounding treatment of prisoners at

⁹⁴ (International Criminal Court (ICC) 2013): Art. 98.

⁹⁵ <http://2001-2009.state.gov/t/pm/art98/c10436.htm> ; and (Cerone 2007): 296.

⁹⁶ (Crawford, Sands and Wilde 2004): 24.

Guantanamo Bay, the US's aggressive campaign against the Court faded and lost support in the Council. The US's attempt, in 2004, to renew the Resolution 1422 deferral for a third year failed. The strategy of pursuing bilateral agreements has also petered out in more recent years. Confronted by opposition from allies, in late 2006, President George W Bush waived some of the penalties associated with the bilateral immunity agreements, and in recent years the conclusion of such agreements with other states has slowed considerably.⁹⁷

The US's new strategy—seemingly encountering no objection, and in harmony with the policy of its P3 colleagues towards the Court—has changed in recent years with regard to diluting the competence of the ICC. Instead of pushing for a generic deferral resolution, the US has taken the opportunity to add to any peacekeeping or other relevant resolution it favours the necessary riders to satisfy its objective of limiting the ICC's jurisdiction. One of the earliest examples of the US's pursuit of this strategy relates to Resolution 1497, dealing with the situation in Liberia. Paragraph 7 of the resolution effectively bypassed the ICC's jurisdiction, by guaranteeing “exclusive jurisdiction of the contributing State for all alleged acts”.⁹⁸ Nigel White has described this resolution as the “exclusive jurisdiction resolution”, and has warned that, should Resolution 1497 be regarded as setting a precedent, then it might have a “permanent effect”,⁹⁹ and be employed in subsequent peacekeeping-related resolutions. If this were to be the case, it would result in the ICC being permanently excluded from exercising jurisdiction over the officials and personnel of the P3 states. In fact, the US, Russia and China now seem to have arrived at a common policy in respect of referrals. As

⁹⁷ (Schabas 2009): 32.

⁹⁸ (UN Security Council Resolutions 1946-2015): S/RES/1497 (2003).

⁹⁹ For the official US State Department report on the ICC and the status of its bilateral agreements, see <http://2001-2009.state.gov/t/pm/art98/c10436.htm>. For the list of 100-plus states that have entered into such agreements, see http://www.iccnw.org/documents/CICCF5_BIAstatus_current.pdf. Both accessed 22 December 2015.

See also, (White and Cryer 2009): 472.

evidenced in the two resolutions relating to Darfur (2005) and Libya (2011), the P3 powers have effectively decided, when adopting a resolution to refer a case to the ICC, to impose an “exclusive jurisdiction” clause that removes their own nationals from the purview of the Court, thereby undermining the ICC’s jurisdiction and competency.¹⁰⁰

Although US policy has become less aggressive towards the ICC in more recent years, its general approach to international criminal justice indicates that it is still in favour of setting up ad hoc courts and tribunals under the supervision of the SC.¹⁰¹ However, in conclusion, and taking into account that “deferral” cases are dormant for now, the US’s policy in relation to the ICC can be summarised as involving one of the following three responses.

The first is adopted when there is international pressure to do something about the atrocities being perpetrated in a crisis situation, and when the US and the other permanent members are in agreement that action should be taken. The relevant SC resolution will then be passed, with members of the P5 either voting in its favour or manifesting their tacit approval by abstaining. In these situations, and in order at least to pay lip service to the R2P doctrine,¹⁰²

¹⁰⁰ For example, paragraph 6 of S/RES/1593 (2005), on the Darfur referral, records the SC as having decided: *that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions...*

(UN Security Council Resolutions 1946-2015): S/RES/1593. The resolution also refers to Article 98(2) of the Rome Statute, regarding the exemption of certain states’ citizens from ICC jurisdiction via the conclusion of bilateral agreements. Ibid. For a similar “exclusive jurisdiction” clause in the resolution referring the Libyan situation in 2011, see (UN Security Council Resolutions 1946-2015): S/RES/1970, paragraph 6.

¹⁰¹ (Cerone 2007): 314.

¹⁰² The humanitarian intervention and R2P doctrines, which challenge notions of traditional state sovereignty in order to prevent grave human-rights violations, developed in response to the genocides that took place in Rwanda and Bosnia in the 1990s, and had gained traction by the time of the 2005 UN World Summit. According to the Summits Outcome Document, heads of state unanimously affirmed that “each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity,” thereby mentioning four particular international crimes whose commission would constitute a legal ground on which state sovereignty could be challenged. It was therefore affirmed that, when a state is “manifestly failing” to protect its population from these four specific crimes, then the international community should in response take collective action, authorised by the “Security Council and in accordance with the Charter of the United Nations”.

the US's strategy has been to refer cases to the ICC. For example, the Darfur situation was referred to the Court in 2005, although without the provision of any enforcement or financial support, and with no follow-up action or resulting trial, and this state of affairs has persisted for the past 10 years.¹⁰³

The second response is deployed if referring a situation to the ICC will lend some legitimacy to a military intervention (possibly involving regime change) contemplated by the US and its NATO allies. In such a case, a formal ICC referral or attempted referral will be made by the SC. Examples include the successful referral of the Libyan situation in 2011, and the unsuccessful attempt to refer the Syrian situation in 2012.¹⁰⁴

(General Assembly Documentation Center 1946-2015): A/RES/61/1, paragraphs 138-140. See also: <http://www.un.org/en/preventgenocide/adviser/index.shtml> .

For critical views of R2P, highlighting its ambiguities and possible misuse, see (Focarelli 2008); and also the 2014 Global Policy Forum (GPF) report *In whose name? A critical view on the Responsibility to Protect*, https://www.globalpolicy.org/images/pdfs/images/pdfs/In_whose_name_web.pdf.

¹⁰³ <http://www.un.org/press/en/2005/sc8351.doc.htm>. The US, during the early years of the ICC's operation, was unsure of the Court's real powers and the extent of its jurisdictional claims on its nationals. Consequently, the US was initially opposed to the SC's draft resolution on the Darfur situation in 2005, and threatened to veto it. However, after the addition of the "exclusive jurisdiction" rider to the resolution, the US abstained from the vote, thereby allowing its adoption. See (Schabas 2009): 170, 473. Also, (Ugarte 2012). As to the resolution referring the Libyan situation in 2011; and under the auspices of R2P, the US and the rest of the P5 voted in favour. (UN Security Council Resolutions 1946-2015): S/RES/1970 (2011). There was also the subsequent adoption of Res. 1973 (also in 2011) and its related "no-fly zone" provision, from which China and Russia abstained. See above: S/RES/1973.

These provisions, under Chapter VII, were later made use of by the US and its NATO allies to carry out aerial bombings in Libya and to arm rebels in the country. This was followed by the ultimate objective of regime change. This event led Russia and China to reject the draft resolution introduced in 2012 on the referral of the Syrian situation, with its primary focus on the ousting of Bashar Al-Assad.

The imbalance and inconsistency in SC referrals to the ICC can be characterised as selective justice, with Richard Dicker of Human Rights Watch (HRW) noting: "When it comes to ICC referrals, the United States, Russia, and China seem more concerned about prosecuting their enemies and protecting their friends. This checkered approach has left victims of abuses in Syria, Gaza, and Sri Lanka without recourse to justice." See (Dicker 2012).

¹⁰⁴ For a discussion of the application of the R2P doctrine to the Libyan conflict, its legality, and the regime change that was carried out, see (Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya* 2012). For the perspective of the states threatened by regime change and by the decisions of the SC and related ICC referrals, see, in the case of Sudan, Omar Al-Bashir: "Conflict in Darfur is my responsibility 2011, and, with respect to Libya (from Iran's point of view), ('US Seeks Regime Change in Libya' 2011).

After the Libyan referral, concerned mostly with the Gadhafi family, and following the regime change that took place in the country, the US appeared to lose interest in supporting the ICC's attempts to assume jurisdiction over the former regime's alleged perpetrators of international crimes from the new Libyan authorities.¹⁰⁵ In the similar situation of Syria, the US failed in its attempt, in 2014, to refer the situation to the ICC, mostly with the object of achieving regime change.¹⁰⁶

The third response has been prompted by situations in which the US has been motivated and genuinely interested in bringing about prosecutions. In such cases, it prefers to set up ad hoc courts that are subsidiaries of the SC, where permanent-member privileges apply. The latest example of this is the Special Tribunal for Lebanon (described in Section 2.2.1).

Intriguingly, although the US does not formally recognise the jurisdiction of the ICC and its role in the global rule of law, in the two types of cases detailed above in which it has referred situations to the Court, this has resulted in the ICC being used as an instrument of US power (Section 2.1). And, where courts have been created as subsidiaries of the Council, this has simply rendered the ICC irrelevant. What, however, all three responses have in common is that the US has ensured it retains exclusive jurisdiction over all its nationals and officials, exempting them from the ICC's jurisdiction.

Now that the SC's adjudicative role, and the way in which this has been subject to the influence of the Council's P5—especially the US—has been examined, the focus in the next

¹⁰⁵ See: <http://www.iccnw.org/?mod=libya>; and also (*Guardian* 2012).

¹⁰⁶ In this case, China and Russia vetoed the draft resolution. See: <http://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court>.

chapter will be on the Council's tendency, since the beginning of the new millennium, to carry out 'legislative' functions.

CHAPTER 3

THE UN SECURITY COUNCIL AS THE GLOBAL LEGISLATOR: ULTRA VIRES OR CONSTITUTIONAL DEFICIT?

3.1 Security Council: The Lawmaker and the Legislator Global

The traditional sources of international law referred to in Article 38 of the ICJ Statute—including treaties and customary international law supported by *opinio juris*—do not include decisions of the UN or any of its organs. If two or more states have wanted ‘hard’ law to govern their relations, then this has typically been based on the consent of the states concerned, and crystallised in the form of a treaty.

When the UN’s Charter was finalised in San Francisco in 1945, the principal purposes of the new organisation were limited in scope, and did not include any lawmaking capacity.¹⁰⁷

Furthermore, the mission of the UN’s most powerful organ, the SC, was to suppress state aggression and maintain “peace and security” for its sovereign member states.

However, from the beginning of the UN’s operation—and in the absence of a world government—the Charter empowered the GA and some other UN organs, as well as conventions sponsored by them, to generate international law:¹⁰⁸ at least in the form of ‘soft’

¹⁰⁷ However, the potential of the SC to act as a global legislator, judge, and enforcer combined was raised by some states’ representatives at the San Francisco Conference, and the Big-3’s proposal regarding the structure of the SC and the use of the veto by permanent members met with opposition. The Netherlands delegation, for example, raised such an objection (UNCIO - Volume XI: Commission III, Security Council 1945): 328. For further details, see Chapter 4, Section 4.3.

¹⁰⁸ For one of the earlier works on this topic, see Rosalyn Higgins, “Development of International Law Through Political Organs of the United Nations”, dealing, in particular, with the creation of law by means of SC resolutions (Higgins 1963).

law for the GA, and case law for the ICJ. However, the SC—the only UN organ that can enforce its decisions and wage war—has, in the last two decades, adopted decisions that are binding on *all* UN member states. In doing so, it has acted as a *de facto* global lawmaker, creating “hard” law—and, under Chapter VII, this is as hard as international law gets.

Jose Alvarez has detected this transformation in the Council’s role:¹⁰⁹

The Security Council’s practice over time has dramatically transformed Chapters VI and VII of the Charter. We now know that the Council can take action neither authorized by Chapter VI nor anticipated in Chapter VII, including: ‘Contracting out’ the use of force without relying on either the Military Staff Committee or Article 47 or Article 43 agreements; creating other institutional bodies capable of taking direct legally binding action on states or individuals (such as ad hoc independent war crimes tribunals, a UN Compensation Commission, or a boundary demarcation body); imposing ‘smart sanctions’ directly on individuals and organizations; or, requiring states to limit their access to weapons without recourse to treaty.

Before examining the details of some of the above SC mandates mentioned by Alvarez, and considering some of the Council’s more recent decisions affecting individual citizens and non-state actors globally—all of which seems to be of a “pseudo” legislative nature—let us briefly examine the Charter articles that might empower the SC to act in this way. The last section of this chapter will then discuss in more detail whether the SC is in fact acting *intra* or *ultra vires*.

The UN Charter’s provisions covering the scope of the Council’s powers appear under the heading “Functions and Powers”. They are very brief (214 words in total) and are contained in three articles:¹¹⁰

[Security Council] FUNCTIONS AND POWERS

Article 24

¹⁰⁹ (Alvarez, *Legal Perspectives* 2008): 59-61. See also (Boyle and Chinkin 2007): 7-10, 110; and (Szasz 2002): 901-905.

¹¹⁰ (Charter of the United Nations 1945-2015): Chapter V; Articles 24-26 (emphases added).

*1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and **agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.***

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

Relying on the text of the Charter, one hopes to find more specific details of the Council's "Functions and Powers" in Chapters VI, VII, VIII, and XII, as indicated in Article 24(2).

However, with Chapters VI and VII primarily concerned with "means and measures" for the pacific or non-pacific settlement of disputes; Chapter VIII dealing with "regional arrangements" (with SC decisions nevertheless being superior); and Chapter XII devoted to the "Trusteeship System," which is now obsolete, we are back to a vague Charter definition of the Council's "functions and powers".

In contrast, states' responsibilities, and the binding nature of SC decisions on UN member states, seem to be more precisely defined.

Article 24(1) is significant in this context, since it confers upon the SC "primary responsibility for the maintenance of international peace and security", and further confirms

that all the member states have delegated their decision-making powers within the scope of the Council's activities to the SC. In doing so, the member states "agree that in carrying out its duties under this responsibility the Security Council acts on their behalf". Furthermore, this delegation of decision-making to the Council in the realm of its activities is made by *all* "Members".

With the exception of Kosovo, Palestine, Taiwan, and a few small enclave nations with undetermined nationhood status, this delegation of powers is practically universal.¹¹¹ These *universal* Council mandates further become *binding* upon the member states where, by virtue of Article 25, *all* the member states "agree to accept and carry out the decisions of the Security Council".

Given that all the world's sovereign states are delegating their powers to the Council, and that SC decisions have binding effect, who then decides what constitutes a "threat to the peace", or what situation qualifies as a "breach" of the peace?

According to Chapter VII, Article 39, these determinations and decisions are within the exclusive competence of the SC. Furthermore, Articles 24(1) and 25, cited above, complement this jurisdictional aspect by giving the SC the necessary delegation of powers from the states, and also reinforce the binding effects of the Council's decisions by requesting the states to "carry out" its decisions.

Moreover, the so-called UN Charter supremacy clause, contained in Article 103 of the Charter, ensures that the decisions of the Council, in case of a conflict of norms or jurisdictions (perhaps with the exception of *jus cogens* norms), take precedence over any

¹¹¹ In fact, Article 2(6) of the Charter creates obligations in relation to SC decisions even for non-member states in situations involving the "maintenance of international peace and security", as discussed later in the chapter.

treaty or other international obligation that a member state may have. Under these circumstances, the member states' "obligations under the present Charter shall prevail".¹¹²

¹¹² Throughout the UN's history, the overarching nature of Article 103 and its ability to override states' other treaty or customs obligations has been a topic of discussion, and its supremacy has generally been confirmed by the GA's Legal Committee (the 6th committee), the ILC, and by the ICJ. In the ICJ case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, the Court ruled that the Charter, as a result of Article 103, constitutes a higher source of law and hence took precedence over any regional arrangements affecting the US and Nicaragua. It stated:

Furthermore, it is also important always to bear in mind that all regional, bilateral and even multilateral arrangements that the Parties to this case may have made, touching on the issue of settlement of disputes or the jurisdiction of the International Court of Justice, must be made always subject to the provisions of Article 103 of the Charter ...

(*Military and Paramilitary Activities in and against Nicaragua 1984*): *ICJ Reports 1984*, p. 438, Para. 102.

ILC reports have also adopted this view: see (Repertory of the United Nations Practices-Supplement-6 (on Article 103), 1979-1984). See also the ILC's *Study Group on Fragmentation*, commentaries on Article 103, (Repertory of the United Nations Practices-Supplement-10 (on Article 103), 2000-2009).

Moreover, the supremacy of Article 103 over states' other obligations is both referred to in the literature and is evident in Council practice. One example is the Iranian nuclear programme. SC resolutions ordered Iran to halt its nuclear-enrichment programme, even though Iran, as a signatory to the NPT Treaty, has, under Article IV of that treaty, the "inalienable right" to enrich uranium and produce nuclear energy for "peaceful purposes". For an example of one of the earlier resolutions on Iran implying that the decisions of the SC took priority over the obligations contained in the NPT, see Res. 1696 of 2006. (UN Security Council Resolutions 1946-2015): S/RES/1696 (2006).

The overarching nature of Council decisions was also referred to in the ICJ *Lockerbie* case in 1998. In that case, involving Libya and the US, the question was whether SC decisions took precedence over the provisions of the Montreal Convention. The Convention's "Rules for International Carriage by Air" specified, among other matters, where the perpetrators of criminal acts involving air incidents should be tried. The Court ruled that it had jurisdiction over the case, despite the US's argument that, by virtue of Articles 25 and 103, the UN Charter trumped the Convention, with the implication that the ICJ was acting *ultra vires*. However, the Court established its jurisdiction on the ground that the Libyan suit was filed in March 1992, before the date of the two related Council resolutions on Libya. In fact, the ICJ president at the time, Judge Schwebel, stated in his dissenting opinion:

To engraft upon the Charter regime a power of judicial review would not be a development but a departure justified neither by Charter terms nor by customary international law nor by the general principles of law. It would entail the Court giving judgment over an absentee, the Security Council, contrary to fundamental judicial principles. It could give rise to the question, is a holding by the Court that the Council has acted ultra vires a holding which of itself is ultra vires?

(Questions of Interpretation and Application of the 1971 MONTREAL CONVENTION Arising From: The Aerial Incident at Lockerbie (LIBYAN ARAB JAMAHIRIYA v. UNITED STATES OF AMERICA) 1998), *Judgment Summary*: 25-28. Subsequently, as a result of an agreement reached by Libya, the UK and the US in 2003, the case was discontinued and removed from the ICJ's docket.

For a more recent discussion of Article 103 and SC decisions as they relate to regional human rights conventions, in the EU context, see *The Application of Article 103 of the United Nations Charter in the European Courts: the Quest for Regime Compatibility on Fundamental Rights* (Istrefi 2012-2013). For a more critical view of Article 103 and the supremacy clause, see *Hierarchy in International Law, the Place of Human Rights*, (De Wet and Vidmar 2012). See also *The Scope of the Supremacy Clause of the United Nations Charter* (Liivoja 2008).

Below, I examine this new auto-interpretation of the Charter, which has unleashed the SC's power as a global lawmaker, in light of the following facts: (1) the SC represents an authoritative source of law, and the Charter is not specific about what constitutes "peace and security" or its "breach"; (2) the SC enjoys significant leeway in what it may do to maintain "peace and security"; and (3) since the end of the Cold War, which has resulted in greater ideological harmony among the P5 members, and a less frequent use of the veto, a new phenomenon has emerged: Council decisions that have a legislative effect.

3.2 The 1990s and the SC Embarking on Quasi-Legislative and Lawmaking Acts: Criminalisation and its Regulations, Financial Settlements for Individuals and Corporations, Sanctions on Individuals and Non-State Actors, and Fighting AIDS

In addition to the unleashing of the adjudicative powers of the Council described in the previous chapter, the SC's global governance competency also seemed to have expanded significantly by the end of the last century, beginning with Resolution 687 of 1991 (regarding the ceasefire in the First Iraq War). The resolution was one of the lengthiest in the Council's history up until that point, consisting of over 3,600 words, with the preamble followed by 34 measures enumerated in as many paragraphs.¹¹³

Resolution 687, *proprio motu* and without any judgment being issued by a court, decided that Iraq had violated international law, determined the boundaries between Iraq and Kuwait, and devised an arms-control regime for Iraq—requiring not only the destruction of any weapons of mass destruction that might exist, but also calling for the destruction of weapons that were not banned by any treaty that Iraq was party to. Other unprecedented measures (discussed

¹¹³ (UN Security Council Resolutions 1946-2015): S/RES/687.

later in this chapter) were also mandated, which directly impacted on individuals and corporations: a radical departure from the Council's typical dealings with sovereign states.

Combating the tyrannical rule of the then leader of Iraq, Saddam Hussein, was clearly one motivation for the Council's actions. However, the resolution went further, containing many measures that broadly impinged on Iraq's sovereignty, and which also had a wide-ranging economic impact on its people—all without recourse to judicial review.

One measure, set out in paragraph 16, and unprecedented in the UN's history, made Iraq financially liable for a wide array of damage and loss—and not only to states, but also to individuals and corporations:¹¹⁴ Under it, the SC:

*Reaffirm[ed] that Iraq, without prejudice to its debts and obligations arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any **direct loss, damage—including environmental damage and the depletion of natural resources—or injury to foreign Governments, nationals and corporations** as a result of its unlawful invasion and occupation of Kuwait [Emphases added.]*

Consequently, not only Kuwait and the Kuwaitis, but also other “foreign governments, nationals, and corporations” became the potential beneficiaries of the war reparations.

However, since the resolution did not specify a lump-sum figure to be paid by Iraq to Kuwait, and as the Council had authorised multiple states and, presumably, many individuals and corporations to file for compensation, what independent court or arbitration panel would have the authority to assess the damages, administer claims, and distribute the funds?

Under paragraph 18 of the resolution, the Council appointed itself to the role, having:¹¹⁵

¹¹⁴ Ibid: paragraph 16.

¹¹⁵ Ibid: paragraph 18.

Decide[d] also to create a fund to pay compensation for claims that fall within paragraph 16 and to establish a commission that will administer the fund.

The P5 all had an interest (financial or otherwise) in this provision. The first sentence of paragraph 16 (honouring prior debts) ensured that Russia would recover its money from Soviet-era loans (mostly for the sale of military equipment). As for the US and the UK, the resolution ensured recovery of some or all of their war expenses, as well as their oil-company losses in Kuwait. It would also seem that France and China must have envisaged some form of economic gain (or at least the recuperation of losses) for them to have adopted the precise wording of the resolution. In fact, in the case of China, more than 10,000 Chinese workers and nationals later filed for compensation once the Commission was set up.¹¹⁶

The SC's subsidiary, the UN Compensation Commission (UNCC), created in Geneva to implement paragraph 18 of the resolution, has now been operating for over 20 years. It has taxed the Iraqi state and its people (currently at the rate of five per cent of their oil export revenue), and has, from this fund, distributed billions of dollars to hundreds of thousands of individuals from dozens of countries, as well as redistributing funds to hundreds of corporate beneficiaries. An analysis of the UNCC as both an administrator of this fund and as a quasi-civil court will be covered in more detail later in the chapter by way of a case study of the SC's newly adopted legislative functions.

Resolution 687, the so-called “mother of all resolutions” —also described as an instance of the P5's “hegemonic international law”—imposed other harsh measures on Iraq that can only

¹¹⁶ In the case of China and France, their interest in obtaining compensation in respect of the First Gulf War appears to be less marked than that of the other P5 powers. However, 10,198 Chinese workers and nationals filed claims in the *individuals Category “A” Claims* and, after the UNCC was set up, 118 French corporations filed for corporate *Category “E” Claims* (France was ranked seventh in that category). (United Nations Compensation Commission 1991-2013). For *Category A*, see http://www.uncc.ch/claims/a_claims.htm; and for *Category E*, see http://www.uncc.ch/claims/e_claims.htm. Both accessed 22 April 2013. For more information on claims and payments initiated by this resolution, see Table 1 in this chapter.

be characterised as a form of selective justice.¹¹⁷ For example, paragraph 14 states the Council’s goal of “establishing in the Middle East a zone free from weapons of mass destruction” (WMD). In trying to achieve this objective, the Council subjected Iraq to intrusive and “unconditional” measures relating to the destruction of WMD, as well as the destruction of some Iraqi non-WMD weapons (in paragraphs 8 to 13). This stands in contrast to previous declarations by the GA, and to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) review conference declarations on a nuclear-weapons-free zone in the Middle East inclusive of all Middle Eastern states, including its only nuclear-weapons state, Israel.¹¹⁸

The Council carried out other unprecedented quasi-legislative actions in the decade immediately preceding the new millennium. It began to introduce “targeted” or “smart” sanctions, as opposed to the state-wide sanctions implemented in previous decades. Previous SC resolutions of this type had mostly imposed arms embargos or general trade and economic sanctions against a particular state, and had been used sparingly. They were first used against Rhodesia (now Zimbabwe) in 1966 (Resolution 232), and later examples included the

¹¹⁷ For a “hegemonic” view of Res. 687, see Jose Alvarez, *Hegemonic International Law Revisited* (Alvarez, *Hegemonic International Law Revisited* 2003): 884-886. For a general discussion of the resolution, see Paul Szasz, *The Security Council Starts Legislating* (Szasz 2002); and Martti Koskeniemi, *The Police in the Temple* (Koskeniemi, *The Police in the Temple--Order, Justice and the UN: A Dialectical View* 1995). All three authors, among others, make reference to the term “mother of all resolutions”.

¹¹⁸ The GA’s push for a Mideast Nuclear Weapon Free Zone (MENWFZ) has been ongoing since the 1970s. First proposed by Iran, and adopted by a GA resolution in 1974, the creation of a MENWFZ was supported by Egypt and other states in subsequent GA resolutions, and by the International Atomic Energy Agency (IAEA) and the NPT in the 1990s. The IAEA general conference, has, since 1991, been passing annual resolutions on “the Application of IAEA safeguards in the Middle East” as a necessary step towards the establishment of an MENWFZ in the region. The NPT review conferences, starting in 1995, have also been calling for an MENWFZ. In fact, the indefinite extension of the treaty at the NPT conference in 1995 was mostly attributed to the NPT consensus and will in establishing the MENWFZ. For a chronology of these events, see the Arms Control Association website: <http://www.armscontrol.org/factsheets/mewmdfz>, accessed 10 August 2013. The last NPT five-year review conference, held in 2010, which the author attended as an observer, resulted in the final outcome document calling for a regional conference on an MENWFZ, to include Israel, which was to be held by 2012. This conference, owing to the non-participation of Israel, has not yet been convened.

sanctions imposed on Iraq in 1990, following the First Gulf War (Resolution 661) and the first round of Libyan sanctions, in 1992 (Resolution 748), in connection with the Lockerbie incident.¹¹⁹

In the 1990s, however, the Council began targeting individuals and then corporations and other non-state actors. The first of this new generation of sanctions was introduced in relation to the conflict in Somalia and Eritrea by means of Resolution 751 in 1992. Subsequent resolutions led to a sanctions list being compiled in respect of Somalia in Resolution 1844 (2008). A year later, sanctions were imposed on the military junta in Haiti, in Resolution 841 (1993), and the following year a companion resolution, Resolution 917 (1994), awarded the 841 Committee—established under the first resolution—the additional task of compiling a list of individuals that were to be sanctioned.¹²⁰

In 1993, in relation to the Angolan civil war, SC sanctions were again adopted in respect of non-state actors: namely, officials of the National Union for the Total Independence of Angola (UNITA) and their families. Resolution 864 (1993) explicitly targeted individuals and corporations as the subject of its sanctions. Although the previously mentioned Council resolutions on Somalia and Haiti eventually led to subsequent resolutions that established listing committees, Resolution 864 on Angola was the first to incorporate the creation of the listing committee as part of its text.¹²¹

In paragraphs 20 and 21 of Resolution 864 (and through the administration of the resolution's mandated sanctions committee), the Council ordered the nullification of certain agreements

¹¹⁹ (UN Security Council Resolutions 1946-2015): S/RES/232, 661 and 748.

¹²⁰ (UN Security Council Resolutions 1946-2015): S/RES/751, 841, 917 and 1844.

¹²¹ (UN Security Council Resolutions 1946-2015): S/RES/864 (1993).

and contracts applicable to specified individuals and entities in connection with the situation in Angola. It also called upon member states to implement proceedings and prosecute the violators specified in the resolution. Under these paragraphs, the SC:¹²²

Call[ed] upon all States, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted prior to the date of adoption of this resolution

Call[ed] upon States to bring proceedings against persons and entities violating the measures imposed by this resolution and to impose appropriate penalties ...

In 1999, there was yet another resolution adopted by the Council which affected individuals and non-state actors: Resolution 1267, which established a Taliban/Al Qaeda sanctions regime after the Kenya and Tanzania US Embassy bombings.¹²³ This resolution and its derivatives (in which Osama bin Laden was listed as a global criminal, and which in turn may have been the precursor to 9/11) for the first time created a long list, with the added significance that it was not related to a specific state, and affected many individuals, corporations and NGOs from multiple states. The 1267 Committee created by that resolution, and complemented by several other resolutions since, has evolved into a robust global and legally binding sanctions regime. Its dynamic “list”, after 15 years, continues to be updated.¹²⁴

¹²² Ibid: paragraphs 20 and 21.

¹²³ For an enumeration of some of these sanctions committees, started as subsidiaries of the SC in the 1990s and 2000s, see (Sands and Klein 2009): 40. For a general discussion of how to combat the democratic deficit of some of the legislative and adjudicative decisions of the SC, see Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing down the Deliberative Deficit* (Jonstone 2008): 275-308.

¹²⁴ The targeted list created by the 1267 Committee in 1999 has, as at 2012, been the subject of 10 resolutions: 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011) and 2083 (2012), which, over the years, have modified the sanctions regime. Subsequently, for political reasons, an Al-Qaeda sanctions list was created separate from that for the Taliban, as is discussed later in the chapter. See <http://www.un.org/sc/committees/1267/>, accessed 19 July 2013.

The more substantive, legislative-type resolutions of the Council that have created global criminal law are discussed below. These resolutions work in a more general and abstract way, without a specific target list, such as Resolution 1373, mentioned in the next section, and have wide-ranging implications when implemented at the national level. First, however, one more atypical and bold decision of the SC is examined: one related to the problem of global health and pandemics.

At the end of the 1990s and the beginning of the new millennium, there were other innovative decisions and resolutions issued by the SC which illustrate that, if the UN is motivated to do so, and if the P5 are in agreement, certain colossal worldwide problems, such as those relating to the environment, poverty and health, can be tackled globally.

In July 2000, the Council adopted Resolution 1308. The Council was “deeply concerned” at the extent of the HIV/AIDS pandemic and by the severity of the crisis in Africa in particular. The Council stressed “that the HIV/AIDS pandemic, if unchecked, may pose a risk to stability and security.” Therefore, the Council requested “the Secretary-General to take further steps towards the provision of training for peacekeeping personnel on issues related to preventing the spread of HIV/AIDS and to continue the further development of pre-deployment orientation and ongoing training for all peacekeeping personnel on these issues.” Finally, the Council instructed “UNAIDS to continue to strengthen its cooperation with interested Member States to further develop its country profiles in order to reflect best practices and countries’ policies on HIV/AIDS prevention education, testing, counselling and treatment”.¹²⁵

¹²⁵ (UN Security Council Resolutions 1946-2015): S/RES/1308 (2000).

Although the resolution can be considered lacklustre in terms of committing resources (other than support for the UNAIDS agency), it does support and encourage educational and informational cooperation in combating HIV/AIDS. The major significance of this resolution is the fact that, for the first time, the Council is making a connection between global “stability and security” and a health matter, thus creating a precedent in Council decisions as to the possibility of making future linkages of this type.

3.3 The 2000s: the Security Council “Starts Legislating”

“The Security Council Starts Legislating” is in fact the title of an article by Paul Szasz, published in the *American Journal of International Law* in 2002.¹²⁶ This was one of the first in a series of articles and scholarly works published soon after the adoption of Resolution 1373 (immediately following the aftermath of the September 11 tragedy and the terrorist attacks on the US mainland).

Paul Szasz, regrettably, died in the same year in which he submitted the draft of his article and before it was published. But his seminal work was expanded in later years by, among others, Jose Alvarez, Martti Koskenniemi, Luis Martinez and Kim Scheppele. These authors suggested that the SC had entered a new phase in making global law. Alvarez, in particular, expands his analysis of the subject further by pointing to the hegemonic effect of the Council’s decisions and the collective hegemonic powers of the P5.¹²⁷

¹²⁶ (Szasz 2002).

¹²⁷ The works of the scholars mentioned above are expanded and referenced later in this chapter and can also be found in the bibliography. For examples of the role of the SC as an agent of “hegemonic international law”, see Jose Alvarez (Alvarez, *Hegemonic International Law Revisited* 2003). See also Detlev Vagts (Vagts, *Hegemonic International Law* 2001).

In the first decade of the new millennium, there were two SC resolutions that particularly stood out as legislative acts.

3.4 SC Resolutions 1373 and 1540: Global Legislation and States' Compliance

In less than three weeks after the 9/11 terror attack, with the tragedy preoccupying most politicians' minds, Resolution 1373 (2001), adopted under Chapter VII, directly defined terrorism-related criminal offenses (without defining "terrorism" itself) for all the world's citizens. This resolution, applicable to all the countries of the world, "decides that all States shall ... prohibit their nationals or any persons and entities within their territories" from committing "terrorist" acts. Furthermore, the resolution commands all the member states to modify their domestic laws and penal codes, so that "such terrorist acts are established as serious criminal offences in domestic laws and regulations".¹²⁸ Under Chapter VII, and by virtue of Article 25, this resolution was binding on all member states. And, in view of Article 2(6), it was applicable even to non-member states, and therefore of universal effect.¹²⁹

Most previous SC resolutions contained, in their operative paragraphs, words such as "calls upon" or "urges" when addressing the member states. However, this resolution uses the more direct and compulsory term "shall" in its operative paragraphs, and is addressed to "all states".¹³⁰

¹²⁸ (UN Security Council Resolutions 1946-2015): SC Res. 1373.

¹²⁹ Article 2(6) of the Charter specifies that, in cases of "international peace and security", "the Organization shall ensure that the states which are not Members of the United Nations" "act in accordance". This is in spite of the fact that, even if excluding the few million nationals of states which are not members of the UN, such as Taiwan, Palestine and Kosovo, the citizens of the UN member states amount to over 99% of the globe's population.

¹³⁰ For a discourse analysis of the text of the resolution, see (Szasz 2002): 902.

In another significant departure from previous SC resolutions, Resolution 1373 is not linked to a particular incident. Although the resolution's preamble references 9/11, the situation being addressed is a generalised one, not related to a specific state or region, but global in scale, and has no implied completion date or time limit associated with it.¹³¹ As a result, the resolution's effect is, in the absence of a corresponding cancelling or modifying SC resolution—which could be vetoed by a permanent member—perpetual.¹³²

Resolution 1373 also established a monitoring regime, creating the Counter-Terrorism Committee (CTC) to assist and monitor the domestic implementation of the resolution. The CTC's main objective is to “criminalize active and passive assistance for terrorism in domestic law and bring violators to justice”.¹³³

The resolution's language is certainly highly demanding. It impinges on the domestic legal systems of UN member states, and constitutes a direct attempt by the Council to govern the global community. The resolution has obligatory and globally mandated wording: for example, exhorting members to “prohibit their nationals” from certain “activities” and to “criminalize” those activities, and to “freeze without delay funds and other financial assets” of certain individuals, and to “ensure that any person who participates” in those activities is

¹³¹ Ibid.

¹³² In fact, after 13 years, and at the time of writing, the Counter-Terrorism Committee set up by the resolution meets regularly, continues to monitor, and periodically reports on the member states' implementation of Res. 1373.

¹³³ According to the CTC's website, its main goals are to:

- criminalise the financing of terrorism;
- freeze without delay any funds related to persons involved in acts of terrorism;
- deny all forms of financial support for terrorist groups;
- suppress the provision of safe haven, sustenance or support for terrorists;
- share information with other governments on any groups practising or planning terrorist acts;
- cooperate with other governments in the investigation, detection, arrest, extradition and prosecution of those involved in such acts; and
- criminalise active and passive assistance for terrorism in domestic law, and bring violators to justice.

See: <http://www.un.org/en/sc/ctc/>, accessed 20 July 2013.

“brought to justice”. The resolution also seeks to monitor the movement of suspected individuals by requiring “all States” to implement “effective border controls” and to prevent the “counterfeiting, forgery or fraudulent use of identity papers and travel documents”.¹³⁴

Overall, both the international community’s perception of the legitimacy of this legislative action on the part of the SC and its willingness to apply this resolution to its own domestic laws and comply have been remarkable. Regionally and collectively, the EU, within a few months, came up with an implementation plan for the main operative paragraphs of

¹³⁴ The relevant sections of the two paragraphs of Res. 1373 are reproduced below:

The Security Council ... Acting under Chapter VII of the Charter of the United Nations ...

1. *Decides that all States shall:*

- (a) Prevent and suppress the financing of terrorist acts;*
- (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;*
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;*
- (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;*

2. *Decides also that all States shall:*

...

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

...

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents; ...

(UN Security Council Resolutions 1946-2015): S/RES/1373 (2001).

Resolution 1373.¹³⁵ The EU also devised the Community-wide European Arrest Warrant initiative.¹³⁶ The African Union, the OAS, the OSCE, and the Association of South-East Asian Nations (ASEAN) all, to varying degrees, took similar action to implement the Resolution 1373 mandates.¹³⁷

At the national level, the US, in addition to enacting the Patriot Act, rushed through its legislative process the ratification and adoption of the 1999 Convention on the Financing of Terrorism, as did many other countries.¹³⁸ Many states welcomed the CTC's technical assistance and adopted CTC recommendations, in all or in part, in implementing Resolution 1373 and its subsequent resolutions.¹³⁹ The CTC Global Survey reported that, as of 2007, 88 states had taken positive steps to implement Resolution 1373 and its follow-up measure, Resolution 1624 (2005). These states did this primarily by modifying their domestic criminal laws and financial and banking laws, as well as by taking appropriate measures in regard to border controls.¹⁴⁰ Furthermore, by 2006, *all* the UN member states (at the time, 191 states) had at least submitted a first report on their implementation action plan for Resolution 1373,¹⁴¹ thereby ensuring that this first global legislative act had a substantial effect, and one that continues to this day.

¹³⁵ (Scheppele 2011): 363.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ (Szasz 2002): 903. It should also be noted that Res. 1373, which was being advanced primarily as a US foreign-policy objective at the SC, was actually an attempt by the US to implement at the international level some of the Patriot Act's components.

¹³⁹ In fact, there were a number of SC-adopted resolutions that followed 1373: for example, Res. 1377 (2001) and Res. 1624 (2005), which reinforced the CTC's functions and offered more information and technical assistance on implementing the resolution.

¹⁴⁰ See *CTC Global Survey Report, S/2008/29*, and its paragraph (2) for information on the number of states complying. See also the related S/2012/16 Council report (Security Council Counter-Terrorism Committee (CTC) 2013).

¹⁴¹ (Jonstone 2008): 286.

A second SC resolution that I consider a further form of global legislation is Resolution 1540 (2004). Again, the resolution is general (not related to a specific incident) and is directed not only to states, but primarily towards individuals, corporations and other non-state actors, and has no expiry date.¹⁴²

Adopted on 28 April 2004, Resolution 1540 decided, with binding effect, that all member states:¹⁴³

... shall adopt and enforce appropriate effective laws which prohibit any non-State actor to [sic] manufacture, acquire, possess, develop, transport, transfer, or use nuclear, chemical, or biological weapons or their means of delivery, in particular for terrorist purposes ...

The resolution was inspired by the discovery of Pakistani scientist Abdul Qadeer Khan's network, involved in the sale of components and technology relevant to nuclear weapons. Moreover, the resolution was applicable not only to nuclear weapons, but also to all other WMD, such as chemical, biological and radiological weapons.

When addressing "all States", the resolution, in three of its operative paragraphs, uses the compulsory term "shall" to provide for its legislative measures— as in: "shall adopt and enforce appropriate effective laws which prohibit any non-state actor" from engaging in certain activities.¹⁴⁴ These activities are generally defined as the "production, use, storage or transport" of WMD-related or dual-use materials.¹⁴⁵

The resolution then attempts to put in place the "appropriate effective border controls and law enforcement efforts to detect, deter" and prevent the "export, transit, trans-shipment and re-

¹⁴² Ibid: 290-294.

¹⁴³ (UN Security Council Resolutions 1946-2015): SC Res. 1540.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

export” of certain materials. The resolution also mandates the implementation of “appropriate laws and regulations”, and the placing of “controls on providing funds and services related to such export and trans-shipment such as financing, and transporting” related to the unauthorised activities. The resolution envisages enforcing these measures by “establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations”. Furthermore, the Council mandates “that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws” prohibiting any non-state actor from engaging in the defined types of activities, and therefore criminalising those activities in their domestic penal codes.¹⁴⁶

¹⁴⁶ The full text of the relevant operative paragraphs of Res. 1540 reads as follows:

The Security Council ... Acting under Chapter VII of the Charter of the United Nations

- 1. Decides that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;*
- 2. Decides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to [sic] manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;*
- 3. Decides also that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:*
 - (a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;*
 - (b) Develop and maintain appropriate effective physical protection measures;*
 - (c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;*
 - (d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations;*

Paragraph 4 of the resolution creates a monitoring committee, the 1540 Committee, as a subsidiary of the SC, similar to the CTC Committee formed by Resolution 1373. In common with the CTC, the 1540 Committee is engaged in providing technical assistance, workshops and consultations to member states to facilitate their domestic implementation of the resolution, as well as carrying out monitoring activities, and reporting on the progress made in the resolution's global implementation. Initially, the Committee's work was supposed to be completed in two years. However, as this was not feasible, the period was initially extended in successive two-year extensions. Finally, in Resolution 1977 (2011), it was extended for a period of 10 years, to 2021.¹⁴⁷

Resolution 1540, like Resolution 1373, was adopted unanimously by the Council. However, with Resolution 1373's legislative effects fully apparent since its introduction three years earlier, the SC debate concerning Resolution 1540 was more contentious, and its adoption took months rather than days. A week before its adoption, on 22 April 2004, the Council, at the insistence of many member states, held an "open meeting", inviting non-Council members to participate in the discussions related to the draft resolution. The letters submitted, and the verbatim discussions at the meeting, reveal that the majority of member-state participants were aware that the Council was in fact taking further legislative action that would impinge on their domestic legal systems, and

4. Decides to establish, in accordance with rule 28 of its provisional rules of procedure, for a period of no longer than two years, a Committee of the Security Council, consisting of all members of the Council, which will, calling as appropriate on other expertise, report to the Security Council for its examination, on the implementation of this resolution, and to this end calls upon States to present a first report no later than six months from the adoption of this resolution to the Committee on steps they have taken or intend to take to implement this resolution; ...

(UN Security Council Resolutions 1946-2015): S/RES/1540 (2004).

¹⁴⁷ For creation of the 1540 Committee, see paragraph 4 of S/RES/1540; *ibid.* For the Committee's scope of activities and the extension of its work until 2021, see (Security Council, The 1540 Committee 2013).

that it was essentially making international law and bypassing treaties, all with the adoption of a single SC resolution.

At the open meeting, Mr. Arias of Spain, noting the similarity of the resolution to a multilateral treaty, suggested that the resolution “be adopted by consensus and after consultation with non-members of the Council”. Mr. Akram of Pakistan, objecting to the fact that “[t]here are grave implications to this effort by the Security Council to impose obligations on States, which their Governments and sovereign legislatures have not freely accepted,” further stated:¹⁴⁸

Pakistan believes that the first question is whether the Security Council has the right to assume the role of prescribing legislative action by Member States. The existing treaties, the Chemical Weapons Convention (CWC), the Biological Weapons Convention (BWC) and the Nuclear Non-Proliferation Treaty (NPT), already prescribe most of the legislation that would cover proliferation by both State and non-state actors.

Of the states that were present at the “open meeting”, more than a dozen presented their views, including Algeria, Angola, Canada, India, Indonesia, Iran, New Zealand, Peru, the Philippines, South Africa and Switzerland—some speaking in favour and some against the resolution. However, almost all recognised the legislative nature of the resolution. Perhaps Singapore’s representative, Mr. Mahbubani, summarised most effectively why the P5 (of course, the permanent members were in agreement concerning the resolution, otherwise any one of them could have vetoed it) and states such as Singapore favour this type of global lawmaking:¹⁴⁹

¹⁴⁸ Ibid: 15.

¹⁴⁹ Ibid: S/PV.4950: 25. These actions by the SC should be viewed in light of the fact that the original founders of the UN envisioned the Council as the enforcer and the military arm of the UN. This type of derogation of international and domestic laws through the adoption of resolutions such as 1373 and 1540, with the justification of efficiency and speed at times of perceived necessity and emergency, reminds the author of characteristics of the declaration of a global martial law by the Council.

Singapore understands many of the concerns expressed here in this debate by some of the other delegations. For example, they question whether the Security Council can assume the role of treaty-making or of legislating rules for Member States. We agree that a multilateral treaty regime would be ideal. But multilateral negotiations could take years, and time is not on our side.

The current status of the global implementation of Resolution 1540, including the member states' compliance records, is regularly presented in the 1540 Committee report. The 2010 report, the last report available that contains extensive detail, includes data up to 2009, and indicates that nearly 160 member states have complied by at least submitting their progress and status reports to the Committee. Furthermore, without giving a specific figure, the report states that "the number of States reporting to have implemented legislative measures to penalise the involvement of non-state actors in prohibited weapons of mass destruction proliferation activities has grown considerably since the adoption of Res. 1540." In summary, the Committee reports positive steps taken by member states in compliance with the resolution.¹⁵⁰ The Committee's 2011 report highlights the fact that up to 140 member states have already adopted domestic legislative measures to implement Resolution 1540.¹⁵¹

¹⁵⁰ (Security Council Report 2013): S/2010/52 (2010), paragraph 3. With regard to the transparency of the two Committees, my examination of the reports of the CTC Committee and those of the 1540 Committee, as well as SC publicly available resources on the subject, have revealed a trend of increasing opacity. In the two committees' reporting, there seems to be an intentional departure from their past practices. Since 2007, the reports have increasingly become vaguer as far as quantifying compliance information is concerned, or in the naming or identifying of specific activities of member states.

¹⁵¹ Posted reports of the Committee: <http://www.un.org/en/sc/1540/reports-and-briefings/committee-reports.shtml>. According to the last available report of the Committee (2011), available online as of December 2015, 140 states have implemented domestic legal frameworks in compliance with the Res. 1540. See: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2011/579. Both accessed 27 December 2015.

3.5 Security Council: Legislating Sanctions Regimes and Listing

Criminals

In the first 45 years of its existence, between 1945 and 1990, the SC applied sanctions only twice: in respect of Rhodesia in 1966 and South Africa in 1977. However, starting with the 1990 SC general trade embargo on Iraq (Resolution 661), the Council has become proactive in the matter of sanctions and has passed dozens of resolutions imposing sanctions on different states in different continents. In fact, in the 25-year period between 1990 and 2015, the SC, in addition to the general trade and financial embargo it placed on Iraq, has passed a number of resolutions mandating “smart” sanctions, which have been “targeted” and amount to 29 in total, an average of more than one per year. These 29 “targeted” regimes have subsequently created “listing” committees. Of these committees, 13 have completed their mission and have been terminated. Another 16 are active and remained as functional sanctions regimes as at the end of 2015.¹⁵²

Article 41 of the Charter empowers the SC to use non-military interventions against a state. Since the end of the Cold War, this article has also been subject to further interpretation, thereby altering the Council’s functions as prescribed in the Charter. The result has been to

¹⁵² In addition to the 29 targeted sanctions in this 25-year period, there were also three sanctions of the general type, applying to Iraq, Haiti and Yugoslavia. The 13 active Committees and sanction regimes, as at the end of February 2013, are related to the following resolutions: Res. 751 (1992) and Res. 1907 (2009) (Somalia and Eritrea); Res. 1267 (1999) and Res. 1989 (2011) (Al-Qaeda and associated individuals and entities); Res. 1518 (2003) (Iraq); Res. 1521 (2003) (Liberia); Res. 1533 (2004) (Democratic Republic of the Congo); Res. 1572 (2004) (Côte d'Ivoire); Res. 1591 (2005) (Sudan); Res. 1636 (2005) (Lebanon); Res. 1718 (2006) (North Korea); Res. 1737 (2006) (Iran); Res. 1970 (2011) (Libya); Res. 1988 (2011) (Afghanistan and Taliban, with the SC hiving off the Taliban section of the 1267 Committee in 2011); Res. 2048 (2012) (Guinea-Bissau); Res. 2127 (2013) (Central African Republic); Res. 2140 (2014) (Yemen); and Res. 2206 (2015) (South Sudan). See (UN Security Council Sanctions Committees 1990-2015). See also: <https://www.un.org/sc/suborg/en/>; and <https://www.un.org/sc/suborg/en/sanctions/terminated-sanctions>; both accessed 5 January 2016. Also see (Cortright, Lopez and Gerber-Stellingwerf 2008): 349-352.

expand the Council's mission and scope of competency far beyond that of sovereign states, as envisioned by the framers of the Charter.

In response to the prolonged suffering that SC sanctions inflicted on the Iraqi people over the 13 years from 1990 to 2003 (the SC later tried to alleviate this misery by allowing the controversial and mismanaged "oil for food programme"), the Council developed the doctrine of "targeted" or "smart" sanctions. Instead of applying indiscriminate and comprehensive economic and trade embargos on a state, with the humanitarian implications this entailed for the general population, the idea was to use targeted sanctions against specific commodities, products or transactions, and, more importantly, against specific individuals and corporations deemed responsible for the wrongful acts. Consequently, the general and comprehensive sanctions of the type mandated in Iraq, Haiti and Yugoslavia between 1992 and 1995 gave way to "smart" sanctions, with a list of individuals, corporations and other non-state actors as their targets.

The first of these "smart" sanctions, accompanied by the establishment of a committee to prepare and maintain a list, as well as to monitor the implementation and progress of the sanctions regime, was applied in respect of the situation in Sierra Leone under Resolution 1132 (1997). The most recent one was instituted at the end of 2015, under Resolution 2206, and concerns the situation in South Sudan.¹⁵³

Structurally, a sanctions committee set up as a result of one of these SC resolutions is typically a Council subsidiary with its own staff and resources. Functionally, these

¹⁵³ (UN Security Council Sanctions Committees 1990-2015): The 2206 Committee. See also: <https://www.un.org/sc/suborg/en/sanctions/2206>; accessed 5 January 2016.

committees have “list” maintenance tasks (including listing and de-listing), offer technical assistance, and monitor the progress of domestic legal implementations, prosecutions and general compliance with the sanctions resolutions. Furthermore, subsequent Council resolutions that might affect the regime, and additions and modifications to the lists, are consolidated in the original committee set up for that state or situation.

For example, there have been four SC resolutions in respect of Iran in relation to its nuclear programme, the first being Resolution 1737 (2006) and the most recent being Resolution 1929 (2010). However, the sanctions committee set up by the first resolution became the consolidating committee for the subsequent resolutions as well. Therefore, the 1737 Committee, taking its name from, and being set up under, the first resolution, became the focal point for the other four related resolutions that end with Resolution 1929 (2010). Its latest list has been updated to include individuals, corporations, and goods and transactions that are the subjects of sanctions that have been added or modified since the original 1737 Committee’s list was released.¹⁵⁴

There are, however, three sanctions committees that are not related to a particular situation or state, but instead concentrate on a particular topic and are more general in nature. The most notorious of these sanctions regimes is the 1267 Committee, created by Resolution 1267 (1999), mentioned above, and which relates to Al-Qaeda and the Taliban, having been set up after the US Embassy bombings in Kenya and Tanzania.¹⁵⁵

¹⁵⁴ The two other sanctions resolutions related to Iran were Res. 1747 (2007) and Res. 1803 (2008). See the 1737 Committee website: <http://www.un.org/sc/committees/1737/>.

¹⁵⁵ The other two subject-related and general sanctions committees are the CTC Committee on terrorism, created after 9/11, and the 1540 Committee that relates to the proliferation of WMD. Unlike the 1267 Committee, these two committees do not maintain a “list”, and their primary function is to oversee, on a global scale, the national implementation of their provisions, providing compliance assistance, as well as monitoring activities. Furthermore, in 2011, the Taliban section of the list of the consolidated 1267 Committee was separated out and,

When it was introduced in 1999, Resolution 1267 was unprecedented, in that it was not state-centric, but rather linked to an undefined category of criminal activity: namely, terrorism. And, similar to some of the Council's other legislative-type resolutions, the compulsory language of "all States shall" in its operative paragraphs commands the member states to implement the resolution's provisions in their domestic legal systems and to cooperate fully with the resolution-created apparatus—the 1267 Committee.

Resolution 1267 and the other "listing" sanctions-regime resolutions of this type devised by the Council are distinguishable from the general and abstract type of SC sanctions resolutions, such as Resolutions 1373 and 1540, mentioned in the previous section. The former type, in addition to specifying the criminal activity targeted, also supplies a list of criminals, whereas the latter type (exemplified by 1373 and 1540) defines only the criminal activity and specifies the appropriate minimum measures or sanctions applicable to that activity. No list is provided, and the identification of individuals, corporations or other non-state actors as criminals is left primarily to the states or subsequent SC determination. However, in both cases, the Council is, in effect, making "instant" international law, and in both cases "all States" are bound by its decisions globally¹⁵⁶—although, in practice, the state-specific and the listing-type of resolution impacts certain states or regions more than others. As far as non-state actors are concerned, however, these "listing" regimes instantly and

under Res. 1988 (2011), a separate list and sanctions regime for Afghanistan and the Taliban was created. On that same day, the SC also adopted Res. 1989 (2011), formally creating an Al-Qaeda-specific list with tougher sanctions. See (UN Security Council Sanctions Committees 1990-2015). The reason for splitting the 1267 Committee and its related list into two was apparently owing to US/NATO and Afghan government policy. The idea was to enable the Council to strengthen the Al-Qaeda sanctions while at the same time leaving the door open for a more lenient approach to the Taliban in the event of a rapprochement between the Taliban and the US and Afghani governments.

¹⁵⁶ The term "instant" is borrowed from Jose Alvarez and his reference to "instant custom" (Alvarez, *Hegemonic International Law Revisited* 2003).

globally criminalise certain individuals, corporations and NGOs—usually in a list embedded in or annexed as part of the sanctions resolution or delegated to a committee to compile.

Moreover, in addition to the highly questionable legitimacy of the SC acting as prosecutor or judge to devise the selection criteria and to criminalise certain individuals or organisations, this targeting of individuals and non-state actors is usually performed disregarding the due process of law.¹⁵⁷

One of the reasons why the 1267 Committee has become notorious in the international legal community and subject to so much scholarly debate, and why its list has been challenged in national and regional courts, is the resolution's wide scope, as well as the large number of individuals and legal persons it impinges on. In its almost 15 years of existence, the Committee has targeted several hundred individuals and over a hundred corporations and NGOs as being criminals or potentially engaging in criminal activities. The identified individuals are citizens or residents of, or corporations domiciled in, dozens of states around the world. The Committee, as of March 2013, still had over 200 individuals and over 100 corporations and NGOs on its dynamic list. In contrast, one of the later sanctions resolutions, Resolution 2048, adopted in 2012, had a relatively small global impact. It created the 2048 Committee, and lists only 11 individuals, all from Guinea-Bissau.¹⁵⁸

¹⁵⁷ See (Jonstone 2008): 295-296; and also (Malone 2008): 128. The importance of following due process, given the possibility of the Council making mistakes, is illustrated, for example, by the Madrid train bombing of 2004. The bombing killed nearly 200 people, and the SC initially, in its Res. 1530 (2004), wrongly named the Basque dissident group Euskadi Ta Askatasuna as the perpetrators. (Boulden 2008): 429-434.

¹⁵⁸ (UN Security Council Sanctions Committees 1990-2015): the 1267 Committee and the 2048 Committee: <http://www.un.org/sc/committees/1267/>; and <http://www.un.org/sc/committees/2048/>. Both accessed 10 March 2013.

As of December 2015, and pursuant to Resolution 2253 (17 December 2015), the so-called “Islamic State” targeted list was added to the file of the 1267 Committee, and the new list was renamed the “ISIL (Da’esh) and Al-Qaida Sanctions List”. As of 5 January 2016, the new list contained the names of 243 individuals and 74 corporations and organisations.¹⁵⁹

Numerous criticisms of the 1267 Committee and its sanctions regime have been made: for example, its opaque method of “listing” and the fact that the individuals or the entities being listed cannot object to such listing—either directly or through a lawyer. In addition, the process of providing listed individuals with notice of their listing is slow and cumbersome. More significantly, there is no clear and concrete way of “de-listing”, and there is no appropriate appellate body to provide judicial review.¹⁶⁰ Furthermore, Resolution 1624 (2005) added the “incitement to commit acts of terrorism” to the list of criminal activities under the 1267 Committee’s competency. This made it easier to target certain individuals or

¹⁵⁹ On Council Res. 2253 (2015), see: <http://www.un.org/press/en/2015/sc12168.doc.htm>. On the new combined 1267 “ISIL (Da’esh) and Al-Qaida Sanctions List”, see:

https://www.un.org/sc/suborg/en/sanctions/1267/eq_sanctions_list. Both accessed 5 January 2016.

¹⁶⁰ Barring a Council resolution, “de-listing” was almost non-existent in the earlier years of these “listing” committees. The criticism from states, NGOs and even the UN Secretariat at the World Summit of 2005 caused the Council to respond to some extent, with the adoption of Res. 1730 (2006). This resolution created a “focal point” for receiving de-listing petitions from three different sources: the SC sanctions regimes, the states, and individuals on the list. However, the caveat for individual petitioners is that their appeal must still be handled at the intergovernmental level: that is, their case must be accepted by either the state of their birth or the state that originally put them on the list. Furthermore, this de-listing petition can only be submitted within 90 days of the original listing, and the de-listing would still need to be approved by the sanctions committee members, who are selected by the 15-member SC (in other words, it is still subject to veto). See (Martinez 2008): 355; see also (Jonstone 2008): 294-296. With regard to making de-listing fairer (either in function or appearance), the Council created an Office of the Ombudsperson, under Res. 1904 (2009), as an “independent” body to review the de-listing cases of the 1267 Committee. It further expanded the Ombudsperson’s mandate after Res. 1989 (2011) as related to the “Al-Qaeda List”. However, while the Ombudsperson may be independent in his or her recommendations to the Committee to de-list an individual or entity, ultimately the Ombudsperson is not independent as regards the de-listing itself. If a single SC member objects, the decision will be referred to the Council, where a P5 member can then veto the recommendation. (UN Security Council Resolutions 1946-2015): S/RES/1989 (2011), paragraph 23. See also (UN Security Council Sanctions Committees 1990-2015): <http://www.un.org/en/sc/ombudsperson/>. Therefore, a permanent member, such as the US or China, which may have placed an individual or entity on the “list”, can prevent the Ombudsperson, the Committee, or even the rest of the Council members, even if they are in agreement about the matter, from de-listing that individual or entity.

groups—again, without due process of law—since, for example, belonging to a particular religious group might be deemed sufficient for someone to be added to the list.¹⁶¹

Despite the widespread criticism of Resolution 1267—ranging from the objections of states and domestic courts, to the ECJ challenging the contents of the list and the implementation of the Council’s mandate—the 1267 Committee is still operating. Currently, it has over 350 individuals and non-state actors on its sanctions and prosecution list.¹⁶² The Committee, in conjunction with the CTC Committee, continues to monitor, and to provide assistance with, the implementation of its regime globally, and in December 2012 the Council extended the Committee’s mandate by another 30 months.¹⁶³

As mentioned above, the 1267 Committee is not the only one of its kind. In fact, by the end of February 2013, there were 13 such active sanction regimes with “listings” and standing committees. Another significant list is the 1737 Committee on Iran’s nuclear activity, with nearly 40 individuals and 80 corporations sanctioned (some of which are multinationals with national registrations ranging from Belgium to Malaysia).¹⁶⁴

¹⁶¹ (Jonstone 2008): 296.

¹⁶² (UN Security Council Sanctions Committees 1990-2015): The 1267 Committee: <http://www.un.org/sc/committees/1267/>; accessed 10 March 2013.

¹⁶³ (UN Security Council Resolutions 1946-2015): S/RES/2083 (2012).

¹⁶⁴ (UN Security Council Sanctions Committees 1990-2015); <http://www.un.org/sc/committees/1737/index.shtml>. The Taliban list is another long one, maintained by the 1988 Committee, the sibling of the 1267 Committee. It was created by Res.1988 (2011), when the Council decided to break up the consolidated list. The 1988 Committee list, as at the end of February 2013, included over 130 individuals and entities in its list: <http://www.un.org/sc/committees/1988/list.shtml>. Both accessed 10 March 2013. According to my estimate, from 1999 until the end of 2015, based on the 29 listing committees which were or are still active, the number of individuals and entities which have been “targeted” by the Council has easily surpassed the 1,000 mark: <https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list>. Under Res. 2231 (2015), relating to the Iranian nuclear situation, the 1737 Committee’s functions were, provided certain conditions were met, due to be terminated, possibly in 2016: <https://www.un.org/sc/suborg/en/sanctions/terminated-sanctions>. Both accessed 5 January 2016.

The combined lists of these 13 current sanctions regimes has the effect of labelling hundreds of individuals, business entities and NGOs as international criminals. They face prosecution and penalties ranging from immediate travel bans to the immediate freezing of their assets and stoppage of their financial transactions. Furthermore, their cases can be referred to domestic courts (and, in certain instances, to the ICC) for additional prosecution.

As to the role of the SC in these targeted sanctions regimes, and regardless of the original intent behind them—whether to fight terrorism, or prevent genocide, or stop the proliferation of WMD—the effect, from a global governance perspective, has been the same. The Council is, with binding effect, criminalising individuals and organisations, and making laws with non-state actors as its subjects. This is affecting *all* member states, and is profoundly affecting states’ domestic legal systems and their citizens’ rights.

3.6 The Council’s Role as Tax Collector and Claims Processor: the Case of the UN Compensation Commission

This section considers the role of a SC subsidiary, the United Nations Compensation Commission (UNCC), by way of a case study. It examines the Council’s varying competency and its role in global governance through the adoption of measures that have the same effect as the legislation of national governments. I specifically examine the Council’s tort legislation competency, by virtue of which a section of the global population is taxed based on certain criteria. After operational and administrative costs have been withheld, the income collected is awarded (according to certain compensation criteria) to another section of the global population—primarily non-state actors, in this case individuals and corporations.

The SC created the UNCC after the conflict commonly known as the First Persian Gulf War of 1990 to 1991 (not including the Iraq–Iran war, which preceded it). After Saddam

Hussein's regime and the Iraqis were defeated, the Council created the UNCC under Resolution 687 (1991), and then further defined the Commission's competency and scope in Resolution 692 (1991).¹⁶⁵

However, upon closer examination, it is apparent that the two resolutions that created the UNCC and the functions delegated to it did not result in a typical war reparations act. There were no winner and loser states at the negotiating table, and there was no peace treaty made between Iraq and the other warring states. In fact, since it was a Council-authorized war under Chapter VII, Resolution 678 (1990), and based on UN member states' delegation of war-making powers to the Council (Articles 24, 25 and 42), the belligerents can be regarded as a single member state, Iraq, on the one side, and the SC, on behalf of all the member states, including Kuwait, on the other. Furthermore, unlike a reparations treaty, a set amount of reparations was not agreed in advance, and no direct payments from the losing state (Iraq) were to be made to the winning state (Kuwait), the government of which would, typically, decide how to distribute the fund domestically.¹⁶⁶

As far as the Council's competency in these cases is concerned, according to Article 36 of the UN Charter, the Council is empowered to decide on "methods of adjustment" in conflict situations. However, Article 36 does not define what is meant by "adjustment" (for example, whether this relates to borders, financial recompense, or to some other type of adjustment) or under what circumstances it is applicable. Further, Article 48, under Chapter VII, grants the

¹⁶⁵ (UN Security Council Resolutions 1946-2015): S/RES/687 and S/RES/692. See also: <http://www.uncc.ch/home>; and (Alvarez, *Hegemonic International Law Revisited* 2003): 885-886. In December 2015, the UNCC temporarily suspended collection of the 5 per cent of Iraqi oil income because of the internal civil war and the partition of the country by the so-called Islamic State: <http://www.uncc.ch/sites/default/files/attachments/80%20close.pdf>; accessed 21 December 2015. Furthermore, some of the award compensation details referred to later in this section seemed to have been blocked and were no longer accessible on the official site. Instead, only summaries were posted.

¹⁶⁶ *Ibid.*

Council broad authority to make decisions on any “action required”, which is binding on “all” or “some” of the member states. Consequently, although unprecedented, the Council’s involvement in financial settlements in a conflict situation, including the establishment of the Compensation Commission, did not, at first glance, seem outlandish.

According to the UNCC’s official website, the Commission was established to settle losses arising from the Iraqi invasion of Kuwait, dealing with compensation owed not only to the government of Kuwait, but also to other governments and international organisations, and even to corporations and individuals. Furthermore, in addition to being formally a subsidiary of the SC, the Commission seemed to have had a mixed mission, as suggested by the following comment from the then UN Secretary-General:¹⁶⁷

The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims; it is only in this last respect that a quasi-judicial function may be involved.

Therefore, the UNCC is claimed to be a political organ and not an arbitration tribunal. Its funding was to come from the taxation of Iraqi oil exports. In the 1990s, these were taxed at a hefty 30 per cent under the “oil-for-food” programme (Resolution 705, 1991). As a result, almost one-third of Iraq’s oil revenue was diverted from food or medical purchases to be allocated to the UNCC. Subsequently, the percentage of oil income withheld was reduced to 25 per cent, and was then further reduced, after almost a decade, to 5 per cent at the end of the Second Gulf War (under Resolution 1483, 2003).

¹⁶⁷ (United Nations Compensation Commission 1991-2013): *Introduction, Governing Council, Press Release, and Claims* web pages; accessed 1 March 2013. The UNCC website does not mention the name of the SG cited. However, at the time of the UNCC’s creation, in 1991, the SG was Javier Pérez de Cuéllar, followed, a few months later, in January 1992, by SG Boutros Boutros-Ghali.

As mentioned earlier, the Council’s collection of 5 per cent of Iraqi oil revenue has been, as of 2014, temporarily suspended, owing to the “Islamic State” situation. However, according to the available data for 2013, the latest distribution to claimants was made in January 2013, and involved the payment of US\$1.3 billion to two *unspecified* corporate claimants. This brings the total distribution of funds up to that date to a staggering US\$40.1 billion. Based on the last two payments (in July 2012 and January 2013), totalling US\$2.6 billion, and made to six claimants, the annualised amount was equivalent to Iraq’s then average monthly income of approximately US\$216 million per month.¹⁶⁸ According to World Bank data from 2011 (before “Islamic State” had overrun the country), Iraq had a population of 32 million, with a Gross National Income (GNI) per capita of only US\$4,640—which, after Yemen, makes Iraq the poorest nation in the Middle East. In comparison, Kuwait, the main beneficiary of UNCC funds, had, in the same year, a GNI per capita figure of US\$48,900. Similarly, in the US—the main military force behind both Iraq wars and also a recipient of UNCC disbursements—GNI per capita in 2011 was US\$48,600. Based on these GNI figures, therefore, average Americans or Kuwaitis had more than 10 times (1,000 per cent) more income than their Iraqi counterparts. In other words, under the SC’s management and enforcement, the UNCC has, at a proportionally high rate, been reallocating funds from a poor country to richer ones, under the guise of war damages.¹⁶⁹

¹⁶⁸ For the total compensation approved and awarded, see the UNCC site: <http://www.uncc.ch/ataglance.htm>; For the latest disbursements, see the following UN News and Fox News sources: <http://www.un.org/apps/news/story.asp?NewsID=42564&Cr=iraq&Cr1=kuwait#.US3wv2eOVDI>; <http://www.un.org/apps/news/story.asp?NewsID=43990&Cr=iraq&Cr1=#.UXD93sqOX64>; <http://www.foxnews.com/world/2012/04/26/un-pays-out-another-1-billion-from-iraqi-oil-fund/>; <http://www.foxnews.com/world/2013/01/24/un-fund-pays-out-13-billion-compensation-for-iraq-kuwait-invasion-total-tops-40/>. All accessed 4 April 2013. Note that neither the UNCC website nor any of the other sources I examined reveal the recipients’ identities.

¹⁶⁹ All the economic and population indicators were extracted from the World Bank website’s latest available data (for 2011). See <http://data.worldbank.org/country>. For data on Kuwait, see: <http://data.worldbank.org/country/kuwait>;

The UNCC, with its headquarters in Geneva, and approximately 300 employees, is now in its third decade of existence. It has sorted its claimants into four general categories: individuals, corporations, international organisations, and national governments. Its governing council and decisions are controlled by, and reflect, SC membership; therefore, the P5 have a permanent presence on the UNCC's governing council. However, the P5 have agreed not to use their veto privilege in respect of the UNCC's decisions, including the approval of claims. According to its rules of procedure, decisions are based on a majority of 9 of the 15 Council members' favourable votes. However, according to UNCC governance records, the understanding, and the usual practice at the UNCC, has been for all its decisions to be made by consensus, which implies that the P5 have not really forfeited their veto. The sessions are "closed to the public", and non-member states of the SC, including Iraq, have access only to the plenary sessions of the UNCC.¹⁷⁰

The proponents of the Council-created UNCC label it a great success. Francis McGovern states that the hallmark of the UNCC is its efficiency and "pragmatism", and further comments that: "by adapting the processes to the claims, rather than vice versa, the UNCC has become a mode of 'rough justice' that will have long lasting precedential impact."¹⁷¹ The UNCC website, which refers to the 1.54 million claims it has processed, declares its accomplishment as a first, stating that "the resolution of such a significant number of claims

for US data, see: <http://data.worldbank.org/country/united-states>; and for Iraq data, see: <http://data.worldbank.org/country/iraq> All accessed 19 April 2013.

¹⁷⁰ (United Nations Compensation Commission 1991-2013): <http://www.uncc.ch/governin.htm>; accessed 26 July 2013. See also (McGovern 2009) and (Lim 2000).

¹⁷¹ (McGovern 2009): 189. McGovern defines "rough justice" as "the philosophical conflict between fairness and efficiency". In the UNCC context, McGovern is in favour of efficiency. Ibid: 172.

with such a large asserted value over such a short period has no precedent in the history of international claims resolution.”¹⁷²

Critics of the UNCC primarily view it from the point of view of most Iraqis, who, in the space of one generation, have witnessed three major Persian Gulf wars, starting with the eight-year Iraq–Iran War in the 1980s, which caused tremendous loss of life and major economic destruction on both sides. During this first Persian Gulf war, Iraqis had to live under Saddam’s illegitimate and undemocratic government, which had massacred its Shiite population and used chemical weapons against its own Kurdish minority, resulting in the loss of many Iraqi lives and great economic damage. Then there were the two other devastating Gulf wars, in 1990 and 2003, against mostly US and UK armed forces, which also resulted in severe loss of life and substantial infrastructural and economic damage to the country. The Iraqis’ hardship was further exacerbated by over a decade of crippling UN sanctions. Despite these decades of war, with the Iraqi economy devastated and its infrastructure destroyed, Iraq has had to pay—and is still paying—billions of dollars to the UNCC as war damages. These retribution payments have now stretched over a quarter of a century, from 1991 to the present.

David Caron calls this Council-created financial obligation placed on Iraq an “odious debt” and has declared it to be void *ab initio*.¹⁷³ Jose Alvarez reminds us that “the international

¹⁷² (United Nations Compensation Commission 1991-2013): <http://www.uncc.ch/ataglance.htm>; accessed 14 April 2013.

¹⁷³ (Caron 2004): 139. With regard to odious debt and the repudiation of Iraqi debt accumulated under Saddam Hussein (as suggested by Caron), Wade Mansell and Karen Openshaw remind us that no state has so far been able to use the odious debt argument successfully to entirely disclaim its debts. Odious debt, basically defined as a sovereign debt being acquired without the population’s consent, and not for its benefit, and with the creditor aware of these facts when advancing the loan proceeds, does clearly apply to the Iraqi debts accumulated during the dictatorial regime of Saddam Hussein, who mostly used them to fund his army and various wars. However, Mansell and Openshaw argue that IR realities limit IL remedies for repudiation. Therefore, even in the successful case of Ecuador reducing its ‘illegitimate’ debts, they argue that President Rafael Correa chose not to

community has resisted the idea that states (as such) or peoples (as collective) are capable of committing international crimes”. In particular, he cites the fact that the ILC debated and ultimately rejected a provision on “state crimes” as part of its codification of rules governing state responsibility.¹⁷⁴

A further issue with regard to the SC’s norms of conduct in this type of situation relates to the Council’s logic and motives in not establishing similar compensation commissions in respect of other conflicts during the same era. For example, only two years before the First Gulf War, the eight-year war between Iraq and Iran (in which Saddam Hussein had used chemical weapons, and was generally considered to be the aggressor) had come to an end. With hundreds of thousands of casualties on both sides, Iran alone had claimed US\$150 billion in Iraqi-inflicted war damages.¹⁷⁵ Similarly, in the same year as the First Gulf War, war broke out in the former Yugoslavia, causing the SC, acting under its Chapter VII powers, to intervene with sanctions and other measures. It was estimated that, in the Bosnia region of the conflict alone, war damages attributed to the aggressor state of Serbia amounted to approximately US\$50 billion.¹⁷⁶

Neither of these wars, nor any other conflict during this period in which the SC intervened, or adopted resolutions in relation to, prompted the Council to set up compensation commissions for the purpose of collecting, administering and distributing war damages. Nor did the

repudiate but to consider the loans as voidable rather than void *ab initio*. (Mansell and Openshaw, *Suturing the Open Veins of Ecuador: Debt, Default and Democracy* 2009): 150, 161-164, 167, 184-185.

¹⁷⁴ On Alvarez’s rejection of the idea that states (rather than people) can commit crimes, and the similar conclusion reached by the ILC, see (Alvarez, *Hegemonic International Law Revisited* 2003): 885.

¹⁷⁵ (Mofid 1990): 115.

¹⁷⁶ (Libera 2000-2001): 291-292.

Council decide to expand the existing UNCC's mandate as an administrative body to cover financial compensation for victims of those other wars.

Yet another criticism of the UNCC is the fact that it is the sole entity empowered to decide—without any appellate process or judicial review—which individuals, corporations and governments qualify as legitimate claimants and how much they should each receive in financial settlement. Given this concentration of power, and the fact that it appears to be a self-contained regime, how has the UNCC fared, and what impact have its decisions had on those subject to its authority?¹⁷⁷

Table 1 below sets out the results of a quantitative analysis, based on information taken from UNCC posted records as at 24 January 2013, on the distribution of funds between state and non-state actors. It leads to a revealing observation: the primary beneficiaries of this SC organisation are overwhelmingly—both in terms of numbers and total amounts received—not sovereign states but non-state actors. Furthermore, within this non-state category, the gap between, on the one hand, the several dozen corporations that have received large compensation for war damages and, on the other, the hundreds of thousands of individuals who sustained injuries, or lost family members, or suffered economic damage seems to be greatly out of proportion.

¹⁷⁷ In spite of the fact that the UNCC is controlled by the membership of the SC and their appointees, it seems to be behaving as a self-contained regime in Geneva, and its decisions are usually final. However, on occasions, it seems that its parent, the SC in New York, has acted as an appellate body. One example involved the proposed distribution of approximately US\$16 billion to two governments, a debate that resulted in a deadlock in Geneva for over 90 days in 2000. The case was then referred to New York, where the Council, this time with more muscle from the P5 (who, as in Geneva, enjoy a privileged position vis-à-vis the other members), ultimately determined the final distribution of those funds. See (Lim 2000): 437-438, 451.

Table 1**UNCC Claims and Payments ***

(As of 24 January 2013. Since 2014, the payment of claims because of the “ISIS” situation have been temporarily suspended)

Category	Number of claims awarded compensation	Compensation awarded (US\$)	Net compensation paid (US\$)	Outstanding award amounts (US\$)
<i>Individuals—claiming over US\$100K (Cat. D)</i>	10,343	3,348,902,861	3,347,980,604	0
<i>Individuals—all others categories (A, B, C)</i>	1,528,886	8,348,843,912	8,308,631,151	0
<i>Corporations—oil companies (Cat. E1)</i>	67	21,522,047,546	9,175,022,476	12,339,324,488
<i>Corporations—all others categories (E2, E3, E4, E/F)</i>	4,038	5,086,789,174	5,085,977,124	1,841,509
<i>Governments and IOs categories (F1, F2, F3, F4)</i>	285	14,076,773,222	14,074,817,116	0
Total	1,543,619	52,383,356,715	39,992,428,471	12,341,165,997

- Source: UNCC website¹⁷⁸

¹⁷⁸ The data in this table are mainly extracted from the “status” page: <http://www.uncc.ch/status.htm> and the various pages in the “claims” section of the UNCC website; accessed 3 March 2013. See (United Nations Compensation Commission 1991-2013). It should be noted that, based on a UNCC governing council decision in 2014 (renewed in 2015), the UNCC had temporarily suspended collection of the 5 per cent tax on Iraqi oil income because of the internal civil war and the partition of the country by the so-called “Islamic State”: <http://www.uncc.ch/sites/default/files/attachments/80%20close.pdf>. Further, some of the award compensation details referenced in this Table and section, available in 2013, seem to have been removed since then, and are no longer accessible on the official site. Last accessed 21 December 2015.

Table 1 Notes:

- Based on the above data, in terms of average claims awarded per instance, it seems that the lowest sums were paid to the 1.5 million individuals (Categories A, B, and C) who received US\$5,460 per person. The highest average recipients were the oil companies, with the 67 oil companies receiving over US\$21 billion, or an average of US\$321 million per corporation.
- Of the almost 1.5 million individual applicants, 31,868 of them were related to the Kuwaiti “Bedouins”, receiving a fixed amount of US\$2,500 per person.
- Of the Category D claimants (individuals claiming US\$100,000 or more), by far the number one ranked were the Kuwaitis (approximately 50 per cent of claims). However, ranked numbers 4 and 5 in in this category were the citizens of the P5 UK and US, with 383 and 317 claims respectively.
- In the individuals’ categories, the highest number of citizens filing claims from a single P5 state, in Category A, were from China, with 10,198 claims.
- Despite the fact that neither Iraq nor Kuwait had diplomatic relations with Israel at the relevant time, there were 102 individuals’ claims in Category B from Israel.
- There were 43 member states’ governments and six international organisations that applied through Category F (F1-F4).
- Category E/F, relating to “export guarantees”, had a total award of US\$311,000. In this table that figure has been added to the “Corporation-all others” category.
- An individual, corporate, or state applicant was able to file multiple claims in different but related categories.
- The figure in the “Outstanding award amounts” column may not match a simple deduction of the “Net Compensation Paid” column figure from the “Awarded” column figure. This may be because of sums that remain unclaimed, or the subsequent disqualification of some awarded claims, or owing to other processing reasons.

Turning from the question of whether the UNCC should ever have been allocated the task of collecting revenue from Iraq and distributing it to others, and whether in fact this work should have been entrusted to a court or tribunal, I now resume my critical examination of the SC's role in global governance.

It appears that, regardless of the politics, transparency and the efficacy of the UNCC's funds collection and distribution process—and whether this is delivering justice, “rough justice”, or no justice at all—one point is clear: the 15-member SC, with the collective will of the P5, has created a global legislative act. A 5 per cent oil tax has been levied on the income of a section of the global population—namely, the Iraqi people—as a result of its dictatorial government's war on Kuwait. The billions of dollars generated have been distributed to hundreds of thousands of people, hundreds of corporations, and dozens of member-state governments, as well as paying the overheads and the administrative costs of the organisation set up to carry out this distribution.

To draw a parallel with domestic models of governance, it is useful to examine a US Act of Congress adopted at about the same time as the establishment of the UNCC. This was the Radiation Exposure Compensation Act (RECA) of 1990, which created a compensation commission that awarded US\$1.1 billion to approximately 25,000 applicants. These applicants, the residents of designated US states, were exposed to nuclear radiation during nuclear testing at the time of the Cold War. In another compensation case, 10 years later, in 2002, the US Congress created the September 11th Victims Compensation Fund, which distributed US\$7 billion to 7,403 claimants.¹⁷⁹

¹⁷⁹ Both these US Congressional Acts delegated the work of handling and awarding these claims to the US Department of Justice (DOJ), with the DOJ incorporating some schemes of judicial review in its claims

Adopting the global governance lens, it seems that, in the case of tort compensation, the SC has been able to act, in the global realm, in a manner similar to the US Congress and other national legislatures. SC Resolutions 687 and 692, of 1991, in effect created global legislation under Chapter VII, which remains in existence after more than two decades, and is still creating obligations, as well as conferring privileges on member states, and benefiting individuals, corporations and other non-state actors.

3.7 Conclusion: SC Acting *Ultra Vires* or Constitutional Deficiency?

Before determining whether the SC's legislative role is *intra vires* or *ultra vires*, it is necessary to elaborate briefly on whether a more appropriate term for the type of Council actions examined in this Chapter is *quasi-legislation* rather than *legislation*—the term I have chosen to use.

But first, what is the definition of international or *global legislation*? Having found it difficult to find one in the scholarship, I offer the following definition:

Global legislation is the act or process of making and enacting laws globally, by a global authority, regulating the activities of, and otherwise affecting globally, persons, corporations, non-governmental organisations, and other legal persons, to be implemented by one, more than one, or all states through their domestic legal and legislative processes, nationally and universally.

Although a formal definition of global legislation has little in the way of precedent, and is not commonly encountered, the use of the term *global or international legislation* has

processing. For further information on these compensation programmes, visit the websites of the US Congress and the DOJ. In regard to RECA (42 U.S.C. 2210, adopted on 5 October 1990), see (Radiation Exposure Compensation Act (RECA) 1990-2013). On the 9/11 compensation, see (The September 11th Victim Compensation Fund (VCF) 2001-2013). See also (McGovern 2009): 190-191.

become, in the context of the Council's general and abstract decisions since Resolution 1373 on terrorism in 2001, increasingly common.

Talmon points out that, in the public international law literature, the term has been used for some time now, mostly in relation to treaty lawmaking, as well as the lawmaking of international organisations. For example, Krzysztof Skubiszewski uses the term in *International Legislation*, in 2 *Encyclopedia of Public International Law* 1255 (Rudolf Bernhardt ed. 1995). Talmon also cites a list of other commentators using the term, some of which I have also referenced in this chapter.¹⁸⁰

The important political development at the global governance level was when the member states themselves observed this new phenomenon and started using the term *international or global legislation* in their discourse. In fact, the SC President, Gunter Pleuger of Germany, in his press conference of 2 April 2004 on the draft of Resolution 1540, asked the member states to study the document carefully, "because the draft would ask Member States to develop a lot of new legislation". He further said that it would be "the first major step towards having the Security Council legislate for the rest of the United Nations' membership".¹⁸¹

In the public discussion that followed on the draft of the "abstract" Resolution 1540 on WMD non-proliferation, some non-SC members were invited to express their views, and a significant number of state participants' substantive argument centered on the draft resolution's *legislative* effect. Those favouring the resolution included Spain's representative, who expressed his view that "since the Council is legislating for the entire international

¹⁸⁰ (Talmon 2005): 176.

¹⁸¹ Ibid: 175. For the full 2 April 2004 press conference of the President of the SC, see: <http://www.un.org/News/briefings/docs/2004/pleugerpc.DOC.htm>, accessed 27 July 2013.

community”, Spain’s recommendation was that it should be adopted by “consensus”.¹⁸² The Philippines’ representative, Mr. Baja, made the same observation, calling for a wider participation of member states, other than just the SC members themselves, in the vote on the resolution.¹⁸³

Those who are bound should be heard. This is an essential element of a transparent and democratic process, and is best to proceed on a resolution that demands legislative actions and executive measures from the 191 Members of the United Nations.

Meanwhile, other states, while not being opposed to the resolution in its intent and principle, were concerned about the increase in the frequency of this type of legislative measure on the part of the Council. For example, Mr. Nambiar of India expressed his country’s concern over “the increasing tendency of the Council in relatively recent years to assume new and wider powers of legislation on behalf of the international community, with its resolutions binding on all States.”¹⁸⁴

In fact, most of the substantive part of the debate at the “public” meeting was concerned not with whether the SC, by introducing resolution 1540, was acting *ultra vires*, but rather with the high impact and the many ramifications that this type of Council law-making has on both domestic laws and existing treaties. For example, both Iran and New Zealand, fully aware of the instant legislative and universally binding character of the measures proposed by the Council, and precisely in recognition of these characteristics, formed two opposing views of the resolution.

¹⁸² (Security Council Report 2013): S/PV.4950: 7.

¹⁸³ Ibid: 2.

¹⁸⁴ Ibid: 23.

Iran was concerned that this resolution might introduce, almost immediately, a new non-proliferation law and regime. Iran was also worried about how this Council legislation would interact or overlap with the existing WMD treaties. For these reasons, Iran's representative, Mr. Danesh-Yazdi, was opposed to the proposed new regime, pointing to the deficiency of the proposed resolution in not addressing "the linkage between non-proliferation and disarmament".¹⁸⁵

In contrast, the view of New Zealand, as represented by Mr. MacKay, was that, by means of this resolution, a fast-tracked and universal treaty was being introduced, and, precisely for those reasons, his country was in favour of the resolution, so that it could serve as a quick "stopgap measure". Mr. MacKay further commented:¹⁸⁶

[W]e place importance on the fact that the draft resolution would also impose restraints on those States that have deliberately chosen to stand outside the major disarmament and non-proliferation treaties to which most States, including my own, have committed themselves. This is a major gap that the draft resolution can begin to fill.

Consequently, following the open meeting with the non-members, when the Council unanimously adopted Resolution 1540 four days later, it was unequivocal to the member states that global legislation had been enacted.

3.7.1 Is the SC Acting *Ultra Vires*?

Those arguing that the adjudicative and legislative functions of the SC exhibited in the last two decades are *ultra vires* primarily base their argument on the purposes and the principles of the UN, and the fact that Article 1(1) of the UN Charter requires the actions of the UN to be "in conformity with the principles of justice and international law". They also point to

¹⁸⁵ Ibid: 32.

¹⁸⁶ Ibid: 21.

Chapter V, Articles 24 to 26 of the Charter, defining the scope and powers of the SC, as further limiting the powers of the Council.¹⁸⁷

More specifically, the *ultra vires* camp argues that the Council's mission is defined in Article 24(2), which states that the "the Security Council shall act in accordance with the Purposes and Principles of the United Nations", and further that "[t]he specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII". Thus, they contend that the powers of the Council are regulated and that its primary mission is the "maintenance of international peace and security."¹⁸⁸ They believe that this implies a "global policing" and executive function, not a judicial or legislative one.

Nigel White and Robert Cryer argue that the SC, in respect of some of its adjudicative functions, such as the ICC *deferral* cases, was acting *ultra vires*.¹⁸⁹ With regard to the legislative issue, Matthew Happold, in reference to Resolution 1373, points to the fact that the resolution was of a "general" nature and "abstract", and argues that "the Council can only exercise its Chapter VII powers in response to specific situations or conduct". Therefore, in

¹⁸⁷ Chapters I, V-VIII, and XII, and Articles 1, and 24-26, of the Charter, (Charter of the United Nations, 1945-2015). See also Judge Weeramantry's dissenting opinion in the *Lockerbie* case:

But does this mean that the Security Council discharges its variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibilities are to be discharged? Article 24 itself offers us an immediate signpost to such a circumscribing boundary when it provides in Article 24(2) that the Security Council, in discharging its duties under Article 24 (1), "shall act in accordance with the Purposes and Principles of the United Nations". The duty is imperative and the limits are categorically stated. The Preamble stresses inter alia the determination of the peoples of the United Nations to establish conditions under which respect for the obligations arising from treaties and other sources of international law can be maintained. Article 1 (1) sets out as one of the Purposes of the United Nations that it is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". [Emphasis added]

(Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), 1992), ICJ Reports 1992, Request for the indication of Provisional Measures, Order of 14 April 1992, at 61: <http://www.icj-cij.org/docket/files/89/7229.pdf>.

¹⁸⁸ Ibid. See also (Martínez 2008): 344.

¹⁸⁹ This commentary was related to Res. 1422 (2002), the ICC *deferral* decision (White and Cryer 2009): 469. See also (Condorelli and Villapando 2002): 647.

adopting Resolution 1373, the Council acted *ultra vires*. Furthermore, Happold argues that this type of resolution was unprecedented and unlike the Council's past practices and customs.¹⁹⁰

Yet others, in spite of their concerns about the Council adopting the role of international legislator, and the implications and effects of this, argue that the Council is, in fact, acting *intra vires*. These scholars primarily point to the wide-ranging, general and unspecified powers granted to the SC by the Charter in furtherance of its mission of maintaining "international peace and security".

Ian Johnstone, for example, "from a strictly legal perspective", while acknowledging that the SC is primarily an "executive body", with the principal function of "crisis management", nevertheless, by referring to Chapter V, Articles 24 and 25, and Chapter VII, believes that "no evident legal rule prohibits [the SC] from acting in a legislative or quasi-judicial manner".¹⁹¹

Another argument that the Council is acting *intra vires* is the fact that *all* UN member states, in Article 24(1), have delegated their rights to the SC so that the Council can fulfil its peace and security duties, and have agreed that "the Security Council acts on their behalf".

Furthermore, the Council's decisions are *binding* on member states, since, under Article 25, all the states "agree to accept and carry out the decisions of the Security Council".

The fact that Council decisions are obligatory and binding on *all* states, or sometimes only on *some* states, is based on the SC's determination. This exclusive Council competency for deciding measures for non-P5 states is reinforced in Article 48(1) of Chapter VII, which

¹⁹⁰ (Happold 2003): 593.

¹⁹¹ (Jonstone 2008): 299. On states conferring powers on the SC, see also (Sarooshi 2007): 21-25 and 59.

states that “[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them as the Security Council may determine.”¹⁹²

Moreover, Paul Szasz cites Article 2(6) of the Charter, which states: “The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security”. This implies that even states not formally admitted to the UN must conform to its wishes, and therefore points to the universality of the SC’s Chapter VII decisions.¹⁹³

The Council’s authority to act as the world’s policeman, taking military action if necessary, has been well known since 1945. However, what non-military measures are at the Council’s disposal, and what are its other competencies?

In fact, the Council can avail itself of a wide range of options. Article 41 of Chapter VII lists a number of measures available to the Council short of military action, including economic ones. However, more generally, and more powerfully, the article provides that the “Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.”¹⁹⁴ Does this imply that the SC can take *whatever* measure it deems necessary?

To summarise, SC decisions are *binding* and *apply globally*. They do not need to involve military action. And, in the case of non-military decisions, in any situation under Chapter VII,

¹⁹² (Charter of the United Nations 1945-2015): Chapter VII, Art. 48(1). See also (Szasz 2002): 901.

¹⁹³ Ibid;

¹⁹⁴ Ibid: Article 41.

the phrase “what measures ... to give effect to [the SC’s] decisions” could be interpreted as encompassing *any* measures that the Council deems appropriate.

One question still remains. During peacetime, and in cases of non-military aggression, what constitutes a “threat to the peace”, triggering, under Article 39, the Council’s non-military (and possibly legislative) measures?

Stefan Talmon has analysed this question. He concludes that the Council, at least over the past two decades, has interpreted Article 39 of the Charter in relation to a “threat to the peace” as extending to “non-military sources”, as well as armed conflicts. Consequently, economic threats, humanitarian and human rights violations, international terrorism, threats to the environment, health pandemics and WMD proliferation can all be interpreted as a “threat to the peace”.¹⁹⁵

In fact, in the ICTY Appeals Chamber in the *Tadic* case, the Court addressed the same issue. The Court interpreted Article 39 in essentially a political way, stating that “the ‘threat to the peace’ [was] more of a political concept”. With judicial support for this political interpretation of the article, the Council has a great deal of leeway in determining what constitutes a “threat” in “international peace and security” situations.¹⁹⁶ Furthermore, the Council’s ability to determine the scope of its competency in lawmaking (which has a binding effect) was confirmed as early as 1971, in the ICJ’s *Namibia Advisory Opinion*. The SC had declared South Africa’s occupation of Namibia “illegal”, and had asked all states to recognise this fact. In its advisory opinion, in which, in essence, the ICJ was examining the

¹⁹⁵ (Talmon 2005): 175-193.

¹⁹⁶ Ibid: 180-181. See also *Tadic* (PROSECUTOR V. DUSKO TADIC a/k/a "DULE", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction 1995): paragraph 29.

“legal consequences for states” of the South African occupation, the Court referred to the SC’s decisions and determinations—albeit in general terms—as “obligation[s]” for all states and “binding”.¹⁹⁷

3.7.2 Constitutional Deficit

Throughout these last two chapters, the focus has been on the global governance role of the SC, or rather its (unplanned) *global government* role. It has been seen that this role encompasses adjudicative and court-making functions; legislative functions (commanding that “all States shall” comply with SC decisions); criminalising functions (targeting certain individuals for prosecution in domestic legal systems); and even acting as a global treasurer and administrator in respect of Iraq, collecting and distributing funds by way of compensation. All these functions would seem to be legally permissible, given the SC’s wide competency in maintaining “international peace and security” embedded in Chapters I, V, VI and VII of the Charter, and hence to be *intra vires*. This is further reinforced by the Council’s own broad “auto-interpretation” of the circumstances that can trigger its intervention to maintain “international peace and security”. Moreover, the Council is the *source* of its own legal powers to decide and implement *whatever* means and measures necessary, even of an adjudicative and general legislative nature, to ensure peace and maintain security. This all makes the SC the only truly global actor with the potential for universal lawmaking.

¹⁹⁷ (Boyle and Chinkin 2007): 110. See also (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) 1971): 1971 ICJ Reports 16. Paragraph 3 of the *Namibia Advisory Opinion* specifically commands non-member states, as well as member states, to follow the Council’s decision: <http://www.icj-cij.org/docket/files/53/5597.pdf>. A more recent ICJ advisory opinion that also creates obligations for “all states” is *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004. See: <http://www.icj-cij.org/docket/files/131/1677.pdf>, especially paragraphs 154-159.

However, the real question regarding these types of SC decisions is not whether the Council is acting *intra* or *ultra vires*, or whether right or wrong decisions are being made—for example, whether the individuals listed by the 1260 Committee really are criminals; or whether the continuing compensation awarded to multinational corporations by the UNCC is greatly disproportional to that which has been paid to individual victims of the Iraq–Kuwait war of over two decades ago; or whether the staggering amount of funds and the accelerated means by which they were collected from the Iraqis (nearly a quarter of whom live below the poverty line and were themselves victims of war) is fair.¹⁹⁸ But rather, the narrower and the legally more pertinent question is the *legitimacy* of the Council acting as a quasi-global government, combining powers of legislative, judicial and executive roles. A further important issue is the applicability of the rule of law to the Council’s decisions.

From the *global governance* and the *global government* perspective discussed in Chapter 1, there are five fundamental problems with the SC acting as a world legislator and adjudicator, stemming from its democratic and constitutional deficit.

The first two problems are internal, arising from the UN’s structure and constitutional framework. The other three are external, and reflect the impact of Council decisions on domestic and international laws, as well as on individuals’ internationally acknowledged fundamental rights.

¹⁹⁸According to 2013 World Bank reports, 22.9 per cent of the Iraqi population was living below the national poverty line (according to the last available data, for 2007). See: <http://data.worldbank.org/country/iraq>; accessed 8 August 2013. During the sanction years, it is likely that this figure was substantially higher.

First, there is the question of the SC's legitimacy and its democratic deficit. Since the San Francisco Conference of 1945, the Council has been notorious for being under-representative and undemocratic. Consequently, it has been the subject of many UN reform debates.¹⁹⁹

In terms of the number of states, the SC is under-representative, since, at any given time, 15 of the 193 member states, or less than 8 per cent of the current membership of the UN, are represented on the Council. The SC is also under-representative in terms of world population. Notwithstanding the population of P5 member China, unless the elected 10 members of the Council are the 10 most populous nations, or those nations are given permanent seats, demographically the Council will always represent less than 50 per cent of the global population.²⁰⁰

In fact, the P5 plus the current 10 non-permanent members comprising the SC in 2013 represented less than one-third of the global population.²⁰¹ This under-representation, both in terms of the world's population and the number of states, coupled with the voting privileges and the permanent seats granted to the P5, causes a severe democratic deficiency. This in turn raises the question of legitimacy for the world's most powerful organ, which has the potential to act, and has acted before, as a quasi-world government.

Second, the SC lacks separation of powers. The Council is the only UN organ with enforcement powers. In fact, under Chapter VII, the Council can enforce its decisions not

¹⁹⁹ For a discussion of states challenging the SC's democratic deficit, even when the Charter was being drawn up, see Chapter 4.

²⁰⁰ According to my calculations, based on available world population statistics for 2012, only when the 10 most populous states in the world (including India, Indonesia, Brazil, Bangladesh, Nigeria and Japan) are elected members of the SC only then would the Council represent approximately 60 per cent of the world's population. See: <http://www.internetworldstats.com/stats8.htm>. See also the UN population statistics available at: <http://esa.un.org/wpp/>. Both accessed 15 March 2013.

²⁰¹ The 10 non-permanent members of the SC, in 2013, were: Argentina, Australia, Azerbaijan, Guatemala, Luxembourg, Morocco, Pakistan, Republic of Korea, Rwanda and Togo. See: <http://www.un.org/en/sc/members/>; accessed 1 August 2013.

only by military means but also through economic and other non-military measures. This latter enforcement mechanism is the primary source of the Council's legislative and lawmaking competency, including global court-making and prosecution competency. In addition, by setting up subsidiaries (such as international criminal courts and tribunals, the UNCC, and the sanctions regimes and committees), the SC has shown that it possesses great executive and administrative leeway, as well as the authority to unleash military firepower enabling motivated or hegemonic member states to enter into a *legal* war. This makes the SC a self-contained regime, with tremendous global concentration of powers, and, in effect, a quasi-world government. The institutional design of the Council is in fact reminiscent of the classical violation of the separation of powers feared by constitutional lawyers: the dreaded phenomenon of the lawmaker, policeman, judge and executioner being one and the same. This concentration of power is avoided in all democratic-state governments and constitutions, and is the fundamental principle and premise of the rule of law.

Third, the SC's lawmaking impinges on domestic legal systems. Implementation of the Council's legislative Resolutions 1373 and 1540 has had a wide impact on the domestic legal systems of states. It requires changes to their domestic legislation and penal codes, court systems, and the process and administration of law enforcement. Furthermore, the impact on various laws is not limited to domestic criminal legislation. It also includes, among other areas, commercial laws concerned with export, re-export, warehousing, inspection, and shipment rules, as well as immigration laws, visa rules, and border controls. Its domino effect

extends even to the various regulatory agencies, such as those overseeing banking rules and financial institutions.²⁰²

Fourth, SC lawmaking may impinge upon and short-circuit existing international law and treaties.

For example, Resolution 1373 had an immediate impact on the International Convention for the Suppression of the Financing of Terrorism.²⁰³ This Convention had been adopted by the General Assembly in 1999, and was opened for signature a year later, but was failing to attract many national endorsements. However, with Resolution 1373's exhortation to adopt the Convention, in just a few months its adoption was fast-tracked, and it was in force by April 2002, six months after Resolution 1373 was passed. Unfortunately, neither the Convention nor the resolution had clarified and defined "international terrorism". In effect, Resolution 1373 had globally criminalised "terrorism" without defining it, thus legitimising prosecution of essentially undefined criminal acts.²⁰⁴ This bypassed previous attempts at the global level to agree on a definition of terrorism, and led to some state governments, when

²⁰² In implementing the resolution, some states bypassed their domestic legal procedures, which normally provide for greater scrutiny of proposed legislation, and so undermined their own legal systems and constitutions. There were even some governments that, during the domestic implementation phase, went beyond the Council's mandate, using the resolution as a pretext to denounce their political opponents as terrorists. Some examples of the states' implementation of the resolution and its manipulation for political purposes, or its impediment of the domestic legal process, occurred in France, Ethiopia, Romania, Russia and Thailand. (Scheppelle 2011): 8-11.

²⁰³ UN Treaty Collection: http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en; accessed 1 Aug 2013.

²⁰⁴ In fact, three years after the adoption of Res. 1373, in Res. 1566 (2004), the Council attempted to associate terrorism with some specific types of criminal activity, mentioned in paragraph 3 of the resolution. However, viewing paragraph 3 of Res. 1566 as an authoritative definition by the Council of international terrorism has a ramification. It indicates that the SC has bypassed the terrorism conventions and treaties, and has legally enacted its own definition of international criminal acts without the usual consent of states, as required in international law as currently perceived. (UN Security Council Resolutions 1946-2015): S/RES/1566 (2004).

implementing the Council's hasty decision—and under its cover—to manipulate its intent and abuse their political opposition by labelling them terrorists.²⁰⁵

As far as existing international law and treaties are concerned, Resolution 1540 also created a conflict of norms, as well as possible administrative confusion, overlap and redundancy in respect of the existing WMD treaties. These treaties include: the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons, and on their Destruction (CWC); the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC); and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). In effect, Resolution 1540 bypassed and possibly undermined these existing WMD regimes.²⁰⁶

Fifth, SC laws impinge upon *fundamental rights*, often incorporated into the constitutions or the legal systems of member states. The SC laws derogate from, and possibly undermine, individuals' fundamental rights. One area in which the Council's legislative and other decisions, as they relate to individuals, have the potential to result in domestic-law derogations is in the "listing" process, which disregards the due process of law. Another example is the case of the UNCC, which is essentially issuing tort judgments, without any mechanism for judicial review, or even an appeal process. And this is in spite of the fact that the UN system and the SC, as its most powerful organ, should—according to the UN's own principles, enshrined in its Charter and in various GA resolutions and proclamations—be the

²⁰⁵ For example, among others, the governments of Ethiopia, Kyrgyzstan, Thailand and Yemen implemented Res. 1373 in their domestic laws in ways which were more aimed at eliminating political opposition rather than eliminating international terrorism. See (Scheppelle 2011): 8-13.

²⁰⁶ In fact, in the public SC session prior to the adoption of Res. 1540, many states were fully aware of the possible impact or the modifying effects of the resolution on the existing WMD treaties. These states included Iran and New Zealand, which presented arguments mentioned earlier in this chapter. For statements by other states, indicating their full awareness of this fact—including Algeria, Brazil, Pakistan, Syria and the UK—see the Council's *public* report (Security Council Report 2013): S/PV.4950 (2004).

guardians of these rights. However, the Council's legislative and other decisions directly affecting fundamental rights mostly crisscross domestic laws, international treaties, and the UN's own statutes and UN-sponsored conventions, often violating rather than protecting them.

By criminalising certain individuals: for example, by publishing a list of perpetrators and expecting all states' domestic legal systems to freeze those individuals' assets, to ban them from travelling, and to send them for prosecution simultaneously violates a number of those individuals' universally accepted human rights. These include the right to property, economics rights, freedom of movement rights, and, procedurally, the right to judicial review and due process of law.

In the case of the existing multiple SC sanctions committees and regimes, those listed individuals, corporations, or NGOs being targeted by the Council have been denied the right of representation and counsel. Only a state can intervene on their behalf, and, even then, the 15-member SC is ultimately the only organ that can remove them from the list. Moreover, if the alleged criminal is listed by a P5 member, which has the power to veto any Council decision unilaterally and without its consent, then that individual is already condemned without a hearing.²⁰⁷

As a result, innocent individuals, not trusting the Council's adjudicative process, and afraid to give themselves up because of inadequacies in the protection of basic and procedural rights, can find themselves in the position of being a perpetual criminal suspect. If, for example, a list of criminals is embedded in a Council resolution, and a discrepancy is brought to light as

²⁰⁷ Of the 13 SC listing committees in existence at the end of 2013, only one has some formal *de-listing* process, with an Office of Ombudsperson. See Section 3.5 above.

a result of subsequent investigation (similar to the case in Sudan, where the actual investigations and findings of the ICC produced a somewhat different list of indictees), there is no due process or procedure by which those individuals initially included on the Council's list can be removed. This casting-in-stone effect can only be reversed by a subsequent SC resolution, which a permanent member can, of course, veto, thereby permanently keeping the individual on the accused list, with all the restrictions on his or her rights that this entails.²⁰⁸

Council decisions affecting individuals and non-state actors are not limited to criminal activities but also extend to civil ones. The unprecedented case in which Council decisions have directly impacted peoples' civil and fundamental rights is that of Iraq, with 35 million Iraqis affected. After three devastating wars and years of economic sanctions, with the Iraqi population's GNI being the second lowest in the Middle East, and nearly a quarter of Iraqis living close to the poverty line, the Council nevertheless made the decision to tax Iraq's oil revenues.

At the rate of more than US\$200 million dollars per month, the Council has effectively been collecting income from Iraqi citizens and redistributing it largely to unidentified transnational oil corporations. Although temporarily suspended, because of the current civil war in Iraq, technically this taxation continues, more than two decades after the end of the Kuwait–Iraq conflict. The consequences of this decision, implemented through the Council's subsidiary, the UNCC in Geneva—with its lack of transparency, closed-door settlement sessions, and absence of judicial review—have undoubtedly had an adverse effect on the economic, health and educational rights of the average Iraqi citizen. However, the principal question here is not

²⁰⁸ For just such a case of discrepancy, between individuals listed by the Sanctions Committee and the ICC-listed indictees, see (Ugarte 2012): Annex-1.

whether this compensation should have been awarded, or at what rate, but whether a qualified court independent of the Council, where both the Iraqis and the claimants could have presented their cases, with the right of judicial review, should instead have been the forum in which this huge financial reallocation took place.

Talmon and Szasz, among others, suggest that these newly found powers of the Council have a positive side and may be put to good use, and can potentially be employed to deal with global problems, such as environmental pollution, drug trafficking, human trafficking, and global health pandemics. In such cases, the Council can create laws swiftly that apply universally. Some even suggest that the Council could set up courts to prosecute those accused of committing crimes in these areas.

However, others argue that these legislative and adjudicative roles of the Council, exhibited since the end of the Cold War, are signs of an “imperial” SC. In fact, Detlev Vagts and Jose Alvarez have described this as “hegemonic international law” or the “collective hegemony” of the P5, perhaps suggesting a new body of international law.²⁰⁹

Ultimately, the Council has the potential to act either as a good global legislator or a bad global dictator. However, without constitutionalising the fundamental rights in the Charter, and democratising and legitimising the UN’s legislative and global governance role, the SC, as demonstrated in the recent past, is likely to continue to intrude on domestic legal systems and existing international law corpuses and regimes, as well as infringing global citizens’ fundamental rights.

²⁰⁹ (Vagts, *Hegemonic International Law* 2001). See also (Alvarez, *Hegemonic International Law Revisited* 2003).

The constitutionalisation of the UN Charter forms the subject of the last chapter.

PART II

THE UN CHARTER: TELEOLOGICAL AND ORIGINAL INTENT

CHAPTER 4

INJECTING THE YALTA FORMULA: THE SAN FRANCISCO ANTI-VETO REBELLION AND THE BIG-3'S COUNTERMEASURES

4.1 Introduction

In critically examining the mission and scope of the UN Charter, particularly in relation to the SC, the UN's legislative history is paramount in establishing the *original intent* of the treaty.

Indeed, both the 1969 VCLT and customary international law put great emphasis on the foundational work of a treaty as one of the formal guides to be used in subsequently interpreting the provisions of that treaty, and determining its good faith performance.

Consequently, the next three chapters are mostly empirical, reviewing the events of San Francisco with the aim of extracting relevant legislative facts, particularly with regard to the SC's structure, representation, voting procedures, and its mechanism for mutation.

The data are primarily extracted from the official 22-volume *United Nations Conference on International Organization* (UNCIO) documents, which, although publicly available, have not to date been accessible electronically, with the full set difficult to consult, not being a typical university-library resource. It is notable, however, that the UNCIO documents were compiled and made available (as a complete and fully indexed set) to member states and the public starting in 1953, eight years after the San Francisco Conference, and as part of GA resolution 992(X) of 1955, dealt with in Chapters 6 and 7.

Perhaps this lack of easy access is one of the reasons why most researchers rely on secondary sources in relation to UNCIO data, primarily relying on others' work, produced mostly by American authors of the 1950s and 1960s, who often adopted an uncritical perspective and whose views were conditioned by the Cold War. The purpose of the legislative history chapters of this thesis, therefore, based on an analysis of the archived data, is to reflect the neglected letter and spirit of the UN Charter at the time of its formulation, particularly in respect of the Security Council.

The discussions of the Big-3 (the US, the UK and the USSR) during World War II on the design of the UN and the new global order pivoted on the SC. Agreeing on the voting procedures for the Council was indeed one of their most difficult decisions. Subsequently, securing the endorsement of the other states on this issue was to prove even more problematic.

The voting privileges of the SC's "permanent members" were the subject of inconclusive discussions at Dumbarton Oaks in 1944. They were later finalised and agreed upon at the last face-to-face meeting between Roosevelt, Stalin and Churchill during the Yalta Conference of February 1945: only two months before the Dumbarton Oaks proposed statutes (DO) were to be presented to the other states at San Francisco for discussion and adoption.

In this chapter, I will first discuss the Yalta formula and the variations in the concept of the veto, as well as the final Big-3 voting-procedure agreement reached before the San Francisco Conference. I will then review the reaction and opposition of the weaker states (small and medium powers) to the unequal sovereign rights that the major powers had awarded themselves on the SC. The majority of states opposed the veto, and this opposition

culminated in an anti-veto bloc of countries challenging the Big-3's model of power distribution, thereby jeopardising the DO scheme for the new global governance organisation.

Next, I will examine the countermeasures employed by the major powers to retain the veto without compromising its extent or effect. The tactics used by the P5, particularly the Big-3, included, in addition to the accepted norms of lobbying and public relations, soft and hard forms of coercion, together with the exertion of pressure on countries within their sphere of influence.

Further, the sponsoring states, and particularly the US, capitalised on procedural matters in their handling of the conference's organisation—determining the appointment of chairs to important committees, selecting agenda items, imposing time constraints, and taking advantage of other factors that gave them control over the *procedural legitimisation* of the Conference.

While the specifics of the permanent members' actions in influencing the contents of the UN Charter are primarily covered in Chapters 4 and 5, the legality of those actions is examined in Chapter 8.

The arguments at the Conference in respect of the SC voting rights issue that took place in the committees, and the final outcome of the constitutional battle over the permanent members' statutory supremacy are covered in Chapter 5.

4.2 The Yalta Formula

Contrary to popular understanding of the veto²¹⁰ as being associated with Russia's demands and the Big-3 Conference in Yalta, in fact, by the time of the Dumbarton Oaks negotiations, all three World War II victors sought the veto power in its most robust form, allowing any one of them to prevent joint economic and military sanctions they did not approve of or that were directed against them. The extent and scope of the veto and its variations—such as those regarding *procedural matters*, *investigative discussion* and *pacific settlement* of disputes—were the subject of disagreement and discussions.

President Roosevelt and the US State Department were concerned not to involve the US in a war to which it had not willingly committed as a result of a UN collective-action decision. With memories still fresh of the US Congress having refused to ratify the charter of the League of Nations, Roosevelt did not want to alienate Congress from its war-making powers and therefore risk non-ratification of the new treaty. In fact, as will be seen in Chapters 4 to 6, top congressional leaders from both of the US's main political parties were invited and played prominent roles at the San Francisco Conference.

Stalin and his delegation, on the other hand, viewing the USSR as the only sovereign communist regime at the time, regarded the veto as vital. It appears that Stalin did not want to

²¹⁰ The term “veto” was generally accepted and widely used throughout the Conference. At the beginning of the UNCIO Conference, the UK, France and, in particular, the US were sensitive about the use of the term, and instead preferred to use words such as *unanimity*, *affirmation* or *concurrence* to convey if a non-procedural, substantive SC decision was adopted or not. For example, Senator Tom Connally, in one of the committee meetings discussing the Council voting procedures, specifically advised against the use of the “ugly” term veto. Nevertheless, “veto” became a widely used term both within and outside the Conference. Dr. Evatt of Australia, in one of the Commission III meetings on the subject of the SC, defined the generally accepted terms of “veto” and the “veto right” of the permanent members, which, if used, allowed any single P5 member to block a majority decision at the Council. (UNCIO - Volume XI: Commission III, Security Council 1945): 122, 335.

sit on a Council dominated by capitalists, who one day might declare war on communism and the Soviet Union without the USSR being able to prevent this.

As to the UK delegation and Prime Minister Churchill, Britain still had a large empire to preserve; they needed to be able to stop the Council from taking any collective action against, or otherwise interfering with, these imperial interests. Further, Churchill, recognising the enormous military contribution that the US and the USSR had made to winning the war—and the fact that the UK now probably ranked below both of them in terms of military strength—was opting for the same privileges as the two bigger powers.

Against this *realpolitik* backdrop, the Big-3 started the first round of Dumbarton Oaks negotiations in August 1944. The Republic of China, the fourth agreed-upon permanent member, was intentionally excluded from the first round, while France, another potential member of the club, was not even invited to the conference.²¹¹

Once they began to discuss the SC and its voting procedures, the Big-3 were indecisive. The US did not want the veto to be exercised for *procedural* matters, *investigative* missions, or items that fell under the *pacific settlement* of disputes (Chapter VIII Section A of DO), and in those circumstances the US felt that a simple majority vote was sufficient. The UK suggested that, on all items under Chapter VIII of the DO, only the veto right of a permanent member that was party to the conflict should be revoked and not allowed.²¹²

²¹¹ The second round of the Dumbarton Oaks Conference, which occurred immediately after the completion of the first round, was conducted by the US, the UK and China. The USSR, reasoning that it had not declared war on Japan at that time, had asked itself to be excluded from the second round of talks. There were no substantive additions or changes to the agreements in the second round, and basically the statutes agreed by the Big-3 in the first round were reviewed with the Chinese delegation in September of 1944.

²¹² The title of Chapter VIII of the DO was “Arrangements for the Maintenance of International Peace and Security Including Prevention and Suppression of Aggression”. What in fact the UK was suggesting was similar to the voting procedure of the council of the League of Nations. The League of Nations also required *unanimity*, but the party to the dispute was excluded from voting. However, the League’s council decisions were less

Meanwhile, the Soviet negotiator, Andrei Gromyko, announced that his instructions were that the veto privilege should apply to *all* SC decisions, even *procedural* ones.²¹³ Hence, the Soviet position would have meant that, without unanimity, even the ordinary business of the Council—such as approving delegates’ credentials or deciding what items could be put on the SC agenda—would grind to a standstill. In view of the complications regarding the Council’s voting procedures, the multiplicity of topics needing decisions, and the lack of consensus, the delegates decided to complete the other tasks related to constituting the new organisation at the DO Conference, and leave the important decision about the veto to a later conference and to their bosses, the Big-3 leaders, to deal with.

President Roosevelt, Stalin and Churchill met in February of 1945 at the Crimea Conference, which, being held in the city of Yalta, also came to be known as the Yalta Conference. The Big-3 intended to resolve the remaining issues from Dumbarton Oaks and to finalise the formation of their vision of a new world governance organisation before it was presented to the rest of the world.

The few remaining issues were resolved, such as the USSR’s demand for admitting Soviet proxy states as separate member states to the new UN. This was settled by the compromise that only two additional states, Ukraine and Belarus, both under Soviet domination, would be admitted as separate states in addition to the Soviet Union. Stalin also satisfied the US’s

binding on its member states, because, unlike the UN, member states were not obliged to participate in sanctions. The League, learning by experience, was applying more amendments to its constitution, and the League Assembly was moving away from *unanimity* to qualified *majority* voting on many questions. For example, the admission of new states required a two-thirds majority of the Assembly only; unlike the UN, where the permanent members can veto a new member state’s admission. See (Sands and Klein 2009): 10–12.

²¹³ (Schlesinger 2003): 49–51.

demand to enter the war against Japan, by agreeing to declare war on Japan three months after the surrender of Germany.

In Yalta, there was further affirmation, and the final adoption, of the Dumbarton Oaks statutory text for the new organisation. The last remaining issue from Dumbarton Oaks—the voting procedures of the SC—was also settled with relative ease. The Soviets showed flexibility and dropped their demand for a veto of procedural matters, and all three powers agreed to keep the veto for substantive cases, such as economic and military sanctions and interventions.²¹⁴ Lastly, it was decided that, as the work was complete, the proposed Charter could be announced to the world. In addition, it was agreed that the venue for the convocation conference, where other nations would be persuaded to accept the Charter, and where its signing would take place, would be the US.

The final text of the voting procedures for the SC agreed by the Big-3 leaders came to be known as the *Yalta formula*. It was presented to the San Francisco delegates in *Section C as proposed at the Crimea Conference* and was incorporated into Chapter VI (Security Council) of Dumbarton Oaks. It read as follows:²¹⁵

SECTION C. VOTING

- 1. Each member of the Security Council should have one vote.*
- 2. Decisions of the Security Council on procedural matters should be made by an affirmative vote of seven members.*

²¹⁴ (Bosco 2009): 29–31. See also (Wilcox 1945). As will be seen later, this hasty adoption of the Yalta formula, without much deliberation, proved problematic during the San Francisco Conference—for example, in connection with the “23 questions” raised by the anti-veto bloc, which the Big-3, in spite of taking approximately two weeks of Conference time to respond to, were unable to answer specifically or even agree among themselves on what the answers should be.

²¹⁵ (UNCIO - Volume III: Dumbarton Oaks Proposals, Comments and Proposed Amendments 1945): 10.

3. *Decisions of the Security Council on all other matters should be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VIII, Section A, and under the second sentence of Paragraph 1 of Chapter VIII, Section C, a party to a dispute should abstain from voting.*

4.3 The Anti-veto Uprising at San Francisco

When the Yalta formula was announced prior to the San Francisco Conference, the medium and smaller powers' reaction to it was slow in forming. At first glance, the voting rule seemed majoritarian and more advanced than that of the League of Nations, where, in most cases, the unanimity of the member states and consensus was the rule.²¹⁶ However, upon closer examination, it became apparent that the liberal majority rule was only for insignificant matters, and obvious from the *concurrency* requirement that any of the P5 could block a UN collective security decision, thus rendering the SC ineffective. Worse yet, the smaller powers realised that a P5 member, or one of its proxy states, could potentially be the aggressor, but could, because of its privileged status, veto any UN actions against it, so that the permanent members would effectively stand above the law.

Dissension and opposition to the veto was being voiced, overtly and covertly, by many of the weaker states, particularly the Latin American states, which were more distanced from the war and therefore had fewer urgent war-related items to deal with and more freedom to elaborate on the proposed Charter. This dissension was picked up by the US State Department diplomatically, as well as through intelligence and espionage channels.²¹⁷

²¹⁶ However, under the unanimity rule of the council of the League of Nations, a party to a conflict was excluded from voting. (Sands and Klein 2009): 10–12.

²¹⁷ Stephen Schlesinger, in *Act of Creation*, based on US government sources that were later formally released, has a revealing discussion of US espionage activity in relation to the delegates and states, both prior to and during the Conference. Before the Conference, for example, Chile's foreign minister, expressing Chile's

By the time the UNCIO had started in San Francisco on 25 April 1945, the great majority of the Independent States²¹⁸ invited to the Conference, as well as even some of the countries under the sphere of influence of the P5, had individually formed their opposition to the veto, but not necessarily as a group or bloc. As the Conference started, what these states lacked in coalition and unity they more than made up for by the blunt expression of their opposition. However, as will be seen later in this chapter and in Chapter 5, because of the countermeasures adopted by the P5 during the two months' duration of the conference, articulation of this opposition became diluted, and the hopes of these states shifted more to having *good faith* in the permanent members, and hoping for more concrete changes in future revisions to the Charter.

In their analysis of some of the political and legal issues inherent in under-representation on the SC, the unequal voting rights of its members, and the overall democratic deficit on the Council, some of the best arguments were put forth by the contesting states themselves.

reservation that the proposed SC structure “would put the permanent members of the Council above the law which will govern all nations,” set out to seek some friendly nations’ advice. The US gained knowledge of the fact that at least the following states responded: Costa Rica, Cuba, Italy, Switzerland and the Vatican, and that they shared Chile’s concern. Another of these diplomatic intercepts, reported by the US Army operation known as *Magic Diplomatic Summaries*, was related to Turkey’s concerns and diplomatic discussions with France prior to the Conference. Turkey had argued that the set-up being proposed “seemed destined to make lawful the projects of the large powers against the small—with the system of voting in the Security Council ensuring them impunity”. (Schlesinger 2003): 94, 100–101. In fact, some of this formal and informal feedback on the Yalta formula compiled by the US was probably one of the main reasons for the US’s proactive act in introducing, right before the Conference, the Charter review amendment provisions to the DO. A Charter *amendment* procedure was already part of the DO proposal, but a Charter *review* suggested a more wholesale, rather than piecemeal, approach to revising the Charter and was not included.

²¹⁸ Independent States at the Conference are generally defined as those that did not have P5 direct military presence on their territories or were not a colony, or under the political/economic sphere of influence, of the P5. The Independent States, as well as the States Under Influence, are set out, with further explanations of these terms, in Table 2 of Chapter 8.

The general opposition to the veto was well expressed by Peter Fraser, the New Zealand Prime Minister. In one of the earlier sessions of the plenary meetings of the Conference, he stated his government's view as follows:²¹⁹

The veto which can be exercised by one of the great powers, both in regard to itself and other nations, is unfair and indefensible and may, if retained and exercised, be destructive not only to the main purposes of the International Organization but to the Organization itself. For instance, under the existing provisions one of the five permanent members which may clearly be an aggressor can use its power of veto to prevent its own condemnation, or even its designation as an aggressor.

...

But what about the veto which can be exercised by one of the permanent powers on the Security Council in respect to aggression by other nations? Surely the inclusion of this particular form of veto has been unintentional. I believe that it was never intended that a great power should be entrusted with the right of veto in regard to the aggression of a small power.

...

For instance, one small power may be an aggressor against another small power, but one of the great powers can even veto the matter being made a subject for consideration by the Security Council.

...

If a great power could cast a cloak of protection over a small aggressor power by the exercise of the right of veto, then the work of the Security Council would be reduced to complete futility.

Ecuador's Minister of Foreign Affairs, Camilo Enriquez, in objecting to the limited representation on the Council, said:²²⁰

It would be highly plausible to increase the number of members of the Security Council, granting a numerically superior representation to small states in order to strengthen that organ, situating its roots in universal public opinion and with due respect to the system of proportion of representation.

Concerning the voting arrangement in the Council, an earnest analysis leads us to declare it unacceptable [sic] that the majority required for decisions concerning questions other than those of procedure, that is the most important ones, should

²¹⁹ (UNCIO - Volume I: General 1945): 504–512.

²²⁰ Ibid: 370.

include the vote of all permanent members since this is equivalent to breaking the principle of juridical equality among states, reducing those who have no permanent seats to a deplorable and unjust condition of inferiority and, even more deplorably, to provoke the collapse of the functions of the Council in the not impossible case that any one of its permanent members should wish to interfere with its smooth running.

In such a strange situation, we would have not an association of states, but the almighty will of a single state against the consensus of the others, that is, an undeniable example of anarchy within a seemingly internationally organized world.

Iran, which was under the occupation of the Allied forces, and whose king, Reza Shah Pahlavi, was forced by the allies to abdicate in favour of his son, was going through a political transition at this time. Nevertheless, Iran had managed to send a delegation under the leadership of the ex-Justice Minister, Mustafa Adle. The Iranian delegation presented to the Conference a proposed amendment for a numerical increase in the member states represented on the SC, as well as a provision that Council decisions be based on a qualified majority, thereby eliminating the veto.²²¹

The Foreign Minister of Venezuela, Caracciolo Para-Perez, in addition to emphasising the role of inter-American and regional organisations as agents in conflict management, also stressed the sovereign equality of states. Para-Perez, hoping to devise a way in due course for the adaptation of the Yalta formula in the direction of sovereign equality, said in San Francisco “that the formula adopted here will be able to follow a timely evolution toward procedures that will be more democratic and represent better the community of nations.”²²²

Syria’s Prime Minister, Faris Al-Khoury, while emphasising the equality of nations and advocating a wider scope and jurisdiction for the proposed ICJ, also warned about the

²²¹ Iran’s delegation, in addition to asking for the compulsory jurisdiction of the ICJ, had proposed a SC membership of 15, an increase on the DO proposal of 11. Their voting proposal was based on qualified-majority voting, with no right of veto for the permanent members on any question. (UNCIO - Volume III: Dumbarton Oaks Proposals, Comments and Proposed Amendments 1945): 555; see also (Hurd 2007): 94.

²²² (UNCIO - Volume I: General 1945): 517–520.

difficulties in enacting future amendments. He appealed to other states not to leave needed statutory enhancements to the future and to “do our best now to elaborate a Charter which will live long.”²²³

The Vice-Premier of Australia, Francis Forde, in promoting the “rule of law”, and adopting the position that the Charter should be a “workable constitution”, proposed a greater role for the GA, compulsory jurisdiction of the ICJ, and changes in the configuration of the SC. He also stated Australia’s opposition to the “rights” of the permanent members. In his speech to the plenary, while criticising these rights in general, Forde stated: “One of these rights is the so-called veto power. The term veto is not altogether a happy one”. His objection was particularly in relation to the use of the veto in cases where the party to the dispute was not one of the permanent members. In a similar vein to Peter Fraser of New Zealand, Forde said: “We think a mistake has been made, and that all the powers concerned should be ready to correct it at this Conference.”²²⁴

The Minister of Foreign Affairs of Egypt, Badawi Pasha, like many other critics of the Council, favoured expanded representation and qualified-majority voting on the Council.

Badawi Pasha, who later became an ICJ judge, had a critical view of the adjudicative implications of the P5 veto, objecting to the world order scheme proposed by the Big-3. At the opening plenary, he remarked:²²⁵

Permitting any power great or small to sit both as judge and jury in its own case does not, in our opinion, contribute to build world-wide confidence so necessary to the success of a plan for world order.

²²³ Ibid: 571.

²²⁴ Ibid: 171–176. Mr. Forde later became, for a short period in 1945, the Australian prime minister. It should be noted that most of the Australian activism and representation in San Francisco was actually the work of Forde’s co-delegate, Dr. Herbert Evatt, External Affairs Minister of Australia.

²²⁵ Ibid: 233–238.

The delegate from Uruguay, similar to many of the other state participants, recommended universal and compulsory jurisdiction for the ICJ, as well as a guaranteed seat for the Latin American bloc of nations on the SC, together with liberalisation of the Council's voting system. Jose Serrato, Uruguay's Foreign Affairs Minister, in expressing his country's position that any acceptance of Dumbarton Oaks' privileged statutory rights granted to the P5 should be only temporary, at the opening session of the plenary stated: ²²⁶

In the present circumstance, however, Uruguay accepts, as a transitory situation, that the four Great Powers ... should be assured seats on the Council, but not indefinitely and only for a period which may be judged advisable, say eight or ten years, for example.

By the end of the first week of the Conference, the anti-veto movement in San Francisco was gaining momentum, with many countries having formally submitted amendment proposals on the topic of the SC and its legal structure and voting procedures. These states—such as Australia, Brazil, Canada, Cuba, Egypt, Greece, the Netherlands, Norway, Turkey and Venezuela—in addition to the ones mentioned earlier, numbered 20 in total, comprising almost one-half of the original Conference invitees. By formally submitting amendments and proposals, these states were actively seeking to correct the democratic deficit of the Council.²²⁷ In the first seven days of the Conference, in addition to the initial 20 countries, the representatives of Chile, El Salvador, Guatemala, India, Iraq, Liberia, New Zealand,

²²⁶ Ibid: 301–302. Jose Serrato was Uruguay's president in the 1930s.

²²⁷ The full list of the 20 states that submitted amendments to Chapter VI of Dumbarton Oaks (Security Council Section) prior to the conference is as follows: Australia, Brazil, Canada, Cuba, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Honduras, Iran, Mexico, the Netherlands, Norway, Paraguay, the Philippine Commonwealth, Turkey, Uruguay and Venezuela (UNCIO - Volume III: Dumbarton Oaks Proposals, Comments and Proposed Amendments 1945): 665.

Syria, Panama and Peru also spoke against the veto or objected to the legal structure of the SC and the statutory rights of its permanent members.²²⁸

Strikingly, France, which, after Dumbarton Oaks, with the sponsorship of the UK, was offered the fifth permanent seat on the Council, submitted its own amendment at the beginning of the Conference to limit the use of the veto. The French policy at the start of the Conference was to attend as a regular member state. As such, France was unsure of the fairness and effectiveness of the proposed Council and, wanting to side with the smaller powers, submitted its own amendment to the DO in the direction of liberalising the Council.²²⁹

As the Conference progressed, more objections and alterations to the constitutive structure of the Council were submitted. Some states for the first time, and some in addition to what they had already submitted, were making arguments for introducing motions at the Conference to eliminate or modify the proposed rights of the permanent members. Countries such as Brazil, Canada, Cuba, the Netherlands, Colombia, and India were among them.

The Latin American countries, which had already developed a bloc approach to the regional issues, were by then developing a common agenda to fight the veto. The opposition to the DO proposal on the subject of P5 privileges became more organised and united.

²²⁸ Most of the factual information on the representatives' speeches, the formal amendments and the committee meetings' discussion of the SC and Charter amendments are compiled from the original 22-volume UNCIO documents printed in 1945 and supplemented in 1955. The empirical information in this chapter is primarily compiled from Volumes I–III, VI–VII and XI of the UNCIO documents, listed in the *Sources Used*.

²²⁹ (UNCIO - Volume III: Dumbarton Oaks Proposals, Comments and Proposed Amendments 1945): 665. See also (Schlesinger 2003): 101–102. Later on, after France had agreed to be the fifth permanent member, it withdrew its amendment proposal on limiting the use of the veto and fully backed the Yalta formula.

The Attorney General and Minister of External Affairs of Australia, Herbert Evatt, emerged as the spokesman and leader of the countries opposing the SC voting procedures.²³⁰ This opposition from small and medium powers to the Security Council part of the DO as the Conference progressed posed a real threat to the sponsoring Big-3 in their scheme to devise a post-war global governance plan.

Meanwhile, the anti-veto opposition strategy evolved primarily along two fronts. In this two-pronged approach, one strategy was to tackle the permanent member privileges and the veto head-on in Commission III and its related Committee 1, referred to at the Conference as Committee III/1- *Security Council Structure and Procedures*. The second strategy was to make alterations to the DO to make future Charter amendments, revisions and withdrawals easier. All these topics were the subject of another committee, under the heading *General Provisions* of Commission I and its Technical Committee 2 (I/2).

According to the proposed DO statutes, even future Charter amendments required the concurrence of the permanent members, and therefore could be vetoed by any one of them. Moreover, the proposed DO treaty had no withdrawal clause. Therefore, the opposition, as part of a fall-back strategy, was opting for amendments to the DO to make Charter amendments easier in the future, or, if all else failed, to at least have the option to withdraw from the organisation altogether. The subject-matter of these last two items fell under Commission I (the *General Provisions*) and *Committee 2*, referred to at the conference as *Committee I/2-Membership, Amendment, and Secretariat*. Therefore, the constitutional

²³⁰ That Dr. Evatt was the *de facto* spokesman for the anti-veto camp is well documented. For example, see (Hurd 2007): 93–94. Although Dr. Evatt worked closely with representatives of some of the other weaker states at the conference, such as Prime Minister Fraser of New Zealand, the anti-veto opposition did not have a formal organisation or hold regular meetings, unlike the P4 and their “after-the-meeting” penthouse meetings.

battlefront in opposing the P5 was primarily drawn in two places: Committee I/2 and Committee III/1, which will be discussed in the next chapter.

In the meantime, the P5 had other existing and potential means to combat the challenge to their statutory supremacy.

4.4 Dictating the Formula: Preventive Measures Before and Outside the Conference

On the substantive (as opposed to procedural) decisions of the SC, the Big-3 were steadfast in holding to the veto. The US, the UK and the Soviets, out of self-interest, as well as for domestic consumption, had already come to their decision at Yalta, and for them the right of veto was not subject to negotiation. However, they had to deal with the small-power insurgency in San Francisco, as well as finish the task they had failed to complete at Yalta. President Roosevelt, Premier Stalin and Prime Minister Churchill, in their enthusiasm and rush to reach an agreement in Yalta, had left many questions on the scope and the applicability of the veto unresolved. For example, what constituted *procedural* matters? Was a preliminary question on determination of a question being *procedural* itself subject to the veto? If a permanent member abstained or was absent when a vote was taken, did that constitute a lack of concurrence and therefore a veto? Did the veto apply to the election of the Secretary-General? These were some of the many ambiguities that the Yalta formula gave rise to.

As will be seen in the next chapter, the attempts by the smaller powers at the Conference to modify or eliminate the veto in the DO proposal ultimately proved futile. The Section C SC voting procedures of Dumbarton Oaks were, in essence, transferred unchanged to the UN Charter. Despite overwhelming opposition from other states, this was possible as a result of

certain actions on the part of the Big-3, both before and during the Conference, that were undertaken either in concert or individually.

The steps taken by the permanent members, and particularly the Big-3, to influence the outcome of the Conference can be grouped into two categories.

The first category includes the precautionary measures taken prior to and outside the Conference, and extends to the *realpolitik* of the wartime situation as this mitigated opposition to the Yalta formula.

The second consists of a number of actions carried out during the conference itself by the permanent members, particularly the US, in order to quell the opposition and to ensure member states' acceptance of the proposed legal structure of the SC.

Before the Conference, the P5, especially the Big-3, took the preventive measures detailed below to ensure that the proposed UN Charter was successfully adopted.

4.4.1 Selective Conference Participation by Limiting Member States

From the outset, the American framers ideal was that the UN would be a *global* organisation and not just a multi-state or regional pact. However, many sovereign states were intentionally excluded from the San Francisco Conference, including the “enemy” states and so-called “fascist” states, as well as any state whose participation was seriously objected to by one of the Big-3. Therefore, a large number of European countries, including Germany, Italy,

Romania, Bulgaria, Hungary, Spain, Portugal, Sweden, Switzerland and Finland, were excluded.²³¹

Moreover, states that were admitted in the midst of the conference, such as Argentina (whose participation was opposed by the USSR) or Poland (whose participation the US objected to), were only admitted after contentious debate and questioning of their regimes' legitimacy. For these countries, winning a formal seat at the Conference was their main goal, with their aim primarily being to win recognition and acceptance in the UN community rather than to critically challenge the DO proposal.²³²

Another large part of the world not invited to the Conference was made up of the numerous colonies in Asia and Africa. Although both the US and the Soviet Union had maintained an anti-colonial and anti-imperialist stance between the two world wars, with the UK as their third partner, sensitivity over the subject of the British Empire led to most colonial states being excluded. No colonies were invited from the South and East Asian continents, with the exception of Lebanon, India, the Philippines, and Syria. Consequently, Asian colonies such as Burma, Cambodia, Korea, Indonesia and Vietnam were excluded (see Table 2).

From the African continent, only Egypt, Ethiopia, Liberia and the racist regime of the Union of South Africa were invited. In contrast, states such as Libya, Congo, Ghana, Morocco,

²³¹ Denmark was admitted to the Conference after it was liberated, and thus after the Conference had already begun. (United Nations Yearbook 1946-1947): 10. During the conference, Denmark acknowledged its obligation to the Allies for its liberation and voted in almost complete alignment with the Big-3's positions on the committees relating to the SC and the amendments sections of the charter. As for Poland, it was actually admitted to the Conference at its conclusion. It was, however, permitted to sign the Charter as one of the 51 original state signatories at the Conference.

²³² Ibid; and see n 243 below.

Tunisia, Algeria, Nigeria, Kenya, Tanzania, Uganda, and many others were excluded (see absence of these states/colonies in Table 2).

4.4.2 Ensuring Conference Participation of States under the Big-3's Sphere of Influence

As will be shown in more detail in Chapter 8 and Table 2, the number of states invited to the San Francisco Conference that were categorised as Independent State participants was less than half of the total number of participants.

In other words, more than half of the 50 states participating in the Conference, excluding the P5, were either militarily, economically, or politically dependent on the P5. This group included states such as Belgium, Czechoslovakia, Denmark, Norway, the Philippines Commonwealth, Iran, Egypt, Iraq, the Ukraine Soviet Republic, the Byelorussian Soviet Republic, the Netherlands, Panama, Greece, Liberia, Ethiopia and Poland. The majority of these states had very large contingents of Allied troops on their soil. Most of these regimes were in government transition. Some were carry-overs from resistance movements and not necessarily democratically elected, and some were either directly installed by one of the Big-3 or dependent on the Allies for support. Therefore, when push came to shove, the Big-3 could exercise a great deal of leverage over these states. As will be seen in the case of the Philippines, for example, its opposition to the veto in the early part of the conference changed as a result of the Big-3's pressure, thereafter supporting the Yalta formula for the rest of the conference.²³³

²³³ (Hurd 2007): 93.

4.4.3 Show of Force and Coercion

Syria was represented in San Francisco as an independent state and as a member of the newly formed Arab League. Charles de Gaulle, to reassert France's colonial rule over Syria, used military force to intervene in Syrian affairs in May 1945. The bloody suppression of the uprising that followed left close to 1,000 Syrians dead.²³⁴ This incident, in the very midst of the Conference, sent a frightening message not only to Syria but also to Lebanon, the Arab League, and the rest of the ex-colonies, French or otherwise, that the old colonial powers, formerly preoccupied with the war, were now making a comeback after the war's end in Europe. This event, which was covered extensively both inside and outside the Conference by news media, certainly had an impact on the Arab League countries, and perhaps other Asian and African ex-colonies present in San Francisco, and on their perception of the UN and their role in its formation. For these countries, the prospect of being recognised as independent states at the UN, although involving subordination to the SC, was a better alternative—and the Charter as a whole a more enticing prospect—than the rule of their ex-colonial masters.

Syria, Lebanon and Egypt, whose delegates had spoken in favour of the liberalisation of the SC's structure at the beginning of the Conference, became submissive, their discourse shifting towards alignment with the Big-3's position after the French military intervention in

²³⁴ (Bosco 2009): 35.

Syria. These countries no longer pursued proposals and amendments in opposition to the veto within the two committees.²³⁵

Another instance of intimidation and coercion being employed by the Conference sponsors and France concerned the Philippines Commonwealth, which had large contingents of US military forces on its land and a special “commonwealth” relationship with the US.

General Carlos Romulo, chair of the Philippines’ delegation, had suggested a more liberal and equitable design for the SC.²³⁶ However, the policy of the Philippines’ delegates towards the Yalta formula, and their opposition to the veto, changed in the midst of the conference. Many years later, General Romulo revealed that he was approached by the US delegation privately and was given a clear signal that a Filipino challenge to the P5’s supremacy on the Council was “not appreciated”.²³⁷

Yet another case of use of force or threat of use of force involved the Big-3’s interference in Iran. The Imperial State of Iran, which, at the beginning of World War II, had declared its neutrality, was invaded by Allied forces in 1941. The objectives of the invasion, carried out by mostly Russian and British troops, were to make Iran’s transportation and rail systems available to the Allied forces, creating a southern supply line from the Persian Gulf to the Soviet Caspian Sea region. Towards the end of the war, Iran’s great fear was that British and

²³⁵ Schlesinger, in *Act of Creation*, suggests that the French re-occupation of Syria may actually have roused the smaller states to oppose the proposed SC structure. (Schlesinger 2003): 201. However, the fact that both the US and the USSR, as the two most powerful members of the P5, had adopted formal stances against colonialism, along with the fact that the UN Charter incorporated some human rights and anticolonial provisions, and the Trusteeship Council being proposed had the potential to serve as an organ for the emancipation of the ex-colonies (or at least for the former colonies of the “enemy states”), made the UN option definitely more attractive to many colonies in transition present at the Conference than the option of being ruled by their old masters without a UN. All the states mentioned above, for example, in addition to India, finally gave in and voted in favour of the Yalta formula.

²³⁶ (Hurd 2007): 93, 106. See also n 491 below.

²³⁷ Ibid.

Soviet troops would not leave the country after the conflict ended. Following Germany's surrender during the second week of the Conference, and throughout the Conference's two months' duration, the Iranians' nightmare began to come true: Soviet troops and agents overstayed in the country embarked on subversive activities with Iran's communists and began to turn the northwest Iranian region of Azerbaijan into a semi-autonomous communist state with the object of breaking it away from the Iranian homeland.

In San Francisco, the Iranians had three main demands, submitted as amendments to the DO: expanding representation at the SC and eliminating the veto, pushing for the compulsory jurisdiction of the ICJ, and incorporating enabling territorial integrity clauses in the Charter. The latter request related to their concern over the presence of Allied forces on their territory. Towards the end of the Conference, however, they had also become more timid, and in the case of their amendment proposal in Commission III/1, on SC voting, although they did not technically withdraw the amendment, they stopped pursuing their proposal for democratisation of the Council.²³⁸ Iran, too, was realising that a UN organisation with a defective SC and Charter was better than no organisation at all.

As for the Soviet Bloc and the rapidly advancing Soviet troops in Eastern Europe, Stalin, as one of the most infamous dictators of the twentieth century, must have been able to exercise total influence over his puppet regimes in the communist countries present at San Francisco, such as Byelorussian SSR, Ukraine SSR and Czechoslovakia. Undoubtedly, therefore, Stalin could count on these states to vote in any way he wished.

²³⁸ The fact that, the Soviet troops remained in Iran even after the War was over caused that situation to be picked up by the SC as soon as the Council commenced work, and formed the subject of its second resolution, in January of 1946. Subsequently, the Soviets withdrew their troops from the country.

This 1945 race for domination of territories, sovereign or otherwise, between the capitalist West and the communist East, under the guise of liberation from the enemy, was no secret.

The race that had been started by the Big-3 after the German surrender and armistice on 8 May, and the formal end of the war in Europe, to assert their political or military domination over Europe, as well as over other regions of the world, and which had now been joined by France, was not necessarily deliberately aimed at affecting the outcome of the UN Charter. However, this rapid and disturbing unravelling of events confronted the smaller powers at San Francisco with a stark reality—that the superpower rivalry and supremacy of the war would continue after its end. This realisation had a great impact on the medium and small powers during the course of the Conference, as they began to perceive that the Charter being formulated would probably reflect the *realpolitik* of the time, and that this would be the case for at least a few years.

This realisation also affected New Zealand's assessment of the Charter. Peter Fraser, in his fiery speech at the opening plenary in April, had condemned the veto, and said that it was so unacceptable that it must be a "mistake", advocating motions to combat it. But, by the end of the Conference in June, he abstained from the vote on the Yalta formula when it was put forward by the sponsoring governments, thereby indirectly aiding its adoption. This abstention, similar to that of many other states, was motivated by the permanent members' promise of a Charter review and revisions in the future, but the decision also reflected *realpolitik* considerations on the part of Prime Minister Fraser. It would seem that New Zealand, after being called upon by the British and the US, in the midst of the Conference, to use its troops in Trieste as part of the race to get there before the Yugoslavs and the

communists had, like many other states opposing the P5's supremacy on the Council, given in to the Big-3's view of how collective security should be conducted.²³⁹

This “boots on the ground” and use-of-force situation that lasted throughout the UNCIO and up to the completion of the required ratifications in October of 1945 certainly had a profound impact on the conclusion of the UN Charter. This intentional or inadvertent application of coercion by the P5 while the Charter negotiations were being conducted, and the legality of it, are covered in more detail in Chapter 8.

4.5 Dictating the Formula: Countermeasures within the Conference

The rapidly developing international events prior to the Conference, and the use of force or the threat of use of force by the Big-3 and France in Europe, Asia, Africa and the Middle East during the Conference, had a direct or indirect impact on the policies and the voting behaviour of the states from these regions. The anti-veto fever of the affected states was subsiding.

The P5, however, had to somehow quell the anti-veto opposition of states from other regions of the world: Australia, Canada, New Zealand and most of the Latin American and Caribbean states that were opposed to the formula, and whose lands were not located in the theatre of war, and hence did not feel the military might of the Big-3's presence at home.

With the arrival during the second week of the Conference of V.M. Molotov, the Soviet Commissar for Foreign Affairs, the Big-3 and the Republic of China (P4) began their almost daily “after-the-meeting” meetings. The purpose of these meetings, held privately in a hotel penthouse, was for the sponsoring P4 governments to discuss the important issues of the

²³⁹ (Hensley 2009): 393–394.

conference, how to steer them, and how to handle their own and other countries' proposed amendments without jeopardising the fundamentals of what they had agreed at Dumbarton Oaks and Yalta.²⁴⁰

Of the 24 amendments adopted by the P4 as their joint amendments to the Conference, with Molotov's concurrence, one related to amending the DO proposal to provide for a Charter review provision. As will be seen in Chapter 5, this amendment suggested that the provision was different from the regular charter amendment provision already offered at Dumbarton Oaks, in that it was intended not to change one or two provisions but to apply to a series of possible enhancements and changes to be considered together at a Charter review conference.

This provision, initiated by the US, was designed mostly to appease the veto opposition that had been sensed prior to the conference and was now, by the second week, more visible. The Charter review amendment sponsored by the P4, however, did not mention a periodic timetable or a fixed date for the review conference, and required a qualified majority to hold it.

The P5 had to make sure that the weaker states' uprising did not threaten the successful completion of the Conference. Therefore, in addition to this conciliatory provision, the P5 employed other countermeasures at the Conference to quell the anti-veto opposition, as described below.

²⁴⁰ Most of the exclusive P4 meetings were held in Secretary of State Edward Stettinius's penthouse apartment on top of the Fairmont Hotel in San Francisco. (Schlesinger 2003): 253.

4.5.1 Dictating the Charter by Procedural Legitimation

The Big-3 and the Republic of China, as sponsoring states, had laid down the Conference's rules, which gave them a number of procedural advantages:

- The Big-3, and particularly the US, controlled the Conference's organisation, logistics and services. The location, timing, and duration of the Conference were decided by the Big-3, and all Conference services and costs, including logistics, accommodation, transportation, translations, duplications and publications, were provided by the host, the US.
- The two most important committees, the *Executive Committee* and the *Steering Committee*, were appointed and chaired by the US, with Secretary of State Edward Stettinius being the chairman of both. These two powerful committees set the agenda, decided on voting and procedural issues, and nominated the conference's four commission and 12 technical committee chairs. The secretary general of the Conference, Alger Hiss, was also from the US State Department.²⁴¹
- The Big-3 had agreed in advance that any change to DO statutes in San Francisco was subject to their concurrence: in other words, the Big-3 could veto and in effect kill any proposed amendment. However, the P4 had informally decided that, on most questions, should the smaller nations muster a two-thirds vote, they would refrain from using their veto.²⁴²

²⁴¹ There were two other "main" committees—the Coordinating Committee, which was chaired by Leo Pasvolsky, also of the US, and the Credentials Committee, which was chaired by Luxembourg. (United Nations Yearbook 1946-1947): 13, 47. See also (Delegates and Officials of the UNCIO - Doc 639 G/3(2) 1945): 1–6.

²⁴² (Schlesinger 2003): 159-160.

As will be seen later, however, on substantive issues, such as the Yalta formula or the Charter amendment and review debate, the permanent members would declare in advance their uncompromising position on a question or an amendment proposal before it was put forward for a vote. In the case of the Yalta formula, the Big-3 even threatened the participating states with the prospect of them going home without a Charter. In the insecure age of war that still prevailed, at the Conference the smaller powers would back down and either accept the Big-3 offer or give in to a lesser agreement.

- At Dumbarton Oaks and Yalta, adopting the proposed world organisation's statutes effectively needed the agreement of only three states—the US, the UK and the USSR. At the San Francisco Conference, however, voting procedures required any new additions or alternative amendments to the DO and its Yalta formula component to be carried with a two-thirds majority. Therefore, based on the 50 member-state conference participants, and assuming they were present and voting, a two-thirds majority required 34 votes for a statutory change to be adopted, whereas, for the bulk of the Charter, already decided and presented as the Dumbarton Oaks Proposal at the beginning of the Conference, only three affirmative votes were necessary. This favoured the constitutional wishes of the US, the UK and the USSR for a world organization by a factor of almost *ten to one*.²⁴³

²⁴³ As mentioned in the previous chapter, the original invitees to, and participants at, San Francisco were 46 states. Four more states were admitted while the Conference was in session, including the two Soviet Bloc states of Belarus and Ukraine, as well as (controversially) Argentina, and, towards the end, Denmark. After the Conference had practically ended, Poland was admitted and allowed to sign as one of the original participants, therefore bringing the number of original Charter signatories to 51 states. Although, at Dumbarton Oaks, effectively only three states needed to reach agreement to add, change or delete a Charter provision, at San Francisco, two-thirds of states, or nearly 33 votes, were required to accomplish the same result.

- The Big-3 also employed the tactic of divide and conquer. Generally, the conference committees were open to all member states. Most of the substantive questions, such as the Yalta formula or charter amendments and charter review, however, would be assigned to subcommittees. The subcommittees, unlike the committees, were not open to all participating states and were generally limited to 15 members only, of which five had to be the permanent members. Thus, in subcommittee discussions and decisions, the P5 ensured themselves of one-third representation, a larger proportional representation among the 50 states participating in the conference.²⁴⁴

All of the above made it more likely that the permanent members would be able to include their desired provisions and statutes in the Charter, while also ensuring that other states' acceptance of the DO proposals, with minimum change, was *procedurally legitimised*.

4.5.2 France Becomes the Fifth Permanent Member

At the beginning of the conference, France had refused to be the fifth permanent member and one of the five sponsoring states. Upset at not being invited to any of the preliminary negotiations and, in particular, to the Dumbarton Oaks and Crimean Conferences, France had refused to formally accept the fifth seat among the permanent members as allocated by the Big-3.²⁴⁵ Arriving at San Francisco, France's policy towards its participation in the UN seemed somewhat confused and contradictory. At the outset, its preference appeared to have been to participate as a regular member state and side with the smaller and medium powers. France had, in fact, introduced an amendment to reduce the scope of the applicability of the

²⁴⁴ The subcommittee created to clarify the ambiguities in the Yalta formula, and its applicability, and which in turn led to the 23 questions being raised, was Subcommittee III/1/B. The subcommittee that reviewed the charter amendments and review was Subcommittee I/2/E.

²⁴⁵ See note n 247 below.

veto, and the French Minister of Foreign affairs, Georges Bidault, in his speech to the opening plenary, explained the fallacy of calling any state other than the permanent members *small*, and criticised the veto power, which he hoped would eventually be dispensed with:²⁴⁶

Justice is another word we must reinstate in all its loftiness—justice in keeping with international democracy, that is to say, justice which gives full recognition to the rights of all countries, including those which do not come under the generally recognized term of great powers—a point I would particularly stress.

I am not convinced that every possible consideration has been given to the nations called the small powers—I do not know why they are called small, for it may happen that they are not, either by their past or by their population, or by the ideal they mean to serve. In any case, it is a fact that the proposals made at the Conference allow for a dominant share to be granted to the great Powers, of which, I again repeat, France is one.

This privilege was decided upon in our absence. What was called the veto of the great powers is certainly not in keeping with the legal ideal, which we do not despair, will someday be established by common accord between peoples.

In the second week of the Conference, on 3 May 1945, France formally asked the sponsoring states if could be one of the permanent members of the Council, and was subsequently accepted as the fifth member of the P5. From that point onward, France was in favour of the P4's joint stance on any UN SC-related matters, including the Yalta formula, and therefore later withdrew its proposed amendment in relation to limiting the scope of the veto.²⁴⁷

With France joining the P5, the Big-3 had co-opted a significant international power, dealing a blow to the veto opposition bloc, which had lost one of its potentially most influential partners.

²⁴⁶ (UNCIO - Volume I: General 1945): 435.

²⁴⁷ (UNCIO - Volume VII: Commission I, General Provisions 1945): 665. See also (Schlesinger 2003): 65, 171.

4.5.3 Coercion—Soft

Some of the techniques used by the Big-3 to persuade other states to accept its DO proposal and the Yalta formula probably fall under the category of public relations, and did not deviate from acceptable legislative lobbying norms: for example, the UK gathering its Dominions immediately before the Conference in London and its “sales talk” to the Commonwealth of Australia, Canada, New Zealand and India.²⁴⁸

In the case of the US, choosing to locate the Conference in the “beautiful” city of San Francisco, on the west coast of the US, required the great majority of the delegates, their consultants, and their entourages travelling thousands of extra miles. This journey across the US of three to four days by train for some delegates, and of multiple stops and many hours of flight for others, was apparently intended to enable the heads of state to see the size and the greatness of the US, while also presumably giving the VIP delegates ample time to contemplate the world organisation and who would be entrusted with running it.

In addition to the trip and accommodation costs being fully paid for by the US government, there were many side events at the Conference organised by the host country. Some of these were intended to impress the participants with the military might and sacrifices of the US, such as showing off the latest US Air Force planes or visiting the military cemetery in south San Francisco, where young US servicemen from the Pacific battlefield were being buried. Others were aimed at just showing off the greatness of the city, or were intended to entertain: a visit to the Golden Gate Bridge, sightseeing and shopping trips, films at the UN cinema, with two showings of mostly Hollywood glamour films up to the midnight hour, and nightly

²⁴⁸ For a discussion of the UK’s gathering of its Dominions in London just prior to the conference, see (Hensley 2009): 378–383.

news bulletins. These side events were as much about being a good host as demonstrating to the smaller nations and delegates of war-torn countries that the US was powerful, rich and caring.²⁴⁹

However, in addition to these public relations and lobbying techniques, the Big-3 also used, both before and during the Conference, other measures in order to ensure the acceptance of the Charter that, in varying degrees, qualify as coercive.

In Section 4.3 above it was mentioned that the US government was, to a large extent, spying on high-level delegates and their staff. To what extent the information gathered through these covert operations was used by the US to influence the outcome of the Conference is not clear, but the mere practice of espionage was unacceptable and in violation of the rules of any conference.

There were also overt and public exhibitions of power and of the Big-3's resolve to keep the permanent-member privileges and the veto. These demonstrations of power made it clear that, without these privileges, the Big-3 would literally destroy the proposed Charter, and there would be no UN. In addition to the newspaper headlines, editorials and radio interviews that, by and large, reflected the US government's view of the necessity of the Yalta formula, and which were subject to wartime-censorship rules, these public displays of power, two of which are cited below, were intended to undermine the anti-veto lobby at San Francisco.

4.5.4 Cocktail with Molotov and the Connally Act

During his short stay at the Conference, after the Soviets had finalised with the US, the UK and China what DO amendments they would allow to the final Charter, and just before he left

²⁴⁹ One of the best sources for the daily side events that took place are the daily journals that were distributed to the delegates. Most of these journals are reprinted in UNCIO Volume II.

for Moscow, Molotov held an important, well-attended news briefing. In a soft but very assertive manner, he emphasised the unanimity of the permanent members on the veto issue and the uncompromising nature of the Yalta formula. This strong “take-it-or-leave-it” Soviet stance on the issue was echoed a few days later by Andrei Gromyko in a speech at the American–Russian Institute in San Francisco, to an audience of five hundred people, as well as during the reception that followed.²⁵⁰

A more dramatic, and probably psychologically more important, blow to the anti-veto opposition at the conference was delivered by Texas Senator Tom Connally, chair of the US Senate Committee on Foreign Relations and the US representative to Commission III/1. The Conference closure was delayed twice, primarily because of deadlock over the Council voting provisions that were being discussed by the Committee. Senator Connally vividly recalled his actions before a crucial committee vote on the veto:²⁵¹

Then standing before the assembled delegates with a copy of the charter draft in my hands, I made the final plea. ‘You may go home from San Francisco—if you wish’, I cautioned the delegates,’ and report that you have defeated the veto. ‘Yes,’ I went on; ‘You can say you defeated the veto ... But you can also say, ‘We tore up the charter!’ At that point, I sweepingly ripped the charter draft in my hands to shreds and flung the scraps with disgust on the table. The delegates fell silent, while I stared belligerently at one face after another.

Senator Connally’s dramatic act occurred at the place and time where it counted most, at the Committee III/1 meeting during the last working days of the conference in June, just before the vote on Australia’s amendment to test the delegates’ resolve in confronting the P5’s veto power.

²⁵⁰ (Schlesinger 2003): 170, 201.

²⁵¹ Ibid: 223. Senator Connally’s dramatic act at Commission III/1 is documented in his own autobiography, as well as in the *New York Times* and other sources. See *ibid*, n 24. See also (Taylor and Groom 2000): 69.

By the second week in San Francisco, the anti-veto rebellion had amassed a clear majority of more than 30 States,²⁵² which had submitted more than 20 amendments or proposals to eliminate or modify the P5's privileges and their proposed Yalta formula. But, by the second month of the conference, the anti-veto opposition was cracking. The legitimate and illegitimate methods used by the permanent members to subdue the majority states' opposition, coupled with their uncompromising stand on the Yalta formula, made the weaker states' quest for equality futile. It had become clear to all the states represented at San Francisco that, on the substantive SC section, the Conference was about dictation rather than negotiation.

However, since both sides were seeking a new world order and global governance, and were striving for a world Charter, the question was how much of a statutory concession and compromise each side was willing to make in the last remaining days of the Conference.

²⁵² My research indicates that at least 31 states (a majority of over 60 per cent) present in San Francisco were opposed to the Yalta formula. This conclusion is based on their voting records, amendment proposals submitted to alter the structure of the Council, and their remarks at plenary or Committee I/2 and III/1, available from the UNCTO *travaux préparatoires*. Further details on the identity and activity of these states, and on the criteria used, is contained in Chapter 5.

CHAPTER 5

THE GREAT COMPROMISE AND THE STATUTORY PROMISE OF SAN FRANCISCO: ANTIDOTE TO THE FORMULA?

5.1 Introduction

In continuation of the discussion of the constitutional battle over the P5's permanent membership of the SC and their special voting privileges, this chapter recounts the statutory debate for the proposed UN Charter.

Drawing on the original UNCIO documents, meeting summaries and rapporteur reports, I will use this chapter to set out the core arguments *for* and *against* the SC's structure, especially the Yalta formula. Particular attention is paid to points and arguments that have proved valid throughout the UN's almost seven decades of existence. Although the battle to correct the democratic deficiencies of the Council by the weaker states in San Francisco was lost, these states' contingency plans and efforts to give the formula a temporary effect will be examined.

In this Plan B attempt, with only a few days remaining until the end of the Conference, a breakthrough was made and a great compromise reached. The statutory promise made by the P5 in response to the majority opposition to the veto was that, after 10 years, the Charter would be reviewed and the Yalta formula would be subject to change, removal or

confirmation. The confidence of both sides in the effectiveness of this change and review process, inspired by the more than twenty-seven amendments to the US Constitution, was so high that the related resolution was almost unanimously adopted. The compromise was embodied in paragraph 3 of Article 109 of the Charter, which promised a special review of the Charter after a 10-year period, with a one-time, *simple majority* vote in favour of it being held.

This statutory promise was particularly attractive to the weaker states because, with the concurrence and support of the P5, the promise was initiated and fully supported by the most powerful P5 state, the US.

The objective of Chapters 4 and 5, therefore, is by means of legislative history to establish the *original intent* of the majority of Conference participants concerning the structure of the Council and the limited and temporary nature of the veto. It also seeks to establish the objectives and the intentions of the P5 and the weaker states, and the agreement reached between them, concerning the Charter review and revision process. The compromise agreement reached at the Conference—the *San Francisco promise*—was enshrined in Article 109 of the Charter. Particular attention will be paid to the *letter* and the *spirit* of paragraph 3 of Article 109, so as to assess its good faith performance in later chapters.

5.2 Battle over Permanent Five Supremacy—the Veto Fight on Two Fronts

Commission III Committee 1 (Committee III/1) was where the main debate and the battle for P5 Charter supremacy took place. At Committee III/1, Security Council Structure and Procedures, the P5 privileges were being tackled head-on by the anti-veto bloc. In parallel, the smaller powers had devised contingency plans aimed at reducing the effect of the veto or

its longevity—the topics of another committee. Should the veto remain, the weaker states were striving to ensure that they could revise the Charter at a later date or enable themselves to withdraw from the organisation altogether. The topics of Charter amendments, revisions and withdrawal all fell under general provisions and were the task of Commission I Committee 2 (Committee I/2), to be discussed in later sections. Together, these two Committees became the legislative battlegrounds for challenging the P5's supremacy.

Although the majority of the anti-veto camp was made up of Latin American countries, Dr. Evatt, Attorney General and Minister for External Affairs of Australia, had become the *de facto* leader of the opposition. In the Security Council Structures and Procedures, Committee (III/1), Dr. Evatt had to contend with Senator Tom Connally of the US, who was the primary spokesman for the P5, as well as the Chair of the powerful US Senate Foreign Relations Committee.

The main argument employed by the Big-3 to justify the formula was that they had made great sacrifices during the war, and that they, together with China and France, were the best equipped and most prepared to commit troops in order to keep the peace anywhere on the globe. And, since they were expected to commit the troops needed for these global peace-keeping missions, in a standing army, as proposed by the Military Staff Committee under the SC, the P5 claimed a right to special privileges in the Council.

Russian delegate Andrei Gromyko put the following argument in favour of the *permanency* of the permanent members:²⁵³

... to give permanent seats in the Council to five great powers is in recognition of the obvious fact that the Security Council can possess sufficient means and forces

²⁵³ (UNCIO - Volume I: General 1945): 664.

necessary for the maintenance of peace only if it permanently includes those countries which have sufficient resources in men and material necessary for the successful and effective fulfillment of its duties.

The French delegates, after they had formally accepted the permanent seat at the Council, were more specific on the P5's promise of setting up a permanent UN military force. Joseph Paul-Boncour, the former French Prime Minister, elaborated on the role of the Military Staff Committee as an organ of the SC, explaining at the Conference:²⁵⁴

... An international force is to be formed and placed at the disposal of the Security Council in order to insure respect for its decision. ... An international Military Staff Committee will draw up plans for employing this collective force under an international command to be determined if and when occasion arises.

In this way, the international Organization will no longer be unarmed against violence. The forceful idea of our writer Pascal will no longer be belied: 'strength without justice is tyrannical, and justice without strength is a mockery.'

When Committee III/1 commenced work, it was already confronted with 21 amendments by 20 states related to Chapter VI of Dumbarton Oaks—the SC. Most of these amendments were related to the composition and the enlargement of the SC, as well as to alterations in its proposed voting procedures in Section C, to do away with or limit the P5's voting privileges.²⁵⁵

By the second week of the Conference, the number of countries opposing the Council's composition and its voting procedures was snowballing and had grown to 30 states—the overwhelming majority of the states invited to the Conference.²⁵⁶

²⁵⁴ Ibid: 668.

²⁵⁵ (UNCIO - Volume III: Dumbarton Oaks Proposals, Comments and Proposed Amendments 1945): 664-445.

²⁵⁶ My decision to include a state in the opposition camp was based on its formal submission of amendments, proposals, or comments challenging *Sections A and C* of Chapter VI of Dumbarton Oaks. Most of the information was extracted from Volume III of UNCIO. See, particularly, Ibid: 664-665; and (UNCIO - Volume XI: Commission III, Security Council 1945): 774-779.

News from the Conference was leaking out, and the media were quick to pick up on the scope and nature of the debate, as well as the extent of the weaker states' discontent. The general public in some countries, particularly in the US, was beginning to comprehend the exclusive and unequal nature of the SC's structure, the most powerful organ of the proposed organisation.²⁵⁷ In particular, for Conference delegates, their governments, and the general public, the spotlight was now on the veto.

Furthermore, US intelligence and the US Army's *magic* operation was intercepting the delegates' and other states' intergovernmental communications before and during the conference, revealing the large number of states discontented with the veto, and the wide scope of that discontent.²⁵⁸

By the third week of the Conference, the greater part of the P4 after-hours meetings at the Fairmont Hotel penthouse was dedicated to how to combat the smaller powers' challenge to their supremacy. The Big-3 head delegates were asking their national leaders for advice and help. The Conference President, US Secretary of State Stettinius, was keeping President Truman informed and, having communicated the grave state of affairs at the Conference and the possibility of failure in San Francisco, requested President Truman's personal intervention with foreign leaders in quelling the anti-veto opposition.²⁵⁹

²⁵⁷ For some of the public's reaction, such as newspaper reports and formal comments from religious organisations and civil society, see Schlesinger, *Act of Creation: The Founding of the United Nations*, which has extensive coverage (Schlesinger 2003).

²⁵⁸ On US espionage operations before and during the Conference, such as the US Army special operation *Magic Diplomatic Summaries*, and including the interception of diplomatic communications between Chile and Turkey, see Chapter 4, Section 4.3, n 217 above.

²⁵⁹ One of the interventions requested by Stettinius was for President Truman to contact the Australian government and formally convey US displeasure at Dr. Evatt's opposing role at the Conference. (Schlesinger 2003): 222-223.

The Big-3, having had some reservations and differing views on the veto at the outset, had, by the middle of the Conference, reconciled and reaffirmed their uncompromising stance on the veto question. They became unwilling to grant even minor concessions on limiting the applicability of the veto or on allowing a more liberal interpretation of the formula.

By the middle of the Conference, the persuasions, coercions, and other methods mentioned in the previous chapter were being applied by the P5 in full force. The dramatic world events that took place during those eight weeks of the Conference, and the uncertainties and anxiety they created for the weaker states, helped turn the psychological tide in favour of the P5 and their demand for special powers in return for the promise of global peace and governance.

Germany's surrender on 7 May 1945 coincided with the second week of the Conference. The rapidity of the Soviet and communist expansion into Eastern Europe caused many of the European heads of state and high-level delegations to depart quickly from the Conference in order to stabilise their immediate domestic situations. With the Soviet and communist expansion westwards, many Western European states represented in San Francisco needed the US and the UK on their side as a counterbalance to the Soviet push, and therefore softened their anti-veto stance, hoping for some sort of collective security arrangement. As for Eastern Europe, the Soviet Union and Stalin did not, of course, have to worry about the voting behaviour of their self-installed regimes, such as the Byelorussian and Ukrainian SSRs.

The French invasion of Syria, which occurred as the Conference was taking place, not only shook the Arab League countries present in San Francisco but also sent a sobering message about the rule of force and the might of the past colonisers to all the current and ex-colonial states, a few of which were selectively invited to the Conference. For these states, basic

human rights and the implied anticolonial text of the Charter, as well as the creation of the Trusteeship Council (Chapter XII of the Charter is dedicated to the “International Trusteeship System”), were of more immediate importance than the long-term potential dangers of the veto. Towards the end, these states abandoned their anti-veto stance.

Countries such as Egypt, Syria, Lebanon and Ethiopia, which at the beginning of the Conference had submitted amendments or had spoken against the veto, switched sides and were willing to accept the SC and its voting procedures package offered by Dumbarton Oaks. In the case of the Philippines, which was the only Eastern Asian state (other than the P5 China) invited to the Conference, the war with Japan was continuing, and the possibility of a resurgent Japanese threat was troubling its delegation. Therefore, with the US message to the Philippines’ chief delegate, General Romulo, that the Philippines’ anti-veto stance was not acceptable, the Philippines softened its position and accepted the formula.²⁶⁰

As to Latin American states, the US in addition to trying to influence the position of the countries under its military and economic might, used the influence and services of Nelson Rockefeller to deal with the large contingent of Latin American states opposing the veto. Unlike the other continents, such as Asia or Africa, the American continent’s states were almost fully represented at the Conference. Based on an analysis of the verbatim records of the plenary sessions and the formal amendments proposal to the DO mentioned in Chapter 4, it seems a great majority of the 19 Latin American countries present in San Francisco were opposed to the representation scheme on the Council and the Yalta formula of Chapter VI of Dumbarton Oaks.

²⁶⁰ (Hurd 2007): 93, 106.

The great wealth of the Rockefeller family was legendary at the time, and Nelson Rockefeller had extensive business ventures in Latin America, as well as personal relationships with some of its leaders. Although not part of the formal US delegation to San Francisco, Nelson Rockefeller was present as Assistant Secretary of State in charge of Inter-American Affairs. During the Conference, he arranged for frequent individual and group meetings, entertainment and side events with the Latin American delegates. In addition to acting in his official capacity, Rockefeller, with both political and business motivations, was attempting to exert some of his personal and financial leverage to influence the Latin American votes.²⁶¹

Against this backdrop, the 9th meeting of Committee III/1, on 17 May, debated the question of the veto to a standstill. Prime Minister Fraser of New Zealand raised a series of questions and potential situations concerning the applicability of the veto, which the UK and US delegates' responses had not clarified. Furthermore, contradictory answers given by the P5 on some of the questions raised were indicative of a disagreement among them, adding to the confusion.

At the same time, delegates from other states were asking additional critical legal questions on the veto. For example, Eelco van Kleffens, Minister of Foreign Affairs of the Netherlands, pointed out the legal dilemma inherent in the formula, whereby the SC had “quasi-judicial” functions in its jurisdiction for pacific settlement of disputes and at the same time “executive” powers to enforce them. Thus, without any alterations to the formula, particularly in cases where a member of the P5 was party to a dispute, the Netherlands delegate pointed out that

²⁶¹ (Schlesinger 2003): 130, 198.

“the guarantee of the elementary impartiality that should characterise any quasi- judicial decision by the Council seems to fail.”²⁶²

At that stage, the Committee decided to create a subcommittee to elaborate and clarify the formula-related questions. Furthermore, the US delegate and chair of the Committee, Senator Connally, as is mentioned later in the chapter, set the terms of reference and indicated that the proposed subcommittee would not be able to decide or recommend changes to the veto, but could only clarify questions and provide interpretation and answers in respect of the situations where the veto would apply.

5.3 The Twenty-Three Questions and the Power of the Formula

The committee created to test the power of the formula and measure its scope and applicability was called *Technical Subcommittee B*. Subcommittee III/1/B met on 19 May and gave itself two days to prepare the list of questions. By 22 May, the subcommittee had compiled a list of 23 questions addressed to the sponsoring governments for clarifications and answers.²⁶³ Some of the questions raised were as follows (numbers below correspond to the question numbers as originally presented):²⁶⁴

(3) If the attention of the Security Council is called to the existence of a dispute, or a situation which may give rise to a dispute, would the veto be applicable to a decision of the Security Council to exercise its power to investigate the dispute or situation?

(9) Would the veto be applicable to a decision of the Security Council, at any stage of a dispute, to recommend to the parties appropriate procedures or methods of adjustment?

²⁶² (UNCIO - Volume XI: Commission III, Security Council 1945): 328.

²⁶³ Doc 855 Memorandum to Sponsoring Countries; Ibid: 699-708.

²⁶⁴ Ibid.

(10) Would the veto be applicable to a decision of the Security Council under the first sentence of this paragraph [referrals to ICJ] that a dispute is of a justiciable character?

(13) Would the veto be applicable to a decision of the Security Council to refer to the International Court of Justice a legal Question connected with a non-Justiciable dispute?

(16) Would the veto be applicable to a decision of the Security Council that it determined the existence of any threat to the peace, etc.?

(19) In case a decision has to be taken as to whether a certain point is a procedural matter, is that preliminary question to be considered in itself as a procedural matter or is the veto applicable to such preliminary question?

(20) If a motion is moved in the Security Council on a matter, other than a matter of procedure, under the general words in paragraph 3 [the Yalta formula], would the abstention from voting of any one of the permanent members of the Security Council have the same effect as a negative vote by that member in preventing the Security Council from reaching a decision on the matter?

(21) If one of the permanent members of the Security Council is a party to a dispute, and in conformity with the proviso to paragraph 3 [Yalta formula section referring to Pacific Settlement cases] has abstained from voting on a motion on a matter, other than a matter of procedure, would its mere abstention prevent the Security Council from reaching a decision on the matter?

(22) In case a decision has to be made under Chapter VIII, Section A, or under the second sentence of Chapter VIII, Section C, paragraph 1, [reference to Pacific Settlement and Regional Arrangements sections] will a permanent member of the Council be entitled to participate in a vote on the question whether that permanent member is itself a party to the dispute or not?²⁶⁵

²⁶⁵ The original list of questions submitted by the subcommittee was in fact 22 questions. However, after the memorandum of the list of questions was submitted, another question on the exercise of the veto was raised by the Greek delegation as an addendum, questioning whether a permanent member can veto the election and the appointment of the Secretary-General, thus increasing the number of questions presented to 23. Ibid: 709. As to the answer to the 23rd question, in practice, the P5 have kept their power of veto over the election of the SG. See: <http://www.un.org/sg/appointment.shtml>.

Days passed without a response from the would-be permanent powers. In the meantime, all discussions in the subcommittee and Committee III/1 were suspended and the deadline for the completion of the Conference had to be extended.

It took the sponsoring states more than 16 days to respond to the weaker states' memorandum on the list of questions. Their 7 June Joint Declaration of "Statement by the Delegations of the Four Sponsoring Governments on the Voting Procedure in the Security Council" avoided addressing the specific questions raised, and instead had generic comments with some examples that were not related to the questions asked.

Some of the comments made by the P4 in their joint declaration were, for example, how unlikely it would be for the veto to be exercised by *any* permanent member on *any* question; that the Yalta formula was already an improvement on the League of Nations' voting procedures at the League Council, the decisions of which were based on the unanimity of its members, with each member state having had the right of veto; and the fact that if all the non-permanent members of the Council acted in unison they could also enjoy a veto and, in effect, be the sixth permanent member. The only question the P4 actually addressed was question 19, where they clarified that permanent members would have the power to veto whether a question raised before the Council was procedural or substantive.²⁶⁶

²⁶⁶ (UNCIO - Volume XI: Commission III, Security Council 1945): 710-714.

The lack of transparent and direct responses to the 23 questions raised by the lesser powers actually stemmed from the fact that the P5 could not agree among themselves. Not clarifying the veto and the formula's applicability and scope in San Francisco actually caused serious problems for the P5 and the functioning of the UN after it became operational. For example, as will be seen in the next chapter, the US and UK were frustrated by the frequent use of the veto by the USSR in the first few years of the UN's existence. The Soviets frequent use of the veto in the latter part of the 1940s, even on procedural matters, practically paralysed the SC. Another example was not responding to the question of whether a permanent member's absence from a voting session would constitute a veto or not. This question would come to haunt the USSR, when, in 1950, its representatives walked out in protest from the SC session that voted in favour of military intervention in Korea, and their absence was not considered a lack of *unanimity*. Some of the UN's problems that related to the SC voting questions raised and left unanswered in 1945 persist to this day, hampering the organisation's effectiveness.

Sub-committee III/1/B concluded its work, therefore, without accomplishing its mission of clarifying the voting procedures in the Council. When the subcommittee report was given to its parent, Committee III/1, Dr. Evatt of Australia and other delegates, expressing their dissatisfaction with the P4's response, asked the Committee to specifically register in its records that the sponsoring governments' response was *not* adopted by the Committee. Meanwhile, valuable time reaching a mutually acceptable compromise on the formula was lost, and the US government, as the host of the Conference, was pushing for its closure, which was already delayed primarily because of the SC voting questions.

Senator Connally, presenting the US's view to the Committee that the US and the Big-3 were fully committed to the formula and that there was essentially no room for compromise, and that time was running out, told the delegates that they had to make up their mind to *adopt the veto or go home*.²⁶⁷

The rapid international developments at the end of the war, during the months of April, May, and June of 1945, coincided with the timing of the Conference, and the pressure to conclude the Conference in June, coupled with the persuasion, coercion and procedural limitations exerted by the P5, practically brought the anti-veto drive to a stop.

Given the choice of no Charter, or having a world organisation with a birth defect—what Prime Minister Fraser of New Zealand and some others dubbed the “evil veto” (see below)—the states were, one-by-one, opting for the latter.

The last-ditch effort by the anti-veto camp to test the will and the level of commitment of their constituents was recommended by Australia.

²⁶⁷ (UNCIO - Volume XI: Commission III, Security Council 1945): 493. See also (Schlesinger 2003): 222-223.

Dr. Evatt and the die-hard anti-*veto* states agreed, on 12 June 1945, with the permanent members at Committee III/1, to put the Australian amendment, as a test amendment, to a vote. Should the Australian amendment, which essentially took away the veto right on the pacific settlement of disputes, be adopted, the plan was then to put forward other states' amendments that were more liberal and in many or all cases would eliminate the veto entirely and put the voting rights of the P5 in equality with the rights of the others. Should the Australian amendment fail to get adopted, then the Committee would, without discussion of any other amendments, directly put the formula to a vote.

At the 19th meeting of Committee III/1, on June 12, the Australian amendment was put to a vote. The amendment failed, with 10 in favour, 20 against, and 15 abstentions.²⁶⁸

The countries voting in favour were: Australia, Brazil, Chile, Colombia, Cuba, Iran, Mexico, Netherlands, New Zealand and Panama.

Among approximately 30 countries that had either presented amendments, made proposals, or had spoken against the Dumbarton Oaks proposal on the composition and voting procedures of the SC, only the above 10 states directly challenged the permanent members and the Big-3's formula. With Prime Minister Fraser having described the formula as an "evil" voting system, and the Mexican delegates having remarked that what the Big-3 proposed was a "world order in which the mice could be stamped out but in which the lion would not be restrained",²⁶⁹ this group of countries was steadfast in its belief that the proposed SC was under-representative, undemocratic, and, as Eelco van Kleffens, Foreign Minister of

²⁶⁸ (UNCIO - Volume XI: Commission III, Security Council 1945): 120. In addition to the 10 votes in favour, the El Salvador delegation, which was absent at the time of voting, stated, at the next meeting of Committee III/1, that if they had been present they would have voted in favour of the Australian amendment. Ibid.

²⁶⁹ Ibid: 472,474.

the Netherlands, described it, a “quasi-judicial” organ that mixes the *jury*, the *judge* and the *executioner*.²⁷⁰

As to the group of countries that gave in to the pressure exerted by the P5 and, despite their true wishes, made sure the Australian motion did not pass, 15 of those states still registered their discontent by abstaining. The common view of the abstaining states, such as Argentina, Belgium, Canada, Greece, Syria, Turkey and Venezuela, was perhaps best expressed by India’s chief delegate, Mr. Ramaswami Mudaliar, as stated in India’s abstention opinion:²⁷¹

It should be stressed that during the debate [SC voting] the representatives of the sponsoring powers made it clear that they were neither prepared to accept any modification to the Yalta formula, nor to agree to a more liberal interpretation thereof than that contained in their Joint Declaration of June 7, 1945, that any unfavorable action of the Committee on the voting formula would imperil the whole work of the Conference. It was on this understanding that many of the delegations voted for or abstained from voting against the Yalta formula.

Ramaswami Mudaliar also noted that, by agreeing to the formula, they were also agreeing to a period of 10 years as the expiration date on the veto. His understanding was based on several proposals that were put forward on putting time-limits on the veto that would make the formula subject to re-evaluation at a future review conference, which was the subject of the parallel Committee I/2. The Indian delegate elaborated on his understanding, which was shared by many of the 15 states which had also abstained, by stating: ²⁷²

On that understanding, my country was prepared to agree to the Yalta formula over a period. And I made my position clear, and that of my country clear—and I believe several other countries did the same in the course of those discussion—that while they were prepared to agree to the Yalta formula over the next ten years, it would be a very proper proposition on their part to urge that the whole position should be reexamined, de nouveau, without prejudice, and without commitments either of one kind or another, at the end of that period. That naturally took us to a consideration of

²⁷⁰ Ibid. Van Kleffens, before becoming the Netherlands’ Minister of Foreign Affairs, and forming part of the Dutch government in exile in the 1930s, was the Secretary General of the Hague Academy of International Law.

²⁷¹ (UNCIO - Volume XI: Commission III, Security Council 1945): 120, and 173-175

²⁷² Ibid.

the amendment sections and on what conditions amendment of the Charter may be proposed. And we felt that if this unanimity rule were not to be applied at the end of ten years to any proposal regarding the amendment of the Charter, we could safely, and with good conscience and with complete trust and confidence in the five great powers, agree to the complete Yalta formula during the intervening period of ten years.

The 20 states which voted *against* the motion—in addition to the P5 and the countries they directly dominated, such as the Soviet Bloc states—included some of the states that were anti-veto at the beginning of the Conference but, towards the end, completely reversed their stance. One example was the Philippine Commonwealth, which, as mentioned previously, was ordered by the US to align itself with US policies at the Conference. Another example is Lebanon, which, after the French renewed colonial activities in the Middle East, also aligned itself with the Big-3's stance at the Conference. The Lebanese delegate, after declaring his support for the formula, gave the following explanation at the Committee:²⁷³

[S]ince his country was a small one it felt that its only guarantee of independence and freedom from aggression lay in a successful international organization. Though the right of 'veto' was an evil his delegation accepted it, because the alternative was a thousand times worse.

Another typical instance of opposing the Australian amendment while expressing support for the anti-veto camp was that of Denmark, which, similar to many other states in Europe with Allied troops on its soil, felt obliged to support the Big-3's wishes.

Based on the report of the Committee's Rapporteur, Denmark's support for the formula is recorded as follows:²⁷⁴

The liberation of Denmark had been made possible by their [Big-3] collaboration. Her fate in the future is dependent upon it. Although there were limitations in the Charter, Denmark would take a realistic view. He believed that the Delegation of

²⁷³ (UNCIO - Volume VI: Commission I, General Provisions 1945): 486.

²⁷⁴ Ibid: 488.

Denmark could best contribute to a speedy conclusion of the Conference by voting for the proposal as it stood.

After the Australian amendment was voted down, as most of the other states' proposed amendments to the formula were not withdrawn, those remaining in the queue were procedurally up for debate and vote. However, with the Committee understanding that other states' amendments in the queue would be ignored as a consequence of a *no* vote on the Australian amendment, the Committee immediately moved to put the Section C Council voting procedures of DO, as it was originally proposed by the Big-3, to a vote at its next meeting on 13 June.

The UK urged the delegates to vote in favour of the text of Section C *as is*, or risk the world sliding into the “dark ages”. The UK delegate, in his pitch in favour of the formula, warned of “Armageddon” if the UN was not established as proposed by the P5.²⁷⁵

Without that unanimity [veto], all countries, large and small would fall victims to the establishment of gigantic rival blocs which might clash in some future Armageddon. Cooperation among the great powers was the only escape from this peril; nothing else was of comparable importance... If the Committee desired to see a world Organization established, it would approve the voting provisions as they now stood.

The main veto legitimiser and spokesman for the P5 at the Conference, Senator Connally, on behalf of the US delegation, reiterated that the veto was what President Roosevelt and the US wanted; it had been presented at Yalta, the Big-3 had adopted it, and the proposal was later agreed to by China and France. Therefore, with P5 unanimity on the subject, there was no room for debate. Connally then reassured the weaker states that, as the Big-3 had guided the world to victory, they would do the same in the future to keep the peace. According to the

²⁷⁵ Ibid: 475.

Rapporteur's report, Senator Connally also mentioned time limitations and the urgency with which the Committee needed to make up its mind:²⁷⁶

He reminded the Committee that the Conference had been in session for 8 weeks and that the British Delegate in the previous meeting had asserted that the sponsoring governments and France had gone as far they could go with respect to the voting procedure in the Security Council. He asked if delegates could face public opinion at home if they reported that they had killed the veto but had also killed the Charter.

Senator Connally's final act in support of the veto, just before the Australian amendment was put to a vote, was in fact very dramatic and had a profound effect on the outcome of both the rejection of the amendment and the adoption of the formula the following day. As observers have reported, and Senator Connally has described in his own memoirs, the Senator "belligerently" looked the delegates in the eye at the Committee while "tearing the Charter", essentially giving them no choice but to accept the Yalta formula or go home and report that "We tore up the charter!"²⁷⁷

This exhibition of threat and belligerence on the part of Senator Connally was very effective in communicating the US's bottom line, and was a display of force that perhaps the delegates might have expected from the Soviet Union, but not from the US—the host, principal creator and sponsor of the proposed global governance organisation.

Many of the states in San Francisco looked to the US for global leadership, and the global leader's final word on the legitimacy of the decisions of the SC had been uttered.

²⁷⁶ Ibid: 493.

²⁷⁷ (Schlesinger 2003): 223. See also (Taylor and Groom 2000): 69.

When the formula was put to a vote on 13 June 1945, just a few days before the finalisation of the statutory part of the conference, it was adopted. Paragraph 3 of Section C, the part related to the veto, was adopted by a roll-call: 30 in favour, 2 opposed, and 15 abstentions.²⁷⁸

Before analysing the vote in terms of the opinion of the states which were in favour, as well as the dissenting opinion of the large number of states that abstained, two caveats need to be mentioned.

First, it is questionable whether the motion satisfied the Conference's voting rules on substantive questions requiring a two-thirds majority to pass a motion; in which case, it would have needed 32 votes of the 47 States which were present at the time of the vote, whereas it was two short of the minimum. Nevertheless, the resolution was considered adopted by the Committee.²⁷⁹ Based on the Committee's adoption, Commission III and the plenary subsequently also adopted the formula as Article 27 of the UN Charter.

²⁷⁸ (UNCIO - Volume XI: Commission III, Security Council 1945): 121. The countries voting in favour were: Brazil, Byelorussian SSR, Canada, China, Costa Rica, Czechoslovakia, Denmark, Dominican Republic, Ethiopia, France, Greece, Honduras, India, Iraq, Lebanon, Liberia, Luxembourg, Nicaragua, Norway, Philippine Commonwealth, Syria, Turkey, Ukrainian SSR, Union of South Africa, USSR, UK, US, Uruguay, Venezuela, and Yugoslavia; There were also three absences (Ecuador, Haiti and Saudi Arabia); *Ibid.*

²⁷⁹ The voting procedures at the Conference were rather ambiguous and contradictory. At the outset of the Conference, it was assumed that the amendments to Dumbarton Oaks introduced by the sponsoring P4 would only require a *simple majority* to pass, and for all other nations a *two-thirds* majority of those *present and voting*, to be adopted. However, at one of the earlier Executive Committee meetings, on the Conference rules and voting procedures, at the objection of Dr. Evatt of Australia, the Executive Committee agreed to the two-thirds majority qualification for any DO amendment, whether by the sponsoring four governments or any other state. (UNCIO - Volume V: Delegation Chairmen, Steering Committee, Executive Committee 1945): 422-423. See also (United Nations Yearbook 1946-1947): 14.

With this qualified majority caveat, by 13 June up until the end of the Conference, the number of states present and eligible to vote (after a few additions) totalled 50. Based on that number, a two-thirds majority would have required 34 affirmative votes to carry it. In regard to the vote on the Yalta formula, counting the three countries that were absent at the time of the roll-call, the two-thirds majority requirement based on those present would be 32 affirmative votes. Consequently, under both of these test conditions, the motion by the Big-3 to amend Dumbarton Oaks would fail. Thus, one conclusion that can be drawn is that the formula, procedurally, was adopted incorrectly.

Of course, one possibility is that states abstaining were excluded from the count, just like the states which were absent and not voting. This loose definition of *present and voting* is used in some legislative processes, where

Secondly, although the formula was adopted, its interpretation and scope of application remained ambiguous. In fact, at the request of Australia, India, and many other states, it was formally recorded at the Committee—and the Commission reports—that the P4 joint declaration in response to the twenty-three questions and the interpretation of the formula was formally rejected as being the official interpretation of Article 27.²⁸⁰ In other words, the interpretation of the situations in which the veto could be applied remained largely unresolved.

The two diehard anti-veto states that had cast a no vote in relation to the formula were Colombia and Cuba. These two states were prepared to risk *no* UN rather than accept a Charter which legitimised the P5's supremacy and provided "world order" under the shadow of the veto.

The Cuban delegation's objection to the Yalta formula in was presented as follows:²⁸¹

His Delegation had not been convinced by arguments in favor of the veto, for if unanimity really existed among the great powers the veto was superfluous. Furthermore, the veto might help to bring on war through lack of action by the Council. The Cuban Delegation wanted not only world order but world Justice.

One of the main Colombian concerns, similar to Cuba's, was that a lack of unanimity among permanent members would be a more frequent occurrence than their unanimity and would lead to lack of action, therefore creating a dysfunctional SC. Further, in principle, Colombia

abstention votes are considered as not being present. My research of the adopted voting procedures at the Conference, however, based on the 22-volume UNCIO documents, does not indicate that at any time *the present and voting* criteria were clearly defined, or that the concept of *quorum* was either discussed or adopted at the Conference for its committees' decisions. (UNCIO - Volume V: Delegation Chairmen, Steering Committee, Executive Committee 1945): 188-190. Yet again, the Big-3 could argue that, even if the Committee made a mistake in its adoption, it was subsequently adopted unanimously at the plenary at the end of the Conference.

²⁸⁰ UNY book 1946: 25.

²⁸¹ (UNCIO - Volume XI: Commission III, Security Council 1945): 460.

was against constitutionalising unequal rights for sovereign states,²⁸² a view which they felt was widely shared despite the abstaining states' decision to acquiesce. The Colombian Foreign Minister, Lleras Camargo, in his dissenting opinion, stated:²⁸³

[W]hen the vote was taken Colombia's opinion was shared only by Cuba. The great majority of the countries represented in this Conference, however, do share the fears of Colombia and of Cuba, and a considerable number of abstentions was registered. It is apparent that those abstentions have the same meaning as our negative vote ... Without the negative vote of Colombia and Cuba, the veto power would have appeared as unanimously adopted, and the abstentions would have been interpreted in a different light.

The 15 States that had abstained constituted almost one-third of the countries present at the time of voting.²⁸⁴ These states included seven of the original 10 countries that seemed to have acted in unison and had voted in favour of the Australian amendment before abstaining from the vote on the formula: Australia, Chile, Colombia, Cuba, Iran, Mexico, the Netherlands, New Zealand and Panama; with two of those original 10 states, Cuba and Colombia, actually voting no.

The 15 abstentions included eight additional states that had abstained or voted against the Australian amendment before giving into the Big-3's demands, thus ensuring that the formula came up for adoption. Now, in the final vote, these states intended to register their true intention and opposition to the veto by abstaining. These eight states were: Argentina, Belgium, Bolivia, Egypt, El Salvador, Guatemala, Paraguay and Peru.

Taking into account the voting pattern of the states that voted in both the Australian test amendment and in the second round of the formula adoption, plus the states which had

²⁸² Ibid: 486. Alberto Lleras Camargo subsequently became president of Colombia, in the late 1950s.

²⁸³ Ibid: 165.

²⁸⁴ The 15 abstaining states were: Argentina, Australia, Belgium, Bolivia, Chile, Egypt, El Salvador, Guatemala, Iran, Mexico, the Netherlands, New Zealand, Panama, Paraguay, and Peru. Three states were absent. Ibid: 121.

aligned their voting patterns with the P5 on both these voting occasions, but nevertheless throughout the conference had demonstrated their objection to the structure of the SC and its voting procedures, my research indicates that at least 31 states (a majority of over 60 per cent) present in San Francisco were opposed to the formula.²⁸⁵

Why did these majority states at the Conference vote against their true wishes?

Setting aside the coercive circumstances detailed in Chapter 8, the short answer is that these states had accepted the P5's supremacy but believed their endorsement of the veto-power of the P5 to be temporary. In addition, they had devised contingency plans in those last few days of the Conference to ensure the future circumvention, modification and possible elimination of the formula in the Charter.

With "might being right", as the Netherlands' delegate described it, and in view of the uncompromising stance adopted by the Big-3, in order to ensure the temporary effect of the veto, the weaker states had contemplated more than one Plan B. Three contingency plans were devised by the anti-veto states and pursued in parallel.

²⁸⁵ Based on the two voting occasions, mentioned above, in Committee III/1 and using the following criteria—that all states voting in favour or abstaining from the Australian draft amendment were opposed to the formula; and that all those states that voted against or abstained from voting in favour of the original text of Section C of Dumbarton Oaks were against the formula—I arrive at 25 states that explicitly or strongly were against the Big-3 proposal.

Further, France (before its co-option as a permanent member), Denmark, Liberia, Lebanon, Norway and the Philippines, although they had aligned themselves fully with the Big-3 on both those voting occasions, were considered to be opposed to the fairness or effectiveness of the veto. These six countries had submitted amendments, proposals, or had commented against the formula at the beginning or sometime during the Conference. Therefore, 31 states out of 50 (including the permanent members) represented by the end of the conference—that is, a majority of over 60 per cent—are documented as being against the veto. Taking into account the puppet regimes or the dependent states of the permanent members, and therefore excluding them from the count, it seems that the approval rating of the formula at the Conference depended solely on the five-member P5 itself (even counting France—that is, five out of 50, or only 10 per cent. Most of the data related to this analysis was extracted from Volumes III, VI, and XI of the UNCIO documents.

The first, less favoured, contingency plan was to be able to withdraw from the organisation if the P5-dominated Council proved to be unbearable. The *second* plan was to make Charter amendments initiated from the bottom up easy by removing the *veto right* on the amendment procedures proposed at Dumbarton Oaks. The *third* contingency plan, which was more popular with the veto opposition, was to fix a Charter review and revision at a set date in the future.

5.4 Can a Member State Withdraw from the UN Charter?

While the anti-veto battle was still going on in Committee III/1, and it seemed that the formula would prevail, some states contemplated their future exit strategy—a withdrawal clause to be added to the Charter.

The Dumbarton Oaks proposal did not have a withdrawal provision. This was intentional on the part of the American architects of the proposed UN, mainly because of the experience of the withdrawal of critical states, such as Japan, from the League of Nations during its brief history, and considered to be one of the reasons for the League's demise.

The *withdrawal* contingency, which was favoured by some states, was to advocate in Commission I Committee 2—which had “general provisions” and “amendments” as part of its terms of reference—for an amendment to allow for withdrawals from the UN Charter.

By 13 June, the anti-veto battle was already lost in Committee III/1, the SC section; and in the following few days' discussions in Committee I/2 the proposal to exclude the permanent member veto from Charter amendments and revisions at the ratification stage, as proposed in the DO, was also being resisted by the Big-3.

At the 16 and 17 June meetings of Committee I/2, the question of withdrawal came up.

Many of the states that had been opposed to the inclusion of a withdrawal provision in the Charter were having a change of heart. The Netherlands delegate stated that, as a result of being “impossible to change the voting procedure”, the Netherlands government, reluctantly, was reconsidering its opinion on the withdrawal question. Australia also expressed a similar view. According to the Committee report, Ecuador’s delegate, echoing the same sentiments, stated:²⁸⁶

[T]he decisions of the Committee at its last meeting [retention of veto on amendments] left many states no alternative but to insist on the right of withdrawal. He admitted that a withdrawal clause might weaken the Charter.

In addition, Canada, Egypt, Peru, Turkey and Venezuela, among others, were now favouring amendment of the DO text to allow for withdrawal.²⁸⁷ However, with the memories of the League still fresh, not all the anti-veto states were in favour of an opt-out clause in the Charter.

The debate that followed on the topic of withdrawals, mostly at the 28th meeting of Committee I/2, held on June 17, ended up being inconclusive. Even among the Big-3 there was disagreement between the USSR and the US. The US was against member states withdrawing from the Charter, whereas the USSR favoured a more lenient approach to the question of withdrawals, prompting Andrei Gromyko to cite from the Soviet constitution, which allowed for the secession of the Soviet Republics from the Union.²⁸⁸ While most states

²⁸⁶ For the Netherlands’ view see: (UNCIO - Volume VII: Commission I, General Provisions 1945):244; Australia and Ecuador: Ibid: 262-267.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

were in basic agreement that the right of withdrawal should exist, some states, including the US and France, were insisting that it should be conditional and based on certain terms.

In the ensuing debate, the final compromise was *not* to provide formally for state withdrawal in the Charter, but to state its possibility as a separate commentary and document it. The final text proposed by Belgium, in the context of a commentary, was voted on and adopted by the Committee. The commentary, with some modifications, was adopted by Commission I at its 5th meeting on 25 June 1945. The text allowed a member state, under certain conditions—for example, a Charter amendment that was not ratified by that member state—to leave the organisation.²⁸⁹

Therefore, those states in favour of adding a withdrawal section in the Charter were defeated, and the final UN Charter adopted in San Francisco has *no withdrawal* provision.

5.5 The Question of Veto on Amendments: Is the Charter Mutable?

A second, more sought-after contingency plan for the anti-veto states—should the formula remain—was to be able easily to change the formula via future Charter amendments.

However, in Chapter XI of Dumbarton Oaks, where the question of amendments to the statutes was covered, the veto had omnipresence, and the ratification of any Assembly-adopted amendments required the concurrence of all five permanent members.

Practically all of the anti-veto states that opposed the formula were also inherently opposed to the veto of constitutional amendments. The leading veto opposition states in Committee III/1 continued their attack on the veto in Committee I/2, as well as objecting to the formula's applicability to future Charter amendments. Prime Minister Fraser of New Zealand warned

²⁸⁹ (UNCIO - Volume VI: Commission I, General Provisions 1945): 206-207.

against giving the veto a “permanent status” by incorporating it in the Charter’s *amendment* articles.²⁹⁰ Furthermore, Vice-Prime Minister Forde of Australia, at one of the plenary sessions, advocated that the UN Charter should be a “workable constitution”, making a comparison with the amendment process in the US Constitution, in which the unanimity of the states is not required. Forde stated:²⁹¹

We were reminded yesterday of the futility of straining after a perfect Charter. This is true, but we must not let that idea block the possibilities of improving the Charter here and now. Nor must we allow the possibilities of improvement later to be obstructed by adopting too rigid a constitutional form. Mr. Stettinius [US Secretary of State] reminded us that ten vital amendments in the United States Constitution were made within four years of its adoption. The parallel must not be pushed too far. No amendment of the Charter as it now stands will be possible without the unanimous consent of the five permanent members of the Security Council. Any one of the five will therefore be able to make the present constitution immutable. If the United States Constitution had given to the five major original states similar entrenched position, I do not think that many constitutional amendments would have been carried.

At the 26th meeting of Committee I/2, on June 16, the US delegate stated that, “so far as his country was concerned the language of the sponsoring governments’ amendment to Chapter XI was essential”, thereby implying that the Big-3’s decision on the veto’s applicability to the amendments must stay.²⁹²

Canada and India, foreseeing a similar fate for the outcome of this Committee as that which had befallen Committee III/1 on the SC’s voting procedures, proposed that the question be deferred altogether, particularly on the subject of amendment proposals submitted in a Charter review conference, to a future conference to decide its own Charter amendment adoption and ratification procedures.²⁹³ While the P5 rejected this deferral proposal, they

²⁹⁰ (UNCIO - Volume VII: Commission I, General Provisions 1945): 243.

²⁹¹ (UNCIO - Volume I: General 1945): 172, 178.

²⁹² (UNCIO - Volume VII: Commission I, General Provisions 1945): 243.

²⁹³ Ibid: 241-245.

were, at the same time, reassuring the smaller states that the veto would seldom, if *ever*, be used and would be a particularly rare occurrence in the case of Charter amendments.

The French delegate, believing that the veto would probably never be applied, described the use of the term “veto” as “unfortunate”. The Chinese delegate, echoing the same opinion, went even further, heralding the possibility of eliminating the veto. According to the Rapporteur’s report, the Chinese delegate stated:²⁹⁴

[T]he veto might prove much less important than expected and might, in fact, never be used; he felt that it was not unreasonable to suppose that after a time the great powers would be willing to consider elimination of the veto.

With these reassurances, and just before the original text of Dumbarton Oaks Chapter XI (Amendments) was to be put to a vote, Belgium intervened and introduced an amendment to the sponsoring governments’ proposal by altering the *simple majority* requirement for ratifications in the original text to a *two-thirds majority*.²⁹⁵ The Belgian text did not alter the concurrence requirement of the permanent members and was apparently intended to make a top-down alteration of the charter more difficult, but some of the weaker states disagreed with the Belgian proposal, since it also made bottom-up amendments more difficult.

The Belgian amendment received the backing of the P5, and when it was put to the vote at the Subcommittee I/2/E on June 14, it was adopted by 6 votes in favour and 5 against.²⁹⁶

Two days later, at the 16 June meeting of the parent Committee, the sponsoring governments’ proposed text, with the Belgian amendment—increasing the simple majority requirement to

²⁹⁴ Ibid: 244.

²⁹⁵ Ibid: 567.

²⁹⁶ Ibid: 567. Further note that in the subcommittees at the Conference, a two-thirds majority was not required and a simple majority was sufficient to adopt a decision.

two-thirds—was adopted by Committee I/2 for the ratification stage for both future regular Charter amendments as well as amendments adopted at a Charter review conference.²⁹⁷

Although Belgium was basically against the formula, and the reason for its intervention was to make P5-forced amendments more difficult, its action provoked contradictory opinions and confusion in the anti-veto camp. For example, while the Netherlands expressed support for the Belgian amendment, Australia and New Zealand spoke against it. In Dr. Evatt's opinion, the Belgian intervention made an already difficult Charter amendment procedure even more difficult.²⁹⁸

In the case of the amendments and ratification procedures relating to a Charter review conference, the original sponsoring governments' text, again with the same Belgian amendment, was put to the Committee vote and adopted by a vote of 29 in favour, 14 opposed, 3 abstentions, and 4 absences. The proposed text related to the ratification of amendments as a result of a *review conference*. It was adopted and incorporated into Paragraph 2 of Article 109 of Chapter XVIII (Amendments) of the final UN Charter, which is essentially the same procedure as for regular amendments specified in Article 108 of the Charter. Article 109(2) reads as follows:²⁹⁹

²⁹⁷ Ibid: 463, 468.

²⁹⁸ The Belgian delegates' intervention occurred under the leadership of the Minister of Foreign Affairs, Paul-Henri Spaak. Ibid. In practice, however, it seems that the amendment to the original text confused the real issue for some of the delegate voters, who thought that the DO text was now more acceptable. But, in fact, with the veto of the P5 on the Charter amendments remaining, it became more difficult to introduce and adopt a bottom-up amendment at the ratification stage.

²⁹⁹ Ibid: 244. Note that, based on the voting outcome, it seems that the *two-thirds* requirement for amendments to DO as the rule of the Conference was again possibly violated. The voting results, not including the voters who were absent, shows a total of 46 countries present; therefore, *two-thirds* of those *present and voting* would have required 31 favourable votes to carry, or *two* more than the actual favourable votes received, unless those who *abstained* were excluded from the count, similar to *absences*: that is, the loose definition of *present and voting*. See also the vote tally and adoption procedure of the Yalta formula mentioned in Section 5.3 and n 279, as well as Chapter 4, Section 4.5.1.

Any alterations of the Charter recommended by a two-thirds vote of the Conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the members of the Organization, including all the permanent members of the Security Council.

This contingency plan of eliminating the veto from the Charter amendment process, if successful, was probably the best Plan B for the veto opposition. Since these states were already a majority in San Francisco, and probably would be in the future, by introducing one or more amendments and mustering the required votes they could have altered the veto or even eliminated it all together.

This possibility was, however, also apparent to the P5 and they saw the veto on adoption of Charter amendments as part of the formula package, and therefore subject to dictation rather than negotiation. To the veto opposition states, this fight was the same as their earlier one in the Committee related to the SC voting procedures, and, therefore, for the same reasons as in that battle, most of the anti-veto states were already prepared to give in to the P5's demand.

5.6 Antidote to the Formula—Take Article 109(3) in 10 years' Time

The third contingency plan, and actually the favourite and most frequently cited alternative by the anti-veto camp, was to have a future Conference to *review* and *revise* the Charter within a five- to 10-year period. The idea was that, when the war conditions had ended, the permanent members would be more willing to relinquish some of their privileges and lean towards a more liberal SC. As the Cuban and other delegates had put it, this would enable the UN to provide for “not only *world order* but *world justice*”.³⁰⁰

This vision of carrying out periodic revisions to the Charter, and making the UN a better and more effective global governance organisation, was in fact shared by the US, the main creator

³⁰⁰ (UNCIO - Volume XI: Commission III, Security Council 1945): 460.

of the organisation. Both before and during the Conference, US government officials had hinted at revisions to the Charter as a dynamic and desirable process. President Roosevelt, immediately after his return from Yalta, had made extensive announcements to the American public and Congress about the plan for the San Francisco Conference and the formation of the UN. In those speeches, Roosevelt had mentioned that Charter amendments were to be a normal process in the evolution of the future organisation.³⁰¹

The US delegate to Commission-I normally credited with introducing the US amendment to Dumbarton Oaks to hold *periodic reviews* of the Charter was Navy Commander and Ex-Republican Minnesota Governor Harold Stassen.³⁰² This US-proposed amendment came about, in part, as a reaction to the feedback the US was receiving from the Latin American countries and some other states that considered the veto highly objectionable. The information was emanating from both diplomatic and intelligence reports.³⁰³

Therefore, the proposed US amendment to the DO on Charter review, although lacking any mention of timing or periods for the review, was considered a necessary feature and a policy of the US Government, as well as an effort to appease the participating states in signifying that constitutional changes were possible and being provided for. Commander Stassen, in reassuring the Conference delegates that there would be an opportunity to work out some of the questions and interpretations of the Charter after its adoption, and in a review conference, reflected on the US's own experience in this regard:³⁰⁴

We know that even in the United States Constitution there have been questions of interpretation that had to be worked out with the experience of time, and finally

³⁰¹ (Schlesinger 2003): 64.

³⁰² Ibid: 161.

³⁰³ Ibid: 100-102.

³⁰⁴ (UNCIO - Volume VI: Commission I, General Provisions 1945): 30.

decided by divided interpretations even of the Supreme Court. So we should not be concerned or discouraged that we cannot here agree in precise and detailed language on all interpretations of this great document.

Even the tough and inflexible Senator Connally, the head of the Senate Foreign Relations Committee, and head of the US delegation tasked with fighting for the formula in Commission III/1, was hinting at future Charter revisions. At the Committee, Connally referred to the evolutionary path of the US Constitution and the changes made to it as part of his argument to persuade the smaller states to vote in favour of the formula. Connally suggested that, similar to the framers of the great US Constitution, they too “were creating one of the greatest documents drawn by the hand of man”.³⁰⁵

Another influential US official appointed along with the Republican delegation to the Conference was John Foster Dulles, the future secretary of state. Likening the proposed UN global governance to the US’s federal system, Dulles also alluded to the necessity of mutation and change at the UN. Speaking at one of the technical committees, Dulles argued:³⁰⁶

The Organization in none of its branches or organs should intervene in what was essentially the domestic life of the member states. Moreover, this principle was subject to evolution. The United States had had long experience in dealing with a parallel problem, i.e., the relationship between the forty eight states and the Federal Government. Today, the Federal Government of the United States exercised an authority undreamed of when the Constitution was formed, and the people of the United States were grateful for the simple conceptions contained in their Constitution.

³⁰⁵ (UNCIO - Volume XI: Commission III, Security Council 1945): 490.

³⁰⁶ Speaking in Committee I/1 on 14 June 1945; (UNCIO - Volume VI: Commission I, General Provisions 1945): 508.

Therefore, in the view of the US, an evolving UN with a Charter *review* and *amendment* mechanism was not just a measure to appease the veto-opposition, but a genuine proposition and policy of the US prior to and during the Conference for the creation of the UN.

From the four sponsoring states, China and the UK had also proven amenable to the idea of future Charter revisions, whereas the USSR did not seem to support a dynamic and changing Charter—at least not anytime soon after the UN’s creation.³⁰⁷ The Soviet Union, unlike the other four permanent members, had not emphasised the possibility of future Charter revisions, and therefore the possible transitory nature of the veto.

The anti-veto camp, in the meantime, having lost the two battles on the veto: first, when the subject of SC voting came up in Committee III/1, and, again, when the question of the exercise of the veto was raised in relation to Charter amendments in Committee I/2, was now seeking more than just words. They wanted the promise of a future review conference, where all the constitutional options would be on the table again, and the world-governance rules could be reviewed and the veto neutralised.

At the beginning of the Conference, several states had submitted amendments or proposals to the Chapter XI of DO related to Charter amendments, reviews and revisions, and the process of ratifications, including states such as Australia, Brazil, Canada, Costa Rica, Ecuador, Mexico, Norway and Venezuela.³⁰⁸ As previously mentioned, the sponsoring states had also introduced their own amendment for charter review at the outset of the Conference. With the

³⁰⁷ In addition to the UNCIO *travaux* on the UK’s and China’s stances on the veto, see also (K. Krishna 1955): 361.

³⁰⁸ (UNCIO - Volume VII: Commission I, General Provisions 1945): 462.

topics of amendments and Charter revisions being basically related, Technical Subcommittee I/2/E was created to tackle both of these important constitutional topics.

The last battle for the weaker states to gain some advantage points from the Big-3, after their submission to the formula, came in the last days of the Conference in Subcommittee I/2/E and its parent, Committee I/2. In this endeavour, Brazil and Canada joined forces and combined two of their earlier proposals into a joint amendment to the DO for convening a Charter review between the fifth and the tenth year of the UN coming into existence.³⁰⁹ At these Committee meetings, as well as in Committee III/1 meetings related to the SC voting procedures, many spoke in favour of holding a future review and linking it to alterations of the formula. In effect, this was the concession they were seeking from the permanent members in exchange for their support of the formula.

In addition to the main objective of democratisation of SC decisions, other benefits of holding a review conference were cited, such as it providing a means of keeping a score card on the Council, and an opportunity to gain from experience after the UN and the SC had been operating for a while. Also cited was the need to gain the support of national citizens to ensure their parliaments endorsed the Charter when it was presented for domestic ratification.

Some of the states' views on the desirability of holding a Charter review—for reasons other than its main goal of democratisation of the Council—were, according to Committee Summary Reports, as follows:³¹⁰

The Delegate of Uruguay believed it necessary to see how the veto power would be exercised and stated that such a revision conference would provide an opportunity for the members to denounce any country abusing the veto power.

³⁰⁹ See n 311 and the text accompanying ns 312 and 313 below.

³¹⁰ Ibid: 209-211.

The delegate of Peru suggested that calling for a review conference “would have a tremendous psychological effect in support of the Charter”. He further explained that, to the citizens of the world, “such a provision for revising the Charter would have wide public appeal”. The Belgium delegate believed that providing for a “full examination” of the Charter in a review conference would demonstrate that the opportunity for reform exists, further increasing the chances of both current members and future ones accepting and wishing to join the UN.

Brazil’s delegate, Dr. Bertha Lutz, one of the handful of high-level women delegates to the Conference, stated the Brazilian view that: “[T]he veto was contrary to the principle of equality of nations expressed in the Preamble of the Charter” and, believing that “revision of constitutional law is more a question of experience than of logic”, put forward the Brazilian amendment requiring periodic Charter review conferences every five years.³¹¹

Since the general understanding at the Conference, on both sides, was that a Charter review would focus on the formula and would mean revisions or perhaps even elimination of the veto, the Brazilian proposed amendment was particularly opposed by the Soviet Bloc. The Soviets argued that a five-year planned date to review the Charter, which in their view was too short, would cause member states not to take the present Charter being released seriously, and would therefore “detract from the permanent character of the Organization”.³¹² Faced with this opposition, and in view of the fact that the Canadians had proposed their own

³¹¹ Dr. Bertha Lutz was the President of the Confederated Association of Women of Brazil and a former member of Congress. She was one of only four high-level women delegates to San Francisco who were voting delegates and were allowed to sign the UN Charter at the close of the Conference. For the references used in this paragraph as to Brazil’s position on the Charter review, see (UNCIO - Volume II: General 1945): 370; (UNCIO - Volume VI: Commission I, General Provisions 1945): 179; (UNCIO - Volume VII: Commission I, General Provisions 1945): 231.

³¹² (UNCIO - Volume VII: Commission I, General Provisions 1945): 210.

amendment for an automatic *special* review conference after 10 years, the Brazilians and Canadians fused their proposals as a joint amendment calling for a review conference “not sooner than 5 years and not later than 10 years”.³¹³

The Brazil-Canada joint motion received a majority vote, both in the subcommittee and the main Committee, but was *not* adopted. In Committee I/2, the votes cast were 23 in favour, 17 against, and one abstention. However, this was not a two-thirds majority.³¹⁴ Although Dr. Lutz later stated that two Latin American states that were in favour of the motion were absent, and implied that the proposed Brazil-Canada joint motion could be passed if reintroduced as a revised separate amendment, the time pressure to conclude the Conference prevented such strategies for those seeking a Charter-embedded review conference.³¹⁵

Moreover, the greater battle for the Charter revisionists was to make sure that the P4-initiated amendment to the DO, adding the subject of Charter review, was altered or defeated.

Although the P4’s sponsored amendment was a step forward in suggesting a review conference, it did not contain any specific dates in its text and specified a stringent rule of adoption by three-quarters of the General Assembly, as well as SC concurrence, just to convene the review conference, making it cumbersome to invoke.

³¹³ Ibid: 464-466.

³¹⁴ Ibid: 219.

³¹⁵ (UNCIO - Volume VI: Commission I, General Provisions 1945): 179.

On the absence of some states in votes for crucial questions, such as the Yalta formula and the Charter amendments and reviews, it seems that some of the lobbying or soft coercion at the Conference was paying off. In this case, perhaps the Rockefeller side events and receptions that were being held for the Latin American delegates were swaying a couple of the Latin American nations, or perhaps the states that did not want to disappoint their colleagues, but also wished to avoid offending the P5 by voting against them, would find it easier to be absent than to be forced to clarify their position by casting a vote. For example, in the vote for Australia’s test amendment, five states were absent, or almost 10 per cent of all the state participants. One of these, El Salvador, went on record to state that if present it would have voted in favour of the Australian amendment. See (UNCIO - Volume XI: Commission III, Security Council 1945): 120.

Furthermore, the majority demand that the veto should not apply to future Charter revisions as a result of a review conference had encountered P5 resistance, and the permanent members had again stressed at the Committee I/2 meetings that, at least for a “few years”, their veto power on future Charter revisions must stay. This latest P5 resistance was reflected in a Memorandum of Decisions of Subcommittee I/2/E report of 14 June:³¹⁶

The subcommittee took cognizance of the declaration of the delegates of the sponsoring governments and France to the effect that they are not able at the present moment to consent to a procedure by which the special conference should be able to decide that amendments adopted by it should come into force without the unanimous consent of the sponsoring governments.

With this “cognizance”, the *anti-veto* camp was even louder in its insistence on a sure way and set time to be associated with the special Charter review conference.

Some states, such as New Zealand and Chile, were linking the ratification of the Charter in their national legislation to a set date for reconsidering the veto at a future *special* review conference. For example, Prime Minister Fraser’s position was expressed by the Summary Report of the Committee as follows:³¹⁷

... New Zealand supported the proposal for specifying a time-limit within which the revision conference should be held. He argued that it was necessary to offer adequate opportunity for proposing changes to the Charter which are desired by a number of countries. He stated that a number of points in the Charter were contrary to the tradition of New Zealand, but he would be able to defend them before his Parliament only if he could offer some hope for change in the Charter.

³¹⁶ (UNCIO - Volume VII: Commission I, General Provisions 1945): 568. Among the many suggestions that the veto should not apply to amendments (at the ratification stage) introduced by the different states, three states—namely, Canada, India, and Mexico—had a compromised joint motion that the voting procedures on the Charter revisions should be left to the review conference itself to decide. This joint Mexican-initiated proposal, which also had Australia’s support, was rejected by the P5. Ibid: 229-230, 242-243, 566.

³¹⁷ Ibid: 212, 250.

In addition to the demand of the *anti-veto* camp on seeking a date for the review conference, its demand for the elimination of the veto, at least as it applied to Charter revisions and amendments, was flaring up once more.

The opinion of the delegate of India, as stated in the Summary Report of the 15 June meeting of Committee I/2, provides an example of a state that wished to set an expiration date on the veto as it pertained to Charter amendments:³¹⁸

The Delegate of India expressed the view that the right of veto on amendments might be conferred upon the permanent members of the Security Council for ten years, but at the end of that time, the revision conference should be held to reconsider this aspect of the problem.

With the potential for a deadlock, at one of the nightly penthouse meetings of the P4 close to the end of the conference, the US prepared a text, with the backing of the USSR, the UK, and China, which specified a date for the review conference:³¹⁹

If such a general conference has not been held before the tenth annual meeting of the Assembly following the entry into force of the Charter, the proposal to call such a conference shall be placed on the agenda of that meeting of the Assembly.

Given the sponsoring governments' proposal, it seemed that the Big-5 and the weaker states were converging on a 10-year set date for the Charter review conference.

5.7 The Promise of San Francisco: Linking Council Democracy to a Special Charter Review Conference

The P4 proposal was considered a step towards reconciliation. However, what guarantees did the weaker states have that the special review conference would actually be held? Some state delegates, such as Eelco van Kleffens of the Netherlands, interpreted the P4 proposal as being

³¹⁸ Ibid: 220.

³¹⁹ Ibid.

a “mandatory” action item for the 10th session of the General Assembly.³²⁰ Other delegates, such as Dr. Evatt of Australia and Dr. Lutz of Brazil, wanted the scope of the text to be more precise, so as to ensure that this *special* review conference would be easier to convene than the normal review conferences already proposed and provided for.³²¹

In the ensuing debate, the weaker states favoured either automatic convocation or a simple majority of the General Assembly, and *no* concurrence requirement of the P5 to convene the review. The Soviet Union, however, and its two Soviet Bloc allies agreed to the timetable of the tenth year for the Conference, but, as far as the voting procedure required at the Assembly to convene the review was concerned, they favoured a three-quarters majority to decide the question.

In other words, with the exception of agreeing to set the date, the Soviets were sticking to the same voting rules as the original DO review amendment proposed and submitted jointly by the P4 at the outset of the Conference. That day’s Committee meeting, on 15 June, ended inconclusively, with a last-minute proposal from Foreign Minister Ioannis (John) Sofianopoulos of Greece recommending that the special conference be convened by just a simple majority vote at the GA.³²²

The next day, at the 27th meeting of Committee I/2, on 16 June 1945, US delegates, *without* prior approval of the P4, incorporated the Greek proposal in their motion, thus requiring only a simple majority vote at the Assembly, as well as a simple majority of the SC to convene the proposed special review conference at the 10th session. The US proposal was well received by

³²⁰ Ibid: 220, 222-223, 229-231; and 465-467.

³²¹ Ibid: 222-223, 229-231; and 465-467.

³²² Ibid.

the anti-veto camp, and the delegates of Australia, Argentina, Brazil, Canada, Chile, Ecuador, New Zealand, Peru and the Union of South Africa all spoke in favour of the revised US motion. The UK, China, and France—all members of the P5—also expressed their approval.³²³

The only opposition came from the Soviet Union. Although supportive of the US motion on the special conference in 10 years' time, the Soviets were opposed to the simple majority procedure for calling such a conference. The USSR and its two Soviet Bloc allies had by now dropped their three-quarters requirement and were leaning in favour of a two-thirds majority.³²⁴

The US's modified motion was put to a vote and was overwhelmingly adopted, with 42 votes in favour, 1 against, and 3 abstentions. The text was subsequently adopted by the Commission and the plenary and was incorporated in the final draft, as paragraph 3 of Article 109 in Chapter XVIII of the UN Charter. It reads as follows:³²⁵

If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

The Conference's work on formulating a review conference was not yet finished. The provisions of this paragraph now needed to be incorporated into the full Article, and it had to be determined how the decisions in such a review conference would be adopted.

³²³ Ibid: 249-253.

³²⁴ In fact, Byelorussian SSR introduced a motion to modify the simple majority to two-thirds to call the special review conference, which was voted down. Ibid: 249-250.

³²⁵ Ibid: 251-252.

It should be recalled that the DO proposal did not have a Charter review section, and the amendment proposed at the outset of the Conference by the sponsoring states to add the Charter review section already contained two paragraphs, and its specified adoption requirement was identical to the Charter amendments section. In other words, the P5 proposal for the adoption of decisions reached by a regular or a special review Conference (eventually included in Article 109) was the same as the adoption procedures already chosen for the regular amendments (as set out in what would become Article 108). Both procedures required a two-thirds ratification of the member states and the concurrence of *all* the permanent members.

Therefore, the full article that needed to be adopted at the Conference—the future Article 109—consisted of three paragraphs:

Para. (1): In essence, how to convene a *regular* review conference with no set date being specified; such a conference taking place as often as adopted and requiring a *two-thirds* favourable vote of the GA and a majority decision at the Council to convene it;

Para. (2): In essence, the adoption procedure for decisions at the review conferences, whether regular or special conferences. This procedure was identical to the normal amendment procedures (as embodied in the future Article 108), requiring a *two-thirds* ratification by member states, plus the concurrence of the permanent members; and

Para. (3): Insertion of the text of the newly adopted compromise motion at the Conference, which, in essence, called for a one-off special review conference after a 10-year period, and required only a *simple majority* at the GA and a 7-member majority at the SC in order to be convened.

Prior to the vote on the full text, Dr. Evatt once again objected to the permanent-member veto at the ratification phase that still remained in the text. He openly announced his voting strategy: that Australia, instead of casting a *no* vote, would “abstain”, so that the motion with the special review conference mentioned in paragraph 3 would carry. In other words, Evatt, as the leader of the anti-veto diehards, was implying that those in *favour* of the special review conference but *against* the P5 veto in the ratification phase of the Charter should cast an *abstention* vote.

The result of the vote was: 33 in favour, 1 against, 12 abstentions.³²⁶

Finally, the full section on Charter review that later became incorporated into the document as Article 109 was adopted. The Article consisted of three paragraphs, with the first two very similar to the single-paragraph Article 108 of the final Charter: the amendment section. The only significant difference between the two Articles was paragraph 3—a facilitated special review conference in 10 years’ time. The full text of what became Article 109 of the Charter reads as follows:³²⁷

Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

³²⁶ Ibid: 251-252. It should also be noted that, since the Charter review and revisions affected the whole Charter, and so might have been of interest to, and discussed in, other UNCIO committees, the Committee had, according to the request of the delegate of Greece, informed the Coordinating Committee of the Conference that jurisdiction of the question of Charter review was to rest *only* with Committee I/2. Ibid: 252.

³²⁷ Ibid: 423-424, 251-252. For the final text see (Repertory Practices of the United Nations 1945-1954): 401.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

The midnight-hour adoption of the special Charter review provision was a cause for celebration, with the delegates of the Committee, as well as the Commission (which considered the compromise as a victory for *all* the powers, *big* and *small*), jubilant at having removed the last hurdle in framing a Charter for the new world organisation. The Saturday evening meeting of the Committee had actually lasted into the early hours of the following day, according to the request of the delegate of Greece, practically the last day and working session of Committee I/2 and therefore of the Conference's work on Charter decisions.³²⁸ The Committee reports in the following week had to be rolled out to the Commission reports and discussed at the plenary sessions, which had more of a reporting and commenting function, as opposed to being responsible for introducing any amendments or inserting any substantive provisions into the Charter. The Coordinating Committee, the Committee of the Jurists, and other supporting committees had to make sure that the language and grammar of the adopted

³²⁸ The Committee started work on Saturday night at 9:55pm and concluded its business the next day, Sunday, 17 June 1945, at 12:35am. Committee I/2 had one more meeting on the Sunday afternoon, which was to be its last. (UNCIO - Volume VII: Commission I, General Provisions 1945): 249, 253, 261.

texts was correct, and incorporated into the final Charter document, with the appropriate translations, ready for the final plenary of Tuesday, 26 June and the signing ceremonies.

It is noteworthy that the special review embedded in the Charter had, at the time, the full support and commitment of the permanent members, according to the Conference

Rapporteur's report:³²⁹

The US delegate had stated that “his Delegation considered the method of calling the special conference democratic and liberal”;

The UK delegate believed “that the provision in the Charter for calling the conference would add a certain solemnity to it. It assured, he believed, that, subject to the Assembly of that day, the conference would be held”;

China had already heralded that “one day” the veto might be eliminated; and France, the newest member of the P5, had fully supported Article 109, paragraph 3.

The only P5 member that had some reservations was the USSR. While the Soviet preference was for a *two-thirds* majority versus a *simple majority* of the Assembly to call the special conference, the USSR, in principle, and similar to the other four Big-5 members, was in full agreement about holding the special Charter review in 10 years' time.

As for the majority of the smaller powers, including the 30 states that at some point during the conference had either formally submitted motions or spoken in favour of a Charter review conference—and which had linked their submission regarding the inequality of the Council and the “evil” veto to the possibility of reviewing and revising the Charter at some point in

³²⁹ Ibid: 222, 248, and 460.

the future—they had now secured the P5’s “conciliation and good-will”, as well as its promise. Moreover, the Rapporteur had explicitly noted and recorded the *unanimity* and the conciliatory spirit of the P5 on the subject, reporting in San Francisco that:³³⁰

Delegates of the sponsoring governments and of France stated that the American proposal had their support. They stated that the proposal was offered in the spirit of conciliation and good-will.

The UN could now go to work. All the states had yielded to the Big-3 and to the two co-opted permanent members in a collective security “plus more” global governance scheme, in which all the member states would entrust and share sovereignty in the UN organisation, albeit with the exception of the P5. However, it was widely believed that this unequal sovereignty sharing would last only for a transitional period, and that, after the end of the war, and after member states had gained some “experience” in world governance, the Charter would be reviewed, and most likely revised, after the 10 years had elapsed. In fact, the delegates were so sure that the general and special future review conference would be held, that the Rapporteur of Commission I to the plenary, immediately before the end of the Conference, on 24 June, announced that the delegates had already selected the venue for it:³³¹

In this connection the Turkish Delegation suggested that the conference ten years hence be held in the city of San Francisco; in recognition of the excellent manner in which the present Conference was managed by the Government of the United States of America, and in ... this City of the Golden Gate. This suggestion was met with general approval.

The great compromise of those last few days at the Conference, leading to its jubilant and successful completion, resulted in the permanent members dictating the formula in

³³⁰ Ibid: 221, 466.

³³¹ (UNCIO - Volume VI: Commission I, General Provisions 1945): 251.

Commission III, but leaving the door open in Commission I for a genuine review and a more democratic version of the Charter in a decade's time.

The *letter* of the compromise reflected in the text of Article 109(3) was that, with a *simple majority* vote of the Assembly and of the Council, the holding of a general review conference of the UN Charter in 10 years' time was now assured.

The *original intent* and the *spirit* of the Article was, in fact, in its *quid pro quo* and promise that the majority weaker states would acknowledge the P5's supremacy, at least temporarily, and would empower them and entrust them with keeping the peace and delivering on the other great ideals of the UN. In exchange, the P5's promise was clear—there would be a special review conference and a simple majority of the states could decide to hold it.

Alterations and even the elimination of the veto would be possible, and any decisions taken by a *two-thirds majority* at the special conference would be honoured by the permanent members refraining from vetoing its implementation.

The most multi-functional universal organisation the world had ever created—the United Nations—was ready to perform its mandate of global governance.

CHAPTER 6

UNLEASHING THE FORMULA AND THE MEMBER STATES’ QUEST TO INVOKE ARTICLE 109: TOO EARLY FOR VETO “ABOLITION”?

6.1 Introduction

As explained in the previous chapter, the UN Charter was concluded in the closing days of World War II as the proposed instrument of the dominant victors. The Big-3 had also acted as the proxy for France, and, to a large extent, for China, in formulating the special privileges of the P5. The sponsoring governments then presented the Dumbarton Oaks proposal plus the latest veto decision of the Yalta Conference, to the world’s smaller powers in San Francisco in April 1945.

The three months’ discussions at UNCIO were primarily a presentation by the group of 3+2 of their model of a UN and how it could provide for peace and security, and for the other 45 countries simply to present their own wish list (such as the incorporation of human rights, economic and educational development, and emancipation for the colonies). None of the other 45 countries at the Conference was there to insist on its requirements for the UN, or to challenge the proposed Charter, if it meant the risk of being excluded from the organisation.

However, the only exception, exciting vocal opposition, was related to the veto privilege of the P5 in the SC. The Independent States present at the UNCIO—the handful of countries that had not been directly affected by the war, because of their geographical distance, and

because they were not a colony, or under the military occupation of the P5—challenged the veto privilege and the exceptionalism it prescribed at the SC. These countries, mostly from Latin America and Oceania (Australia and New Zealand), particularly disliked the veto in the case of one of the P5 being party to a conflict and still retaining its veto—and thus being able to exclude itself from any UN decisions and sanctions. Some of these states, although willing to accept the P5’s privileged status for now in exchange for peace, wished to deal with this inequality in the Charter at some point in the future. Moreover, those states were also worried about the expanded privilege of the veto granted to the P5, not only under the headings of *peace and security* and what became known as Chapter VII, but also in the provisions for Charter Amendments, because of the potential for the future freezing of the Charter in its current form.³³²

This vocal opposition, as articulated by Peter Fraser, Prime Minister of New Zealand, under the leadership of Herbert Evatt, Australian Minister of External Affairs, and with the backing of most Latin American countries, led to a compromise and the creation of a new article to allow for a comprehensive review of the Charter under Article 109, particularly paragraph 3 of the article, which essentially promised a review of the whole Charter in 10 years’ time.

This chapter and Chapter 7 chronologically examine the formal events that occurred at the UN in connection with a general review conference to review the Charter, as provided for under paragraph 1 or paragraph 3 of Article 109. In particular, the invocation and the current legal status of paragraph 3 will be examined.

³³² The amendment provision mentioned in Chapter XI of the DO charter proposal became part of Chapter XVIII in the final Charter, which contains Articles 108 and 109. It should be noted that the actual section headings and the chapter numbers in the DO proposal do not always correspond with those in the final UN Charter as it was adopted. The full text of the DO proposal can be found in: (United Nations Committee of Jurists 1945): 453-460.

The early attempts at Charter revision in the first 10 years of the UN's existence is the focus of this chapter. Who were some of the member-state stakeholders of the Charter at that period? What were the main arguments of those states that wanted the Charter to be revised, and of those that wanted it to remain unchanged? What procedural and legislative actions were taken in the GA to review the Charter, and how successful were those attempts in the direction of achieving Charter revisions?

The first few years of the UN were characterised by the repeated use of the veto, which had caused the UN to become dysfunctional not only on decisions related to substantive issues, such as peace and security, or admitting new member states, but also in relation to procedural and administrative matters. Council decisions on trivial items, such as approving delegates' credentials, authorising new committees or commissions, or even approving agenda items, were encountering P5 opposition and hitting a brick wall (as analysed in Section 6.2).

This impasse was disappointing to the smaller nations, which had seen the creation of the UN as a sign of the major powers' consent and unanimity. But now, immediately after World War II, they were witnessing the rivalry among the P5, which was making the UN incapable of resolving small and large conflicts, such as wars of aggression and the wars of independence and self-determination that were now flaring up. The frequent use of the veto in unexpected and even procedural matters, which the Big-3 had not foreseen at Yalta, made some P5 members, particularly the US and the UK, highly frustrated with the voting procedures in the Council. This resulted in an attempt by one of the permanent members, as well as some of the smaller member states to seek legislative and procedural methods to revise the Charter and make the UN work as it was envisioned.

6.2 The UN Goes to Work: The Veto is Unleashed and the Attempts to Modify or Eliminate the Veto

From 25 April 1945, the date on which the UNCIO had started its session to finalise the creation of the UN in San Francisco, to 10 January 1946, just 10 months later, when the first UN GA session was convened in London, the world underwent monumental change.

In May 1945, while the UNCIO Conference was still in session, Germany surrendered. Less than two months after the UN Charter signing ceremony on 26 June in San Francisco, on 6 and 9 August 1945, the US demonstrated the destructive power of atomic weapons in the two apocalyptic nuclear bombings of Japanese cities. The unleashing of nuclear weapons heralded the “atomic age” and its implications for future warfare and the new balance in international power relations.

Japan surrendered in September 1945, and World War II ended. With the completion of all the domestic ratifications required for the Charter only four months after the San Francisco Conference, on 24 October 1945, the UN Charter came into force.

Less than three months later, on 10 January 1946, the first session of the UN GA was held. In that same month, the first session of the SC was also convened, both at the UN’s temporary site in London. The work of the UN had officially started. Thus, within several months, the world had transitioned from war to peace, and the international organisation that had been created with multiple objectives, including the main mission of keeping global “peace and security”, was about to be tested.

However, the spirit of San Francisco among the Big-3 and the member states was short-lived. The ideological conflict between the communist East and the capitalist West, coupled with

the emerging struggle for self-determination and independence of subjected peoples and colonies that would dominate international global relations for nearly three decades, meant that signs of polarisation and conflict among member states had already emerged by the time of the UN's first session.

Disagreements among the permanent members, problems with the deficiencies in the UN Charter, and the inability of the SC to prevent armed conflicts and to cope adequately with the geopolitical shifts in international relations, became apparent shortly after the war. In view of all this, a number of states were already prepared to reform and revise the Charter, starting with the GA's first session.

Within the first year of the UN's operation, interest in UN reform was already apparent on the part of some of the smaller states, which took the view that the UN Charter had been put together hastily and under wartime duress and special circumstances, and was therefore inadequate. In the first session, the GA dealt with a request by Cuba to review and revise the Charter based on Article 109. Further, the Philippines' request to "delete" the "veto privilege" was submitted to the *GA First Committee* for discussion. Later, during the debates in the First Committee, the Philippines withdrew its proposal in favour of that of the Cubans'. However, with many member states wanting to give the Charter a try before attempting reforms, the Cuban–Philippines draft resolution received little support and was rejected.³³³

In the meantime, with the old "enemy states" gone, as referenced in the Charter just a year previously, the new enemy states, particularly in relation to the *East–West* conflict, were now forming. The UN's spirit of cooperation among member states and the San Francisco

³³³ (Repertory Practices of the United Nations 1945-1954): 402. See also GA (I/2), 1st Committee, 42nd meeting report: 293.

honeymoon of only seven months earlier was clearly over when the Soviet Union cast its first veto in the second month of the SC's existence, on 16 February 1946.³³⁴

When the Charter was drawn up, it had generally been perceived that the veto would be used sparingly, and only when a P5 member was implicated in Chapter VII military or economic sanctions. However, with the use of the veto by the Soviet Union beginning in the UN's first month of operation and, in particular, its frequent use by the USSR on what were perceived to be "procedural matters", member states began to consider how to deal with this Charter-granted privilege that was proving problematic. Not only the smaller states, but even the US, which had emerged as the new and only nuclear weapons superpower in the world, saw their attempts at conflict resolution and admitting new member states frustrated by the unanimity requirement of the P5. The US and the UK were particularly wary of unexpectedly facing the veto in the so-called *double veto* cases.³³⁵ The Article 27 provisions on SC voting provide that decisions on procedural matters do not require unanimity, whereas those on substantive matters do. But, in practice, the P5 were able to apply the veto even to questions relating to whether an issue inherently constituted a substantive question, or whether it could be considered procedural—thus the double veto.³³⁶ Therefore, not only the smaller states, but even two of the P5 were early proponents of changes to the veto structure.

³³⁴ This veto was used in relation to foreign troops leaving Syria and Lebanon. (ODS 1993-2012): 37.

³³⁵ For an example and discussion of the double veto, see the SC debate in 1948, when the Council was deciding to create a fact-finding subcommittee on the situation in Czechoslovakia. (UN Office of Public Information 1947-1948): 457-458.

³³⁶ Using this technique, a P5 member could choose to characterise a procedural question they opposed as substantive, and then veto it, thereby circumventing Article 27, which does not grant the permanent members veto privileges for procedural items. Thus, they would then be able to block any procedural item.

By the second part of the 1st session of the GA, the debate on SC voting had been gaining momentum, and on 13 December 1946 the GA adopted Resolution 40(I), addressed to the SC, indicating that the Assembly:

*Recommends to the Security Council the early adoption of practices and procedures, consistent with the Charter, to assist in reducing the difficulties in the application of Article 27 [SC Voting Procedures] and to ensure the prompt and effective exercise by the Security Council of its functions*³³⁷

In other words, the GA, interpreting its role as that of the central organ of the UN, considered it to be within the scope of its powers (as set out in Article 10 of the Charter) to request the SC to put its house in order.

6.3 Calls for “abolishing” the veto

By the 2nd UN session (1947–1948), the debate on voting procedures in the SC had become much more heated, and some member states were asking for the outright abolition of the veto. The Argentinian delegation, at the outset of the 2nd session, requested the GA to add the item "Convocation of a General Conference under Article 109 of the Charter to abolish the privilege of the veto" to the Assembly's agenda.³³⁸

With the GA's presidency having been assumed by Argentina for that year, Dr Jose Arce was the President of the Assembly. With his support, the delegation from Argentina, following up on their agenda item, submitted a draft resolution (A/351) on 22 August 1947, proposing that, immediately after the end of the GA's current session in three days' time, a Charter review

³³⁷ (General Assembly Documentation Center 1946-2015).

³³⁸ (UN Office of Public Information 1947-1948): 59. See also GA Document A/330.

general conference be held to review the Charter, particularly in respect of the SC voting procedures and abolition of the veto.³³⁹

The Russian delegation, under the leadership of Andrei Gromyko,³⁴⁰ strongly opposed the Argentinian draft resolution and the convocation of the general conference for the purpose of reviewing the Charter. Gromyko, one of the drafters of the Charter at Yalta, as well as at San Francisco, argued that the unanimity of the super-powers was the main pillar of the UN, and that the campaign to do away with the veto, in his view, served only to impose on the USSR the will of other nations.³⁴¹

In addition to the USSR, some of the other permanent members who feared abolition of the veto opposed the Argentinian proposal. In view of this P5 opposition, and particularly that of the USSR, the Syrian representative proposed a friendly amendment to Argentina's draft, in which the review conference would be called upon to "amend" rather than "abolish" the veto privilege. The amended Argentinian draft resolution, at the General Committee, received the required votes to be sent to the Assembly plenary for discussion and possible adoption.³⁴²

In parallel, Australia, one of the other middle powers at the San Francisco Conference which had opposed the veto, proposed its own draft resolution on issues related to SC voting, focusing on the previous year's 1st session of the GA, in which the Assembly had requested, in Resolution 40(I), that the SC remedy the deficiencies in its voting procedures. The

³³⁹ Ibid; see also GA Document (A/351).

³⁴⁰ (UN Office of Public Information 1947-1948): 1065. Andrei Gromyko, the Permanent Representative to the UN, was the Soviet Union's delegate to Dumbarton Oaks and the chief delegate at the San Francisco Conference. He later became head of foreign affairs, and the Chief of the Supreme Soviet in the USSR, in the 1980s.

³⁴¹ (UN Office of Public Information 1947-1948): 59.

³⁴² Ibid: 59-60.

Australian proposal also received the necessary votes at the General Committee and was put on the GA's agenda for debate.³⁴³

The General Committee then referred the Argentinian and Australian proposals to the First Committee (the Disarmament and International Security Committee) to be addressed concurrently. At the First Committee, the US, expressing the frustrations and the “great difficulties” encountered with the voting procedures at the SC, introduced its own draft resolution.³⁴⁴ In the view of the US delegation, the time remaining was too short in the current GA session, and their proposal asked for the Interim Committee (the working committee between the sessions) to seize the subject and report on its work at the next (3rd) session of the Assembly. This resolution had the backing of three other P5 members—the UK, France, and the Republic of China—as well as several other states that considered the veto had “paralysed” the workings of the Council. The US draft proposal was, however, opposed by the Soviet Bloc, with the USSR, Poland, Czechoslovakia, Ukraine, Byelorussia and Yugoslavia against the US proposed draft from the outset.³⁴⁵ The Bloc's argument was that the unanimity principle at the Council was the *sine qua non* for the existence of the UN, and that the veto discussion should not even have been on the GA's agenda in the first place. Further, the Soviet Bloc was opposed to any kind of tasks being assigned to the Interim Committee, since it considered it illegal and an illegitimate creation of the Assembly.³⁴⁶

In addition to the six-nation Soviet Bloc, there were other countries that opposed the US proposal. But opposition in this latter group was mostly based on the fact that the US

³⁴³ Ibid.

³⁴⁴ Ibid: 60.

³⁴⁵ Ibid: 61.

³⁴⁶ Ibid.

proposal did not go far enough, or that the forum for discussion of such an important topic should be the Assembly itself, and not the Interim Committee. On these grounds, Chile, India and Egypt, among others, had stated that they would abstain from voting on the US draft resolution.³⁴⁷

Despite this opposition, the US draft resolution received the required majority vote at the First Committee and was sent to the floor of the Assembly. Argentina, taking the view that the US proposal was inclusive of all other relevant proposals and that its utilisation of the Interim Committee between the GA sessions for an extended period of time could act as a “pseudo” review conference on at least the topic of the veto, withdrew its draft resolution in favour of the US proposal.³⁴⁸

As to the Australian proposal, Poland, as a member of the SC at the time, and in direct response to the Australian draft and request, submitted a letter to the First Committee stating that the SC, at its next session, would report on the results of its recommendations on the topic of SC voting procedures, as raised by GA Res. 40(I).³⁴⁹ In other words, the SC’s self-assessment of how its voting should be carried out was to be delayed for one more year.

Therefore, of the three proposed resolutions on the desirability of Charter review—and especially revisions to the Council veto privilege—only one, the US draft resolution, was sent to the floor of the Assembly for debate.

The GA picked up the debate on the US draft resolution at its 122nd and 123rd plenary sessions, in November 1947.³⁵⁰ Since the proposed resolution did not contain any specific

³⁴⁷ Ibid.

³⁴⁸ Ibid: 61.

³⁴⁹ Ibid: 59-61.

³⁵⁰ See GA First Committee document A/501; and also (UN Office of Public Information 1947-1948): 61.

proposals, and the detailed recommendations for the reform of the voting procedures was entrusted to the Interim Committee to undertake, the discussion on the resolution that followed mostly involved generality and ideology, rather than the specifics. In those two plenary sessions, there was a heated debate among the member states of the young UN. For the Soviet Bloc, the veto was existential. With China being represented by the Republic of China (Taiwan), the Soviets felt that, without the veto, they would always be out-voted by the other four SC permanent members, who basically shared the same political and economic outlook.

The position of the Soviets is well summarised in this paragraph from the Assembly's official meeting records:

It would appear, the U.S.S.R. representative stated, that certain states had accepted the principle of unanimity at San Francisco and had signed the Charter only to struggle against its basic principles as soon as it had been adopted.

...

The attack upon the "veto" constituted a danger to the very existence of the United Nations. While the Argentine delegation openly urged the abolition of the "veto", the representatives of the United States and the United Kingdom professed to take their stand in favor of the principle of unanimity. In actual fact, however, they attempted carefully and cunningly, but consistently, to circumscribe that principle.³⁵¹

The Soviet delegate, in defence of his country's frequent use of the veto, denied, at the Assembly's plenary session, any abuse of voting behaviour and defended the USSR's 22 uses of the veto. The Soviet delegate claimed that these 22 vetoes (deployed in almost the same number of months, since the founding of the UN) had, in essence, been used in relation to

³⁵¹ Ibid: 61-62.

only four questions: “the *Spanish question*, the *Greek question*, the *Corfu Channel question* and the *admission of new Members*.”³⁵²

On the second day of its deliberations, on 21 November 1947, the Assembly at its 123rd plenary adopted the US proposal as Resolution 117(II).³⁵³ The resolution, making reference to the GA’s powers under Article 10 (which enable it to make recommendations to any UN organ), requested in its operative paragraphs that the Interim Committee:³⁵⁴

1. *Consider the problem of voting in the Security Council, taking into account all proposals which have been or may be submitted by Members of the United Nations to the second session of the General Assembly or to the Interim Committee;*
2. *Consult with any committee which the Security Council may designate to co-operate with the Interim Committee in the study of the problem;*
3. *Report, with its conclusions, to the third session of the General Assembly ...*

As planned by its supporters, therefore, the Interim Committee, according to paragraph 1 of the resolution, was to consider “all proposals” submitted, including the elimination of the veto, which had been requested by Argentina and many other independent small and medium powers.

Towards the end of the second year of the UN’s operation, and going into the 3rd session, the different stakeholders in the SC voting procedures formed and their views crystallised. They can be grouped as follows:

³⁵² Ibid: 62; (ODS 1993-2012).

³⁵³ Res. 117(II) was adopted with 38 in favour, 6 against and 11 abstentions. The 6 negative votes came from the Soviet Bloc countries, and the 11 states which abstained were mostly those who had suggested that the resolution did not go far enough, or that the scope of the work was not suitable for a committee, and should be taken up by the Assembly or a larger forum. (UN Office of Public Information 1947-1948): 63.

³⁵⁴ (General Assembly Documentation Center 1946-2015): A/RES/117(II) (1947).

I. The *veto abolitionists* – the States that wanted the veto to be abolished altogether. These countries and their delegates, such as Argentina, Australia, Chile, Turkey, Egypt and New Zealand, among others, had recent memories of the 1945 UNCIO Charter debates on the P5’s privileges, and particularly the objection to the veto. Many of the state representatives, in the first few years of the UN’s operational sessions, were in fact the same individuals who had taken part in the San Francisco Conference. To these delegates, such as Jose Arce of Argentina, or Sir Carl Berendsen of New Zealand, and their respective governments, the time for the fulfilment of the *promise of San Francisco* to revise the Charter had already arrived.³⁵⁵ The UN, in its first two years of operation, owing to the lack of super-power unanimity, had turned out to be dysfunctional, and they had been proven right in their prediction. Therefore, the time to act on the Big-3’s concession granted in return for their endorsement of the UN Charter—the Charter review provisions enshrined in Article 109—had arrived. Consequently, these countries did not wish to wait to try out the Charter further, but instead wanted substantive revisions to the SC voting procedures contained in Article 27 *now*. In the case of Argentina, New Zealand and some other states in this group, not only did they want the total elimination of the veto, they also wanted this addressed in a legitimate forum—the general conference to review the Charter, as specified in paragraph 1 of Article 109, where they would formally do away with the veto and make the Council’s representation more democratic and equitable.

³⁵⁵ (UN Office of Public Information 1947-1948): 1050-1052.

II. The Charter *reformists*—the states in this group were led by the US and the UK. These two P5 states (which were also two of the Big-3) and their supporting states, which were mostly the countries in their spheres of political, economic or security influence, supported revisions to the Charter in order to save the UN from what the US delegates termed “paralysis”.³⁵⁶ The leader of this group, the US, favoured majority decision-making in respect of some issues, such as procedural matters (part of the problem was the disagreement on what could be categorised as procedural), creation of new organs or committees, fact-finding missions, and admission of new member states, and argued that this could be achieved by revising Article 27 (the SC voting procedures). In the case of the US, there was even domestic popular and political pressure beyond the US administration’s wishes to democratise and empower the UN, in line with a federal world government.³⁵⁷ The late 1940s and the early 1950s was an active period in US legislative drives in this direction. The US Senate’s Foreign Relations Committee drew up draft resolutions, while state legislatures adopted resolutions relating to Charter revisions and the strengthening of the role of the UN, and even the promotion of a federal system of world government.³⁵⁸

³⁵⁶ Ibid: 61.

³⁵⁷ During the period from 1945 to 1951, the popular world government movements in the US included such prominent figures as Albert Einstein, Supreme Court Justice William Douglas, and future vice-president Hubert Humphrey. The United World Federalist movement in the US claimed more than 100,000 members, with such diverse membership as the future Democratic Senator Alan Cranston and the future Republican President Ronald Reagan. Academics in various American universities had interests in the subject of world government, including at the University of Chicago, which, during that period, funded a programme under the heading of *Committee to Frame a World Constitution*. Thirty US State legislatures had passed resolutions urging the federal government to share sovereignty with other world states, and 111 senators and congressman had drafted a joint resolution calling for the US government to take steps to strengthen the UN along the lines of a federal world government. Among its sponsors were two future presidents, John F. Kennedy and Gerald Ford. See Chapter 7, Section 7.2 and n 636 below. For a brief summary of the matter, see (Weiss, *What Happened to the Idea of World Government 2009*): 253-271.

³⁵⁸ For an example of the US legislative initiatives, see, for example, the House, HCR-64, and the Senate, SCR-56, draft resolutions. (Baratta, *The Politics of World Federation: From World Federalism to Global Governance 2004*): 357-358, 461-462, 578. See also (Baratta, *The Politics of World Federation: United Nations, UN Reform, Atomic Control 2004*): 3-4; and (Center for Legislative Archives (USA)-Committee on Foreign Relations 1947-

However, the US administration and the UK government were following a much more conservative path, and in fact did not promote majority-decision making on all SC matters, being keen to preserve their veto privilege, particularly for Chapter VII items concerned with economic sanctions and military action.

III. The Charter *conservatives*—these states were led by the USSR, the third member of the Big-3, and the lone P5 member of the communist bloc. This group consisted of the six Soviet Bloc nations: the USSR, Byelorussian SSR, Czechoslovakia, Poland, the Ukrainian SSR and Yugoslavia.³⁵⁹ For this group, the Charter was fine as it was: it was what they had bargained for, including the veto, and what they had agreed and signed up to at San Francisco. In their view, it was other states' non-compliance with the Charter that was the main reason for the difficulties the UN was experiencing. Moreover, for the Soviet Union, the majority of UN member states, including the other four members of the P5, were antagonistic to its regime, and it therefore regarded the veto as an existential matter. As Andrei Gromyko had stated in the Assembly, the veto was a “*sine qua non*”. It was this that led to the repeated threat by the Soviet Union that no veto for the USSR meant that it would leave the Charter, thereby spelling the end of the UN. Thus, the Soviet Bloc's message during these

1968). A more extensive list of draft resolutions before the Senate, including SCR-56, can be found in the Digital Collections of the University of Wisconsin: (University of Wisconsin Digital Collection 1950).

³⁵⁹ France and the Republic of China (Taiwan) at times shifted position between the Charter *reformists* and the *conservatives*. Both of these countries, not being part of the Big-3 framers of the Charter, were possessive of their status as part of the P5. In recognition of their newly obtained privileges, their voting record, particularly in the case of France, was usually in opposition to any GA action that could have diluted these privileges. Although both France and China were co-sponsors of Joint Resolution 267(III), which reformed some of the SC voting practices, France's opposition to both Charter review (Article 109) in 1955 and Charter amendments (Article 108), related to the SC and ECOSOC membership expansions in the 1960s, can be cited as examples of its Charter *conservatism*.

years was very clear and unrelenting: *no* Charter review, and *no* change in the veto privilege.

By the 3rd session of the GA, and while the Interim Committee (between the 2nd and 3rd sessions) commenced its work in the summer of 1948, of the three categories of stakeholders mentioned above, the abolitionists were the most proactive, offering several alternative options for replacement of the veto.

In this group, New Zealand's UN delegation, under the chairmanship of Sir Carl Berendsen,³⁶⁰ offered support for any proposal that would eliminate or substantially attenuate the SC voting structure. In addition to its offer of general support for abolishing the veto, it alternatively proposed—in view of the fact that procedural matters were already based on simple majority voting—that a majority decision of four out of five of the P5 should be viewed as sufficient for the SC's substantive decisions to carry.³⁶¹

Turkey and Argentina both suggested simple majority voting at the SC for Chapter VI (Pacific Settlement of Disputes) and Chapter VII (Sanctions) decisions, with no P5 veto privilege.³⁶² Belgium recommended that requests to the ICJ for advisory opinions should be treated as procedural matters (no veto),³⁶³ and Canada recommended that voting procedures should be devised so that “no state is Judge in its own case”.³⁶⁴ Lastly, the most radical proposal for revising the SC voting procedure was the Argentinian proposal to not have any

³⁶⁰ (UN Office of Public Information 1947-1948): 1050-1052. Another member of the New Zealand team of delegates to the UN at the time was Dr. W. B. Sutch. Ibid: 1087. In a controversial case in the 1970s, Dr. Sutch was accused of spying for the USSR by the New Zealand Security Intelligence Services. However, after a year of investigations and a trial, he was acquitted.

³⁶¹ (UNRIC 1946-2000): A/AC.18/38. See also (UN Office of Public Information 1947-1948): 289.

³⁶² (UNRIC 1946-2000): A/AC.18/52 and A/AC.18/53. See also Ibid: 290.

³⁶³ (UNRIC 1946-2000): A/AC.18/50. See also Ibid.

³⁶⁴ (UNRIC 1946-2000): A/AC.18/49. See also (UN Office of Public Information 1947-1948): 289-290.

kind of privileged voting for the P5, totally “abolishing the privilege of veto”. This was to be accomplished by a call for a UN general conference for Charter review, in compliance with Article 109.³⁶⁵ In response to Soviet comments that the idea of “abolishing the veto” was *absurd*, the Argentinian delegate on the floor of the Assembly argued:

*The political conditions prevailing at present were not the same as in 1945. Experience had shown that those who had opposed the "veto" at San Francisco had been right. The "veto" was originally intended to maintain peace and to keep differences from arising, but the "veto" had not resulted in unanimity and had not worked in the interests of peace. Adverse comment from the U.S.S.R. delegation could not prevent the Argentine delegation from submitting its proposal to reform the Charter. Only those who would deny the right to modify the Charter were violating its principles.*³⁶⁶

The Interim Committee, in execution of Resolution 117(II), prepared a long list of recommendations to address the SC voting issues and impasses. This comprehensive examination of the voting procedures and proposals, under the heading “List of Possible Decisions of the Security Council”, contained 98 items in different categories.³⁶⁷

Further, the Interim Committee, in examining the different implementation strategies for its legal and procedural recommendations, examined three different options:³⁶⁸

- i. Implementation by means of interpretation.
- ii. Implementation on the basis of agreement among the five permanent members of the SC.
- iii. Implementation on the basis of convening a general conference to review the Charter.

³⁶⁵ (UNRIC 1946-2000): A/AC.18/12; see also Ibid.

³⁶⁶ (UN Office of Public Information 1947-1948): 62; see also (Repertory Practices of the United Nations 1945-1954): 402-404.

³⁶⁷ (UNRIC 1946-2000): A/578; *ibid*: 291-295.

³⁶⁸ *Ibid*: 295.

Of the four states out of the P5 participating in the Interim Committee's work, France and the Republic of China (Taiwan) preferred option (i), the US and the UK's preference was option (ii), and all the P5 present at the Committee opposed option (iii).

The abolitionists, however, preferred option (iii).

The different options were put to a vote and the majority of members voted in favour of option (iii) —that is, “*to hold a general conference to review the Charter*”, in line with paragraph 1 of Article 109—in order to implement the reform of SC voting procedures.³⁶⁹

Thus, at the Interim Committee, it seemed that the reformists' attempt to implement SC voting changes, while avoiding a review conference, had failed. In particular, the permanent members sponsoring the committee considered the choice of this option to be a setback, since the holding of a general Charter conference might trigger a chain reaction of UN constitutional changes, and become more than they had bargained for.

In anticipation of the Charter review general conference under Article 109(1), the Interim Committee went on to clarify that the SC decisions related to that article were to be considered “without the distinction between the permanent and non-permanent members”.³⁷⁰

In the final conclusions section (part IV) of its report to the Assembly, the Committee reiterated that this might be the right time to hold a Charter review conference:

Whereas the deficiencies observed in the present functioning of the Organization of the United Nations require due consideration, The Interim Committee recommends to the General Assembly to consider at its third regular session whether the time has

³⁶⁹ The vote count was 19 in favour, 7 against and 10 abstentions; *ibid.* It should be noted that the Soviet Bloc, in opposition to the existence of the Interim Committee, had boycotted the meetings, and was not participating in the Committee's work. (Yearbook of the United Nations 1948-1949): 16.

³⁷⁰ (UNRIC 1946-2000): A/578. See also (UN Office of Public Information 1947-1948): 295.

*come or not to call a general conference, as provided for in Article 109 of the Charter.*³⁷¹

6.4 Third Try at the Third Session—A Tactical Breakthrough?

At the first part of the 3rd Session of the GA, in November 1948, the Report of the Interim Committee was combined with a new request from Argentina and its supporters for the convocation of a general conference under Article 109 for a review of the Charter, and after being assigned to the First Committee was then referred to the Ad Hoc Political Committee.³⁷²

In November and December 1948, several draft resolutions on the reform of SC voting were introduced at meetings of the Ad Hoc Committee at the Assembly's 3rd session. The four permanent members of the US, UK, Republic of China and France presented a joint draft resolution seeking revisions and clarification of SC voting, and essentially asking themselves plus the USSR to “forbear” from the use of the veto in some cases.³⁷³ Australia introduced an amendment to the joint draft to the effect that the P5 should forbear from exercising all their veto rights, except in relation to the enforcement clauses under Chapter VII, and Argentina submitted its separate formal draft resolution on the convening of a general conference to review the Charter according to Article 109(1).³⁷⁴

The USSR, representing the Soviet Bloc, which had boycotted the Interim Committee's work, introduced their proposal for a resolution.³⁷⁵ The text of this draft resolution, while defending the unanimity principle and being critical of other proposals as “unnecessary

³⁷¹ Ibid: 296. See also (Repertory Practices of the United Nations 1945-1954): 403.

³⁷² (Yearbook of the United Nations 1948-1949): 426. The Argentinian proposal for a Charter review was being put forward for the second year in a row (A/586). It is to be recalled that the first year's request (GA Session II) was later withdrawn in favour of the US's resolution.

³⁷³ A/AC.24/20.

³⁷⁴ A/AC.24/33 and A/AC.24/31, respectively.

³⁷⁵ A/AC.24/34. See also (Yearbook of the United Nations 1948-1949): 426.

regulation and formalism in the activity of the [UN] organs”, was, however, somewhat more conciliatory than before in stating that the SC in its voting procedures should “take account of its past experience to apply the method of consultation and seek to improve the possibility of adopting concerted decisions.”³⁷⁶ In other words, since the Soviets up until that time were the only P5 state which had wielded the veto, the Soviet draft resolution could be interpreted as their readiness to use the veto more sparingly.

The Soviet draft resolution, which did not contain any concrete proposals, did not attract any support beyond the then six countries of the Soviet Bloc and was rejected.³⁷⁷

The Argentinian proposal for a Charter review conference had the support of most smaller and non-aligned powers, including New Zealand, Chile, Cuba and Egypt. These states observed that the trust they had extended to the Great Powers at San Francisco to act in unison had not been honoured, and super-power rivalry and the exercise of the veto had paralysed the UN and had prevented it from achieving its objectives, particularly in the area of maintaining peace and security. Argentina’s delegate, according to a summary of the meeting minutes, adopted the following position:

*The Great Powers had not kept their promise, and their persistent disagreement proved that the unanimity rule served no purpose, and that they would not or could not apply it. The United Nations, he argued, was faced with serious difficulties because of the right of veto or of the abuse of that right. He considered that a provision more satisfactory than the unanimity rule should therefore be found. In his opinion, a general conference was necessary to find a way out of the impasse confronting the United Nations. The purpose of the conference he was proposing would be not merely to abolish the veto, but to seek a solution of the problem.*³⁷⁸

³⁷⁶ Ibid.

³⁷⁷ Ibid: 429.

³⁷⁸ Ibid: 427.

The countries supporting the Argentinian draft resolution argued that, although they were aware that revision of the Charter would be difficult, in their opinion it was the only legal and fundamental way of dealing with the serious problem of the veto. In their view, convening a Charter review under Article 109(1) and dealing with the SC voting problem there would carry much more weight than just making a set of recommendations to the P5.

The Charter reformists and conservatives joined forces, with all the P5 in unanimity—including the USSR and the Soviet Bloc, and the US, UK, France, and their allies, as well as the Republic of China—to oppose the abolitionists, who supported the Argentinian proposal. The argument they put forward was that if a general conference to review the Charter was to be held now, it would do harm and lead to a division among the members of the UN. In their opinion, “the time had not yet come to convene a conference”.³⁷⁹

The Argentinian proposal was put to a vote and, by 12 votes in favour, 22 against and 10 abstentions, was defeated.³⁸⁰

Australia’s representatives, under the leadership of J.D.L. Hood,³⁸¹ put forward in effect a Plan B for the abolitionists, by proposing a draft amendment to the four permanent members’ joint draft resolution.

The Australian proposal to eliminate the veto, except in Chapter VII enforcement clauses, contained similar arguments to the Argentinian proposal, stating that the main reason for the near paralysis at the SC was the Great Power rivalry that had prevented the permanent

³⁷⁹ (Repertory Practices of the United Nations 1945-1954): 403-404; (Yearbook of the United Nations 1948-1949): 427-428.

³⁸⁰ Ibid: 429. See also (Repertory Practices of the United Nations 1945-1954): 402-403.

³⁸¹ (Yearbook of the United Nations 1948-1949): 61.

members from acting in unison, contrary to the San Francisco promise of P5 unanimity.

According to the summary minutes of the Ad Hoc Committee:

*Australia declared that the spirit of the Charter had not been observed in the use of the veto and that it had been applied in ways never intended by the San Francisco Conference and in ways contrary to the assurances given by the Great Powers at San Francisco.*³⁸²

The Australian amendment to the joint resolution was rejected by the main sponsors of the draft. The US, the UK, France and the Republic of China regarded the Australian proposed amendment as a misrepresentation of the character of their joint resolution and as “infringing upon the prerogatives of the five Great Powers”. Therefore, this amendment was also defeated.³⁸³ With all the other draft resolutions rejected, the Ad Hoc Political Committee approved the joint draft resolution and sent it to the floor of the Assembly plenary session for debate and a vote.

At the Assembly, the P4-sponsored draft was adopted as Resolution 267 (III).³⁸⁴ This resolution, referencing the powers conferred upon the Assembly by Article 10 of the Charter, essentially sets rules and guidelines for what are procedural decisions in the SC and therefore not subject to veto. The long list of procedural items provided in the Annex to the resolution was somewhat shorter than the Interim Committee’s proposed list but still contained close to

³⁸² Ibid: 428.

³⁸³ Ibid.

³⁸⁴ (General Assembly Documentation Center 1946-2015): G/RES/267 (III) (1949). Also of significance is the last paragraph of Resolution 267 (III), which:

4. Recommends to the Members of the United Nations that in agreements conferring functions on the Security Council such conditions of voting within that body be provided as would to the greatest extent feasible exclude the application of the rule of unanimity of the permanent members.

It seems the above paragraph is relevant to multilateral agreements that have decision-making interaction with the SC. For example, in the case of the SC and the ICC, it could be applied to prevent the veto from being used to stop the referral of a case to the Court. Another application could be in respect of the situations that the International Atomic Energy Agency (IAEA) refers to the UN that involve the Council.

50 items. The Annex covers a wide range of procedural questions, from *approval of the SC representatives' credentials*, to adoption of the method of *selecting [a] Security Council president*, to how to set up *SC subsidiary bodies*, how to decide *which conflicts or situations to consider* (adoption of agenda), and decision rules on many more procedural items.³⁸⁵

The adoption of Joint Resolution 267 (III) seems to have been a major tactical breakthrough for its main sponsors, the US and the UK. While it allowed them to keep the powerful veto privilege on what they perceived as substantive issues, it also provided for enough procedural rules—which were now acceptable to the USSR—to conduct the Council's day-to-day business. The alternative path to resolving the impasse was the second option of giving way to the abolitionists and convening the conference on Charter review. This option, in view of the fact that the World War II circumstances of 1945 no longer applied, probably meant that the majority states would now demand Charter revisions in the direction of a more democratic and representative SC, which in turn would have caused the loss of all or part of the P5's veto and other privileges. This latter option may also have led to some members—namely the Soviet Bloc—leaving the UN.

The fear of splitting the UN was the main factor cited by some neutral countries at the time, such as Turkey, Norway and Cuba, for switching to the reformists' side and opting for the joint resolution, rather than the more substantive option of the Charter review proposed by the abolitionists.³⁸⁶

For the US, the adoption of this resolution, with its package of procedural solutions, was a major accomplishment and breakthrough. However, the US still needed to fine-tune the SC

³⁸⁵ Ibid.

³⁸⁶ (Yearbook of the United Nations 1948-1949): 427.

voting procedure. For example, removing the P5 unanimity rule for admitting new members was on the US's agenda: an objective that Resolution 267 did not address.

As for the Soviets, who had opposed both the Argentinian and the joint draft resolutions, and had cast a negative vote at GA for Resolution 267(III), this latter outcome was more acceptable to them than the dreaded alternative of a Charter review under Article 109 proposed by the abolitionists. It should be recalled that the Soviets had boycotted the Interim Committee, which had done most of the initial work of preparing the long list of procedural items which was then incorporated into the Annex to Resolution 267 (III). However, the Soviets realised that complying with the procedural items in the Annex and, as recommended in the resolution, restraining their use of the *veto*, at least in minor cases, would be to their long-term advantage. Compliance with the resolution would avoid the risk of losing their SC privileges, by preventing a San Francisco-style conference and review.

As for the abolitionists, although the resolution at least removed the almost daily deadlock at the Council, it certainly was not the remedy for the substantive global problems the UN increasingly had to face. Moreover, the outcome did not address their demand for expanded and more equal representation at the Council.

In spite of three years of trying, the abolitionists came to the realisation that they were unable to hold a Charter review under paragraph 1 of Article 109, let alone implement any amendments or revisions to the Charter. This group of independent smaller and medium powers realised that, in addition to facing P5 opposition, they probably could not muster the *two thirds majority* required by paragraph 1 of Article 109 to convene a review conference. Therefore, their best option was to wait for a few more years, until the 10th session of the Assembly, for activation of paragraph 3 of Article 109, and the *one-time* opportunity of

holding a general review Conference with just a *simple majority*. The events leading up to the Assembly's 10th session, and whether Article 109 was acted on, and its legal significance, if any, is the subject of the next two chapters.

CHAPTER 7

THE UNITED NATIONS’ “CONSTITUTIONAL QUESTIONS” AND THE ACTIVATION OF ARTICLE 109(3). STATUS OF THE GENERAL REVIEW—NOT “AUSPICIOUS” OR PERMANENTS’ CHANGE OF HEART?

7.1 Introduction

This chapter examines the following: the events leading up to the adoption of GA Resolution 992(X), calling for the Charter review conference; the establishment of the Committee on Arrangements for a Conference for the Purpose of Reviewing the Charter; the debates and the output of this Committee; and whether a formal review has taken place.³⁸⁷ The period covered is a span of approximately 70 years, from the beginning of the functioning of the UN up to the writing of this thesis (2015). Particular attention is paid to the 12-year period when the preparatory Committee was actively meeting, from 1955 to when it held its last formal meeting in 1967. The period from 1968 until the present is then reviewed, in order to determine the good faith performance of Resolution 992 (X) and its authorised preparatory Committee after its last activity. The purpose of the fact-finding mission of this chapter is to gather deterministic data as to the legal and procedural status of Article 109(3) and Resolution 992 (X) and the UN’s respective constitutional and statutory compliance. The information presented in this chapter is then used in the next to analyse the legal aspects of

³⁸⁷ During the period reviewed, after the implementation of Article 109(3) was suspended in 1967, there were other UN “ad hoc” and “special” committees and forums that were formed to deal with Charter topics, some of which owed their origins to Res. 992 (X). However, none of their competencies included a review, and they are therefore covered under the UN reform section of Chapter 9.

Article 109 in order to determine whether paragraph 3 has in effect been rendered obsolete, or whether it remains in force and is still applicable. If the latter, then the issue is how the review conference may be convened without resorting to the more cumbersome paragraph 1 of Article 109, which requires a two-thirds majority for adoption.

As a preliminary matter it is necessary to briefly revisit the classification of the stakeholders in the UN Charter, which was introduced in the last chapter. This is a useful analytical tool to better deconstruct and understand the discourse of the 1950s and the 1960s in the UN's attempts to reinvent itself.

By the 1950s, the radical view of the abolitionists that the single reason for holding a review conference was to eliminate the veto had faded away. Both the veto abolitionists and the Charter reformists were by now in agreement that revisions to the Charter were needed, including revisions to the P5's voting privileges, and also that exactly what changes, and their scope, should be left to the review conference to decide.

Therefore, unlike the attempts at reform in the late 1940s, the abolitionists came to realise that there was no need to insist on a particular outcome before the actual review started. With this realisation, the veto abolitionists and the Charter reformists converged on the same goal—the convening of the Charter review conference. Then, at the Conference itself, they could work to achieve their desired outcome.

This being the case, our three categories of stakeholders in the previous chapter are now reduced to two:

The Charter *reformists*: comprising many of the smaller nations, plus three of the P5 members—the UK, the Republic of China and, in particular, the US, which was the most proactive of the P5 in the reformist camp.

The Charter *conservatives*: consisting primarily of the Soviet Bloc, plus some indecisive states, such as Israel and Sweden, which swung between the Charter conservatives and the reformists. Further, in addition to the USSR, France, the last member of the P5, can be considered as a stakeholder in this category. Although not openly opposing the reformists, France, during this period through to the 1960s, and based on its voting records, was siding with the conservatives.³⁸⁸

7.2 The Evasive Upcoming Charter Review and the UN’s “Constitutional Questions”

After a few years of passivity in the Assembly, as the promised tenth session approached, in the GA 8th and 10th sessions of 1953 and 1955, member states actively took up the topic of the Charter review again. The discussions of these years among the states’ representatives had the flavour of those of a constitutional convention or assembly. In the forum debates on what type of Charter revisions should be implemented, the veto abolitionists and the Charter reformists, mentioned in the previous chapter, were debating more than just the veto. Issues such as principles of *equal representation* and *expanded representation* (in the SC and the Economic and Social Council), *competency* of the different organs, *voting procedures*,

³⁸⁸ France, during this era, voted against or abstained from substantive decisions relating to UN Charter revisions, including Res. 992 (X) on invoking Article 109(3) in 1955, and Article 108 Charter amendments Resolutions 1991 A(XXIII) and 1991 B (XXIII) of 1963 relating to the expansion of the two councils of the SC and ECOSOC. The voting records of France in connection with Res. 992 (X) indicate that it simply abstained at the SC and apparently withheld voting at the GA (no records). (Yearbook of the United Nations 1955): 76.

national ratification procedures, and the degree of constitutionalisation, were all, *inter alia*, debated.

With the Korean War and the Cold War already having begun, and with ex-colonies beginning to emerge as independent sovereign nations, the role of the UN as the global governance institution, and thus the attributes of its Charter, were becoming crucial for many of these ex-colonies in regard to how and when they could become new states and recognised members of the UN. The UN's decisions as to whether to allow a new member to join and therefore formally exist in the community of nations, or its decisions under Chapter VII, revealing its power in imposing sanctions and waging wars, were beginning to highlight just what the Charter *could* and *could not* do.

The hope, the interest and the anxiety of the different member states in respect of the possibility of convening the promised 1955 Charter review general conference manifested themselves in the *constitutional question* debate at the Assembly of 1953:³⁸⁹ two years in advance of the date specified in the operative clause of Article 109(3).

At the GA's first general debate session of 1953, a group of Charter reformists representing the states of Brazil, Ecuador, El Salvador, Panama, Peru and Venezuela, among others, voiced the need for Charter revisions and advocated holding the general conference at the UN's 10th session, as provided for by paragraph 3 of Article 109, expressing their support for this.³⁹⁰ In addition, these countries were in favour of carrying out some preparatory work in anticipation of the 1955 review conference, starting at the 8th session.

³⁸⁹ The title *constitutional questions* was in fact used in the UN publications of that year. (Yearbook of the United Nations 1953): 45.

³⁹⁰ Ibid.

A second group of representatives, including those of the Netherlands, New Zealand, the UK and Egypt, without necessarily advocating changes to the Charter, expressed the view that conducting preparatory work for the general conference was important and advisable.³⁹¹

During the Assembly's general debate, those who spoke in opposition to Charter revisions, including the representative of Israel, doubted that the UN's effectiveness would be increased by any Charter changes. The representative of Sweden expressed the view that the veto was a reality in current international relations, and that the time was not right for turning the UN into a "world government". Consequently, he saw no immediate need to revise the Charter.³⁹²

The five-nation Soviet Bloc (the USSR, Byelorussian SSR, Czechoslovakia, Poland, and the Ukrainian SSR),³⁹³ as the main advocates of the Charter conservatives, expressed their opposition to any amendments to the Charter and categorically opposed holding any review conference. In addition, the Soviet view on the proposed preparatory measures was that it was "part of a campaign directed, mainly by the United States, against the fundamental principles of the Charter, particularly against the rule of unanimity of the permanent members in the Security Council."³⁹⁴

The only active P5 member in the reformist camp was the US. US official policy at the time was in favour of holding the review conference and revising the Charter. This in turn reflected strong civil society and popular movements in the US in the late 1940s and early

³⁹¹ Ibid. See also (Repertory Practices of the United Nations 1945-1954): 408-410.

³⁹² (Yearbook of the United Nations 1953): 45.

³⁹³ It should be noted that the Soviet Bloc had lost a member, and now represented five countries. The communist Yugoslavia, under General Tito, was showing more signs of independent foreign policy and was not voting with the USSR as a bloc. As will be seen later in this chapter, Yugoslavia was, from 1953 onwards, in favour of UN Charter revisions.

³⁹⁴ Ibid.

1950s which were advocating a world government, modelled after the US's own federal system.

US academics were also interested in the concept of *world peace through world law*, as proposed by Harvard Law School Professor Louis Sohn, by means of the transformation of the UN into a world government, and the University of Chicago had spearheaded a programme under the heading of the *Committee to Frame a World Constitution*.³⁹⁵

US legislative supporters of these ideas of *the rule of law* at the global level had introduced in the US Congress draft resolutions asking for the strengthening of the UN, along the lines of a federal world government.³⁹⁶ Although most of these draft resolutions were not adopted and remained merely drafts, a number of the more moderate versions were adopted.³⁹⁷ A significant example, known as the Vandenberg Resolution, was adopted in 1948, as Senate Resolution 239 at the 80th Congress. The operative paragraphs of this resolution instruct the State Department to hold the UN Charter review provided for in Article 109, if needed, with the objective of eliminating the veto on the questions of *pacific settlement* of disputes and *admission* of new Members.³⁹⁸

³⁹⁵ For further information on the University of Chicago's efforts on the Committee to Frame a World Constitution, and for a synopsis of the other world government efforts of the period, see (Weiss, *What Happened to the Idea of World Government?*). On Professor Sohn of Harvard promoting *rule of law* at the world government level, and the first edition of the epic *World Peace through World Law*, published in 1958, see (Grenville and Sohn 1958). See also Chapter 7, Section 7.2; and n 357 above and n 636 below.

³⁹⁶ For examples of these draft resolutions, see Senate Concurrent Resolution 56 (the *Tobey* or "World Federalist" resolution) of 1949–1950, also known as House Concurrent Resolution 64. (University of Wisconsin Digital Collection 1950).

³⁹⁷ (Scott 2005): 73-74.

³⁹⁸ (Archives n.d.). Resolution 239 was adopted mostly in response to the veto issue at the UN. In addition to the UN, the resolution was more generally applicable to allow for US multilateral relationships outside of the UN system: in particular, giving the US government a green light to enter into multilateral security arrangements without reliance on the SC. NATO, for example, in the history of its creation, refers to Resolution 239. See: http://www.nato.int/cps/en/natolive/official_texts_17054.htm

Another US Senate resolution, Resolution 126 of the 83rd Congress, of 1953, had created a special Sub-committee specifically on the UN Charter, in anticipation of the 1955 review conference.³⁹⁹

During the 1950s, John Foster Dulles, the US Permanent Representative to the UN and, from 1953 to 1959, Secretary of State, as well as a veteran of the UNCIO Conference in San Francisco, was promoting public discussions on UN Charter review, and personally wished for another great San Francisco-style conference on the Charter. These earlier sentiments were expressed by Dulles in 1950:

*... there is much to hope for, and little to fear, from another great world conference called primarily to modernize the United Nations in the light of its five years' experience, and to review broadly its basic objectives of peace, justice, human liberty, and regulation of armaments.*⁴⁰⁰

Against this backdrop of public and US governmental interest in Charter revisions, the US delegation, under the chairmanship of Dulles, spoke at the GA's general debate of 1953. The US delegation, referring to the US Senate resolution (Joint Resolution 239), expressed their support for holding the review with the goal of implementing Charter revisions, including the elimination of the *unanimity* rule on questions of *peaceful settlement of disputes* and the *admission of new Member States*.⁴⁰¹

In a somewhat uncoordinated fashion, but nevertheless with the same objective, the Charter reformist states at the 1953 GA's Legal Committee (the Sixth Committee) presented a number of draft proposals for the convening of the review conference. Argentina and Egypt jointly with Costa Rica and the Netherlands, made three separate, but similar, proposals

³⁹⁹ (McKendree 1954): 151.

⁴⁰⁰ (Scott 2005): 74.

⁴⁰¹ (Yearbook of the United Nations 1953): 45.

requesting preparations for the Charter review conference of 1955, provided for in Article 109(3). The Argentinian draft, in preparation for the review, included a paragraph that in effect instructed the Secretariat to conduct research on the UN's past and current constitutional and legislative practices, requesting:⁴⁰²

- (a) *a systematic compilation of the documents of the San Francisco Conference not yet published;*
- (b) *a complete index of all the documents of the San Francisco Conference;*
- (c) *a systematic and comprehensive study of the legislative history of the Charter; and*
- (d) *a repertory of the practice followed by the main organs of the United Nations on given subjects.*

This paragraph of the Argentinian draft was later adopted in Resolution 796 (VIII) of that year, which was also incorporated in GA Resolution 992 (X) of 1955. Its *repertory of the practice at the UN*, in particular, has become an ongoing effort, and a useful document which has been periodically published up to the present, and has been praised as an invaluable UN research tool by both government leaders and academics.⁴⁰³

Egypt submitted a separate draft proposal accompanied by a memorandum noting that the UN Charter had been drafted in *extraordinary circumstances* that no longer prevailed, and that it therefore needed revisions. Egypt's proposal, which was later supported by Costa Rica as a joint draft resolution, in addition to requesting that the review take place, also requested a

⁴⁰² Ibid: 46.

⁴⁰³ At the UN World Summit of 2005, the *Repertory* was praised publicly, and in the same year a GA resolution was passed encouraging academic institutions to cooperate in the research work related to the *Repertory*. In consideration of the UN's budget constraints, the *Repertory* is now being prepared in voluntary cooperation with several universities around the world. Recently, it has been published at 10-year intervals, with the last supplement covering the period to the end of 2009. See: <http://www.un.org/law/repertory/>.

technical committee to be set up to complement the Argentinian proposal to consider Charter revision proposals.

The third proposal submitted to the Legal Committee was the Netherlands' draft resolution. The Netherlands' proposal was similar to the Egyptian proposal, explicitly asking for member states' input on the Charter revisions. However, instead of being handled in a committee, the Netherlands proposal asked for *all* member states directly to submit their views on Charter revisions prior to the 10th session.⁴⁰⁴

At the same time, a draft resolution, referred to as the joint Six-Power Resolution, sponsored by Canada, Cuba, New Zealand and Pakistan, and inclusive, again, of Argentina and the Netherlands, was submitted to the Legal Committee. This called for the review conference, and in its operative paragraph 2 specified the details of the invitation for soliciting Charter revisions, setting a deadline of the first quarter of 1955 for collection of member proposals.⁴⁰⁵

France and Belgium submitted an amendment to the Six-Power Resolution, which, while concurring with the holding of the Conference, intended to restrict the invitation to obtain Charter revision requests. The amendment therefore rejected paragraph 2 of the Six-Power Resolution on the elicitation of Charter revisions in advance. France presented two objections: a technical one, pointing out that, in France's view, the operative part of Article 109(3) only empowered the GA to call for the setting of the *date* and the *place* of the general conference, nothing more; and further objecting to inquiring about constitutional change recommendations two years in advance of the conference. In the view of France and

⁴⁰⁴ (ODS 1993-2012): Argentina, Meeting A/2415; Egypt, A/2466; Netherlands, A/2442. See also (Yearbook of the United Nations 1953): 46.

⁴⁰⁵ (GA 6th Committee (Legal Committee): A/C.6L.306/rev.2 1953).

Belgium, this might cause *rigidity* of the members' position at the review conference, which they opposed. Therefore, their proposed amendment was to delete paragraph 2 of the Six-Power Resolution, which, in their view, addressed the substantive question of Charter revisions and was not within the scope of Article 109(3).⁴⁰⁶

The Soviet Bloc, while categorically opposed to any kind of Charter review, was in favour of the French amendment. To the representatives of the Soviet Bloc, the whole question of the preparatory work for the review of the Charter involved a plan by the US to change the Charter, allowing the UN to become an instrument for US world domination. In the summary report of the Sixth Committee of 1953, the Soviet Bloc's criticism of US foreign policy was stated as follows:

*In 1953, a special committee of the United States Senate had been set up to study the proposals for Charter revision. The Chairman of that committee had said that he regarded the principle of unanimity as a great weakness in the Organization. In addition, it was stated, the United States Secretary of State, John Foster Dulles in a speech delivered in Boston on 26 August 1953 had stated that the Charter was out of date and that the principle of unanimity failed to meet the present day needs of the United Nations. The aim of the United States attack on the principle of unanimity was, these representatives held, to use the United Nations as an instrument in achieving world domination.*⁴⁰⁷

The Soviet Bloc's view, similar to its earlier, 1946 to 1948, debate on Charter review, was that the violations of the Charter were the root cause of the international tensions, and not the Charter itself. The Soviet delegation cited some recent US-sponsored developments, such as the Korean War, the creation of NATO (as a security arrangement outside of the SC), the Marshall Plan (outside of ECOSOC), and the non-acceptance of the People's Republic of

⁴⁰⁶ (Yearbook of the United Nations 1953): 48.

⁴⁰⁷ Ibid: 48.

China as a UN Member and the legitimate representative of the Chinese people, as examples of the US-led Charter violations.⁴⁰⁸

Therefore, the Soviet Bloc, recognising that the Charter conservatives were a minority and would not be able to stop the authorisation of a review by the Assembly, supported the French amendment. The advantage of the French intervention to the Soviet Bloc was that, while it did not avoid the conference, it would at least limit the scope of the Charter review preparatory work and eliminate the formal seeking and compilation of the desired Charter revisions.

The UK also supported France's amendment to the Six-Power resolution and therefore the deletion of paragraph 2 on the solicitation of Charter revisions.

Some Charter-reformist member states, on the other hand, expressed their full support for the Six-Power resolution, therefore rejecting the French amendment. The representatives of Brazil, Chile, Cuba, Ecuador, El Salvador, Honduras, Nicaragua, Argentina, Peru and Uruguay expressed the view that not only was Charter revision desirable, but in fact it was a *necessity*. These representatives pointed out that their primary concern was with the privileges of the P5 as provided for in the Charter, which they considered to be against the principle of the sovereign equality of nations. Other perceived major shortcomings of the Charter they sought to revise were:⁴⁰⁹

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid: 48-49

- Article 2, paragraph 7 of the Charter, regarding the scope of domestic jurisdiction and non-interference in relation to Chapter VII interventions and sanctions;
- the role of the General Assembly in the maintenance of peace and security, particularly in its relationship with the SC; and
- the P5 unanimity rule with regard to many questions, such as admission of new member states, which was preventing some otherwise well-qualified countries from joining the UN.⁴¹⁰

Yugoslavia also expressed its support for the Six-Power Resolution and the creation of a dedicated committee to collect and study Charter revisions.

In addition to the smaller states, the US was the only P5 member expressing its support for the Six-Power resolution while rejecting the French amendment. Therefore, unlike the P5 members France, the UK and the USSR, the US was in favour of the advance elicitation of proposed Charter revisions and recommendations from the member states prior to the Charter conference.

The US indicated that the review set out in Article 109(3) would provide “the opportunity to work for a peaceful world order, representing the true interest of all nations”. The US believed that Charter revision proposals should be sought not only from all the member states but also from those states which were awaiting admission to the UN, such as Austria, Italy,

⁴¹⁰ The admission of many states to the UN during this period, particularly European ones, was stalled because of rivalry between the US and the USSR. For example, states such as Austria, Bulgaria, Hungary, Italy and Finland were unable to obtain admission as member states. Another notable example was the People’s Republic of China, which, from 1949 until 1971, primarily owing to US opposition, was unable to replace Taiwan as the legitimate Chinese representative to the UN.

Japan, and some other western allies. Further, in rebuttal to the Soviet Bloc argument, the US representative countered:⁴¹¹

[T]hat it was indeed true, as stated by representatives of the "Soviet bloc", that there was need for scrupulous adherence to the present Charter. However, he said, it was the "Soviet bloc" which had been guilty of Charter violations including illegal and aggressive intervention in Greece and Czechoslovakia. It had flouted Security Council and Assembly decisions on Korea and had sabotaged United Nations efforts in the economic and social fields and through the specialized agencies.

...

His government [the United States], however, had an open mind on the question of Charter revision and its aim would be to build up the Organization rather than to tear it down.

At the Legal Committee, the draft resolution and the amendment were then put to a vote.

First, the French amendment was voted on and was adopted (25 in favour, 24 against, and 5 abstentions), thereby deleting the operative paragraph on elicitation and compilation of Charter revisions.⁴¹²

Then the Six-Power draft, as amended, was put to a vote and was adopted by a vote of 48 in favour to 5 against.⁴¹³

The Legal Committee's report and the draft resolution adopted by the Committee were then introduced to the Assembly's plenary meeting on 27 November 1953. The Assembly

⁴¹¹ Ibid: 49-51. The US representative's remarks were at the Sixth Committee and at the GA plenary session. See also (ODS 1993-2012): A/2559.

⁴¹² The French and Belgium Amendment subsequently had two additional co-sponsors (Mexico and Colombia), and was referred to also as the Four-Power Amendment. After the success of their first amendment, the same four introduced another draft amendment, which would have deleted all the references to Article 109 in the Joint Six-Power's text. Their argument was that the GA does not have competency to decide on matters related to the Charter review conference. That proposed amendment was put to the vote and was rejected. (Repertory Practices of the United Nations 1945-1954): 410-411.

⁴¹³ (Yearbook of the United Nations 1953): 50. See also voting records at the Sixth Committee: A/C.6/L.307 and A/C.6/L308Rev.1; and the Sixth Committee Meeting 379 of the 8th session; (Repertory Practices of the United Nations 1945-1954): 410-411.

conducted further debate on the resolution that was basically similar to, and in continuation of, the Legal Committee's debate.⁴¹⁴ The amended resolution, with the exception of the Soviet Bloc, had no other opposition. Representatives of the Netherlands and New Zealand, two of the main sponsors of the Six-Power draft, highlighted the fact that the resolution was the result of a *compromise*, and although their countries favoured inclusion of Charter revision studies and elicitation as part of the resolution, they would not reintroduce it to the floor.

Therefore, the amended draft resolution, as sent by the Legal Committee, was put to a vote and was adopted as Resolution 796 (VIII) by a vote of 54 in favour and 5 against.⁴¹⁵

In anticipation of the 1955 review Conference, the operative paragraph of the resolution authorised a major study of the legislative repertory of the UN, and a comprehensive documentation and indexing of the San Francisco UNCIO Conference records also got underway. The *Repertory* always contains an analytical summary of each Charter article as it may have been affected each year, and it has been produced periodically ever since.⁴¹⁶

In the meantime, the division in the reformist camp as to whether they should formally preview Charter changes now, or leave it until two years later—the trigger date of Article 109(3)—helped the Charter conservatives' political manoeuvring to pay off. The unprecedented *yes* vote of the Soviet Bloc (to any resolution planning for Charter review), and their temporary alliance with the French and the British to have the amendment adopted,

⁴¹⁴ (Yearbook of the United Nations 1953): 50. See also (ODS 1993-2012): A/2559.

⁴¹⁵ Ibid: 51.

⁴¹⁶ Thanks to Res. 796 (VIII), a significant part of the empirical part of my research has been from sources, records and documentation authorised by that Resolution. The completion of the 22 volumes of the UNCIO documents, their updated indexes, as well as the ongoing legislative *Repertory of the UN Practices*, are the result of the work authorised under that Resolution. The *Repertory* now covers the period from 1945 to 2009, its latest edition being the 2000–2009 10-year issue.

made sure that the final resolution, Resolution 796 (VIII), had no preview or elaboration of the Charter revisions. This was important for Charter conservatives, because it prevented the reformists from becoming “rigid”, as the French called it, and from inhibiting the increase in the states’ preparedness and expectations in 1955 that a Charter Review *must* happen.

7.3 Ten Years On: The UN Constitutional Debate Coast-to-Coast, in New York and San Francisco

Ten years after the completion of the UN Charter, the US once again, in San Francisco and New York, was providing the forum for an exchange of ideas on the constitution of the UN. At the 10th session of the Assembly, in 1955, Secretary-General Dag Hammarskjöld, in execution of Article 109(3), added the item *proposal to call a General Conference of the Members of the United Nations for the purpose of reviewing the Charter* to the Assembly’s agenda.⁴¹⁷

The Assembly devoted a significant part of its session, a total of six sub-sessions, to the subject of the Charter and its review. The formal discussions and debate had, in fact, started a few months earlier at another UN forum in San Francisco, in June 1955, on the tenth-anniversary commemoration of the signing of the UN Charter.

The Charter reformists, comprising more than a two-thirds majority of the member states at the 10th session,⁴¹⁸ engaged in a lively and fundamental debate at both of those events on what constitutional changes they envisioned for the UN. The highlights and the summation of the UN constitutional debates at the San Francisco Commemoration and at the UN New York

⁴¹⁷ (ODS 1993-2012): A/2919. See also UNYBook1955: 76.

⁴¹⁸ This figure is based on the voting records of states in favour of Charter review. For example, Resolution 992 (X), the resolution in favour of holding the Charter review, was adopted by 43 in favour to 6 against, with 9 abstentions, which is 74 per cent in favour, and therefore more than two-thirds. See the related section later in the chapter. (Yearbook of the United Nations 1955): 76-77.

headquarters, reflecting member states' proposals for changes, can be categorised as follows:⁴¹⁹

- ***Democratisation and Sovereign State Equal Rights***: Discussions on the total abolition of the P5's privileges; modification or elimination of the veto; and increasing member state representation at the SC.
- ***All states inclusivity and universality at the UN***: That is, easier access for new members to join the UN in view of a rise in emerging ex-colonial nations as new states; simple majority requirement for admission of new members without the permanent member *unanimity* rule; elimination of the Charter term, and concept of, "enemy state"; elaboration of and definition of *self-determination*; and more support for *freedom movements* and emerging ex-colonies as independent states.
- ***Human Rights***: Establishment of a human rights council at the same organisational level as the SC; capability for such a Council to enforce the rights of individuals.
- ***Economic Development***: Division of the Economic and Social Council (ECOSOC) into an Economic and Technical Assistance Council, and a Social and Human Rights Council, thereby facilitating specialisation and focus on economic development, and, as a separate and parallel function, social development and protection of human rights; increase in participation and membership of ECOSOC and expansion of its role in economic development.

⁴¹⁹ The following three sources were used in compiling this information: (1) the *Repertory* (Repertory of the United Nations Practices-Supplement-1 1954-1955): 438, 449; (2) the UN's 1955 Tenth year San Francisco anniversary publication *Commemoration of the Tenth Anniversary of the Signing of the Charter of the United Nations in the City of San Francisco, 20-26 June 1955*; and (3) General Assembly Meeting Reports (UNRIC 1946-2000): A/542, A/543, A/544, A/545, A/546, and A/547.

- **Regional Organisations:** Further recognition of the regional arrangements, and the clarification of Charter clauses referring to regional organisations, particularly on the topic of peace and security pertaining to Articles 52 to 54.
- **Judicial Changes:** Establishment of a UN Human Rights Court or Tribunal; the clarification and definition of the question of *domestic jurisdiction*; increasing membership of the ICJ; making ICJ rulings in all matters and cases compulsory.

The minority Charter conservatives naturally did not participate in the constitutional debate in terms of how the UN could be reformed or enhanced, but, rather, gave their reasons as to why the Charter both in the *letter* and the *spirit* was sound and did not require any changes.

The minority conservatives' view, opposing a review conference, was put forward most strongly by the Soviet Bloc, but was also shared to some extent by certain other countries, such as Sweden and Syria. The arguments put forward by the minority were:⁴²⁰

- that Article 109(3), calling for a review conference, was *not mandatory*, and since the Charter was adequate *as it was*, there was no reason to review it, but there should instead be more goodwill from all nations to implement and follow Charter provisions;
- that present conditions in international relations, and the ideological polarisations of the Cold War, meant that it was not the right time for a Charter revision, since it might lead to splitting and “wrecking” of the UN;
- that the routine of going through the Charter review would probably lead nowhere, since, according to paragraph 2 of Article 109, any Charter revisions to be adopted

⁴²⁰ (Repertory of the United Nations Practices-Supplement-1 1954-1955): 445,447; (Yearbook of the United Nations 1955): 75-76; (UNRIC 1946-2000): A/542, A/543, A/544, A/545 and A/546.

must receive the favourable vote of two-thirds of the member states and, in addition, no negative vote of a member of the P5—in other words, agreement among the super-powers and their unanimity. However, if there was unanimity between the super-powers, there would be no need for any Charter revisions in the first place;

- a review of the Charter would be justified only if the foundations upon which it had been based had changed. This was not the case, and a more consistent and genuine implementation of the Charter was what was needed; and
- even if there were some special areas of the Charter that needed to be revised, then Article 108, in Chapter XVIII of the Charter, already provided for an amendment process, and therefore there was no need for an Article 109-type general review of the Charter.

As regards this last point of the conservatives, suggesting using Article 108 amendment procedures to implement changes to the Charter, in fact, by this time, a few of the Charter reformists were already adopting this approach. Hence, a number of mostly Latin American states, including Argentina, Brazil, Chile, Costa Rica, Peru and Venezuela, as well as Spain, had already, in the 10th session, as a back-up to the Charter review initiative and in parallel to it, requested that three items—expansion of the membership of the SC, ECOSOC and the ICJ—be added to the provisional agenda of the 11th session, to be implemented in accordance with Article 108.⁴²¹

⁴²¹ (Repertory of the United Nations Practices-Supplement-1 1954-1955): 440.

7.4 The Charter Reformists' Quest and the Founders' Promise to "Seize" the Moment

As previously mentioned, in both the San Francisco and New York forums of 1955, a substantial majority of the member states—more than two-thirds—in principle favoured some form of Charter review.⁴²²

The reasoning put forward by this group was partly on the *necessity* of a Charter review and partly on the *principle* of Article 109 itself. Those countries that emphasised upholding the principle of Article 109 reminded the other member states that they had not been ready to support the Charter when it was presented to them in San Francisco in 1945 because of the flaws and imperfections which they then saw in the Charter. And it was because of the concerns and objections expressed by these countries that the Great Powers had agreed to review the Charter at some point in the future, and had in fact backed up their promise by providing Article 109, especially paragraph 3. Hence, this provision required only a *simple majority* to vote for a Charter review, and also contained a time-specific promise: that it would commence by the tenth anniversary of the Charter. The view of the group was that this article “was not written into the Charter by accident or without serious thought and intention” and therefore the Assembly should “seize this opportunity” to conduct the review conference, as it had intended.⁴²³

Therefore, to seize the promised opportunity, and based on the time-triggered invocation of paragraph 3 of Article 109, the Charter reformists started work at the 10th session of the

⁴²² At the GA's 10th Session, of the 39 countries that participated, 27 countries favoured the review conference and 12 were opposed. (Repertory of the United Nations Practices-Supplement-1 1954-1955): 443. Later, based on the voting records for Res. 992 (X) of that year, the numbers in favour increased. See Section 7.2 above.

⁴²³ (Repertory of the United Nations Practices-Supplement-1 1954-1955): 444; (UNRIC 1946-2000): A/542, A/545 and A/546.

Assembly's plenary and the General Debate. With the item "Call for a *General Review Conference*" already on the GA's working agenda, in line with paragraph 3, and in view of the importance of the matter and the earlier years' preparation, the issue was not assigned to a committee but was taken directly by the plenary, in six meetings from 17 November to 21 November 1955. When the Assembly, at its General Debate, took the question, it already had a joint draft resolution before it. The US, the UK, Canada, Ecuador, Iraq and Thailand had presented a Six-Power draft resolution that referred to the terms of paragraph 3 of Article 109 and called for the review of the Charter. However, instead of fixing the time and place of such a review, the joint resolution deferred the date to an "auspicious" time to be decided by a committee that the draft was requesting be set up. The committee was expected to report on the time and place for the review conference at the 12th session (in two years' time).⁴²⁴

The General Debate on holding the conference and the discussions on the joint resolution occupied a significant part of the Assembly's time at the 10th Session, and was mostly dominated by the majority Charter reformists, who expressed the following main points.⁴²⁵

- the Charter could not be considered "immutable". After 10 years of the UN's operation, with the experience gained and the shortcomings encountered, it was now time to implement revisions to the Charter to enhance its functioning and to provide for the delivery of its objectives;

⁴²⁴ (Yearbook of the United Nations 1955): 74; (Repertory of the United Nations Practices-Supplement-1 1954-1955): 441.

⁴²⁵ The states presenting arguments in favour of the Charter review, either at the tenth anniversary in San Francisco or at the 10th Session's six plenary meetings in New York in 1955, were, among others: the US, Argentina, Ecuador, Iraq, the Netherlands, Peru, Chile, Costa Rica, Venezuela, Panama, Columbia, Pakistan, India, Australia, Honduras, Lebanon, Canada, Haiti, Indonesia, Peru, El Salvador and Uruguay (UNRIC 1946-2000): A/542, A/543, A/544, A/545, A/546, and A/547. See also *Commemoration of the Tenth Anniversary of the Signing of the Charter of the United Nations in the City of San Francisco, 20-26 June 1955: Meeting Reports 1-8*. See also (Repertory of the United Nations Practices-Supplement-1 1954-1955): 443-444; and (Yearbook of the United Nations 1955): 75.

- the whole system of warfare had changed. When the UN Charter was drawn up, the atomic age had not yet dawned. But now, with nuclear weapons capable of causing massive devastation and indiscriminately killing hundreds of thousands of people in one blast, and ballistic rockets capable of delivering those nuclear weapons anywhere in the world in a matter of minutes, Charter revisions were needed to regulate the pacific settlement of conflicts and to provide for total nuclear and general disarmament. Furthermore, even if the UN were capable of conflict management, the existence of security concepts and defence doctrines such as ‘second strike capability’ and Mutually Assured Destruction (MAD) had increased the possibility of accidental nuclear wars and nuclear accidents in general; consequently, the UN’s role in nuclear disarmament had become critical and pivotal—a mission that the GA and its ongoing *First Committee* on disarmament had failed to fulfil, and therefore amendments to the Charter to enable the UN to provide for and implement disarmament were paramount;
- with the current increase in the number of UN member states and the anticipated further increase, as colonial dependent nations became independent states, the UN’s structure should change to reflect this rise in membership. Specifically, in relative and absolute terms, states’ representation on the governing councils of the SC and ECOSOC, as well as the number of judges at the ICJ, should be expanded;
- some provisions in the Charter required clarification, changes, amendments or deletion: for example, the provisions on SC voting and the veto;
- in view of liberation and freedom movements in the colonies, as well as self-determination of peoples, the provisions of the Charter dealing with dependent peoples needed to be reviewed;

- as the UN derived its support and understanding from the peoples of the world, a review conference would be helpful in renewing the involvement and the support of such peoples for the UN system. Further, the UN should be enabled to protect peoples' rights and human rights;
- member states that had not participated in the drafting of the Charter and had joined the UN after its founding "should be provided with an opportunity to state their views on the instrument which defined their rights and obligations"; and
- the UN had, since its inception, encountered new global problems that it was not designed or enabled to handle. Issues such as immigration and refugee problems, resource-sharing of the oceans and unchartered territories, and regulations on peaceful uses of atomic energy, had all arisen in the past 10 years, and required special handling or provisions in the Charter.

The reformists did not necessarily agree on all of the above, nor did they have the same wish-list. However, a common denominator for the majority was that the UN had not achieved some of its goals, such as the maintenance of peace and security, primarily because of certain Charter shortcomings, such as the voting procedure in the SC, and therefore "a review of the Charter was both desirable and necessary."⁴²⁶

The Charter conservatives, whose viewpoint was mentioned in the previous section, and which primarily consisted of the Soviet Bloc, opposed the Six-Power resolution. In addition, a few states were opposed to the draft resolution being put forward, on essentially technical

⁴²⁶ Ibid.

and legal grounds. Pakistan, Norway and Yugoslavia argued that the joint resolution did not go far enough in satisfying paragraph 3.

This view was most notably put forward by Pakistan's Allah Bukhsh Karim Brohi (Pakistan's Justice Minister), who argued that, according to paragraph 3 of Article 109, and with regard to the tenth anniversary of the UN Charter, all the GA could do was fix *the place and date*.

A.K. Brohi, in arguing that the question of time and place could not be deferred, and also that the 12th session was not the 10th session, stated:⁴²⁷

... [I]t is not possible to engraft an additional procedure on to paragraph 3 of Article 109, because to do that would be to read more into the language of the Charter than is warranted.

... The paramount importance of the tenth session consists in that it is the favorite of the United Nations Charter.

In other words, if the Assembly was in favour of activating paragraph 3 and holding the conference, it could not delay its main purpose of determining the date. A similar position was taken by Yugoslavia in opposing the resolution. Norway, along the same lines, when analysing paragraph 3 of the article, stated that there was a distinction between actually calling the conference, as was provided for, and calling for the conference to be held at an “auspicious” time, as the resolution suggested, while still referring to the same provision. Therefore, those countries were against the resolution, not necessarily on the merits or the desirability of a review conference, but owing to the technical objection that the decision to have the conference was manifestly linked to the selection of the place and time, and the two questions could not be separated.⁴²⁸

⁴²⁷ (UNRIC 1946-2000): A/ 545: paragraphs 25 and 27.

⁴²⁸ (Yearbook of the United Nations 1955): 75-76; (Repertory of the United Nations Practices-Supplement-1 1954-1955): 447. For one of only a very scarce number of law journal articles on the subject at the time, see

7.5 The General Assembly Resolves to Convene the General Conference to Review the Charter

After the six sessions of the plenary discussions, at the trigger date of the UN's tenth anniversary, on 21 November 1955, the Assembly put the joint draft resolution to the vote, and it was adopted as Resolution 992 (X). Under it, the Assembly called for the convening of the review conference, but with the time and place to be set at a later date. The Resolution 992 (X) text as adopted reads as follows:⁴²⁹

The General Assembly,

Mindful that paragraph 3 of Article 109 of the Charter of the United Nations provides that if a General Conference of the Members of the United Nations for the purpose of reviewing the Charter has not been held before the tenth annual session of the General Assembly, such a conference shall be held if so decided by a majority vote of the Members of the General Assembly and by a vote of any seven members of the Security Council,

Believing that it is desirable to review the Charter in the light of experience gained in its operation, recognising that such a review should be conducted under auspicious international circumstances,

- 1. Decides that a General Conference to review the Charter shall be held at an appropriate time;*
- 2. Further decides to appoint a Committee consisting of all the Members of the United Nations to consider, in consultation with the Secretary-General, the question of fixing a time and place for the Conference, and its organization and procedures;*
- 3. Requests the Committee to report with its recommendations to the General Assembly at its twelfth session;*
- 4. Requests the Secretary-General to complete the publication program undertaken pursuant to General Assembly resolution 796(VIII) of 23 November 1953 and to continue, prior to the twelfth session of the General Assembly, to prepare and*

(Schwelb, Charter Review and Charter Amendment--Recent Developments 1958): 308-311. See also (UNRIC 1946-2000): A/544, A/545.

⁴²⁹ (General Assembly Documentation Center 1946-2015): Res. 992(X); see also (Yearbook of the United Nations 1955): 76-77.

circulate supplements, as appropriate, to the Repertory of Practice of United Nations Organs;

5. Transmits the present resolution to the Security Council.

Therefore, in the preamble, the resolution was linked to paragraph 3 of Article 109, and in its operative paragraphs 1 and 2 the Assembly decided that the general review conference *should be held* and that the determination of the date and venue of the conference would be delegated to a Committee, deferring the Committee's recommendation for two years.

The overwhelming majority of states were in favour of the resolution (43 in favour to 6 against, with 9 abstentions).⁴³⁰ It should be noted that this outcome was more than a two-thirds majority in favour of the resolution, and was in fact more than the simple majority requirement that Article 109(3) had required.

Operative paragraph 5 of the resolution, in order to satisfy Article 109's additional requirement for adoption of the decision by the SC, required that the resolution be sent to the SC for its concurrence. In Article 109, both paragraphs 1 and 3 specify that, in addition to the GA's adoption, majority concurrence of the SC without regard to permanent membership (no veto) was also needed to convene a Charter review conference.

Therefore, to obtain the concurrence of the SC, Resolution 992(X) was then transmitted to the Council. At the SC, the US, Iran, Brazil and the UK sponsored a draft resolution in support of

⁴³⁰ The six countries that voted against were the five states of the Soviet Bloc, plus Syria. Yugoslavia, the only other communist country in the UN at the time, abstained. Further, it seems France had withheld from voting (not reported in the GA records). (Yearbook of the United Nations 1955): 76.

Resolution 992 (X), which was adopted on 16 December 1955⁴³¹ as SC Resolution 110 (1955), with 9 votes in favour, the USSR voting no, and France abstaining.⁴³²

With the SC's favourable vote of also more than two-thirds, the last hurdle of Article 109(3), SC concurrence of *any seven* members (that is a qualified majority with no *veto*), was overcome.

Thus, with the adoption of Resolution 992 (X) at the GA's 10th session, and the SC's concurrence, in effect the general conference to review the charter had been authorised, awaiting a date and place to be held.

7.6 On the Lookout for the “Auspicious” Time

The Committee on Arrangements for a Conference for the Purpose of Reviewing the Charter (Arrangements Committee), created under Resolution 992(X) to fix the time and place for the conference, had two meetings in 1957. A draft proposal was submitted by Brazil, Iran, India, Canada, Egypt, Indonesia, Ireland, Liberia, Panama and El Salvador, known as the Ten-Power draft, which called for the Committee to be “kept in being” and to defer its decision on the date and place of the general review conference for a maximum of another two years.⁴³³

This draft resolution had strong support and did not have any outright opposition. Even the Soviet Bloc, which still maintained that making the existing Charter work was more important than talking about how it should be changed, had softened its position and, instead

⁴³¹ Note that the concurring part of SC Res. 110 (1955), Doc. S/3504, states in its text that it “expresses its concurrence in the Assembly’s decision, as set forth in resolution A/RES/324 of the General Assembly.” The reference used, “A/RES/324”, was actually an internal GA reference and the designation for the formal Res. 992 (X). See footnote 8 of Repertory Supplement One (Repertory of the United Nations Practices-Supplement-1 1954-1955): 440.

⁴³² Ibid. See also (Yearbook of the United Nations 1955): 76.

⁴³³ (UNRIC 1946-2000): A/AC.81/SR.1. See also (Yearbook of the United Nations 1957): 114; and (Repertory of the United Nations Practices-Supplement-2 1955-1959): 548-549.

of casting a *no* vote, abstained from voting.⁴³⁴ The Ten-Power draft, with some additional sponsors, including, Austria, Argentina and Afghanistan, was introduced at the 12th Session to the GA plenary and, on 14 October 1957, was adopted as Resolution 1136 (XII). The full text of the Resolution states:⁴³⁵

The General Assembly,

Recalling the provisions of its resolution 992 (X) of 21 November 1955, having considered the report of the Committee established by the above resolution,

1. Decides to keep in being the Committee on arrangements for a conference for the purpose of reviewing the Charter, established by General Assembly resolution 992 (X) and composed of all Members of the United Nations, and to request the Committee to report with recommendations, to the General Assembly not later than at its fourteenth session;

2. Requests the Secretary-General to continue the work envisaged in paragraph 4 of General Assembly resolution 992(X).

With no states voting against, and 9 abstentions,⁴³⁶ Resolution 1136 (XII) extended the mandate of the Committee and set a new two-year date for the completion of its work.

Further, it extended the Secretary-General's 1955 mandate to continue the work of the *Repertory and compilation of the legislative practices of the United Nations organs*.

The 1959 events concerning the Arrangements Committee's work were very similar to those of 1957. The Committee met twice that year and the majority view was to extend the question of time and place for another two years. However, some countries suggested that postponing the question was "defeatist", and Ceylon (now Sri Lanka) was particularly insistent that the

⁴³⁴ (Yearbook of the United Nations 1957): 114.

⁴³⁵ Ibid.

⁴³⁶ Ibid.

date and place should be set without any further delay.⁴³⁷ On the Committee's recommendation, the Assembly's plenary adopted Resolution 1381 (XIV), in which it decided "to keep in being" the Committee on Arrangements for a Conference for the Purpose of Reviewing the Charter, and deferred the Committee's recommendation for a date and place for the review conference for a maximum of two more years, to the 16th session.⁴³⁸

At both the 16th and the 17th sessions of the Assembly, the Arrangements Committee met. And in both of those sessions, in 1961 and 1962, the Committee met only once, and in both years a draft resolution was put forward by Ghana, and had majority support for keeping the Committee, but deferring its question of date and venue of the review conference. GA Resolution 1670 (XVI) of 1961 deferred the question for one year, and GA Resolution 1756 (XVII) of 1962 also deferred the question for a maximum of one year. But the 1962 resolution adopted a more urgent tone, asking that the Committee meet in the summer prior to the September plenary session, in advance of the following year's Assembly session, when it would presumably have completed its work. Both the 1961 and 1962 resolutions were adopted with all the member states in favour, and no objections.⁴³⁹

As provided by Resolution 1756 (XVII), the Arrangements Committee began its work earlier in 1963, in the summer of that year. The Committee decided to create a subcommittee composed of, among others, Brazil, Guinea, Iran, Liberia, Nepal, the Netherlands and Poland, to ask *all* the member states for their views on what should be recommended to the next GA session for convening the review conference. The subcommittee later concentrated its efforts

⁴³⁷ (Yearbook of the United Nations 1959): 81. See also (UNRIC 1946-2000): A/4199.

⁴³⁸ Res. 1381(XIV) was adopted by 72 votes to 0, with 9 abstentions. (Yearbook of the United Nations 1959): 81.

⁴³⁹ The *Committee on Arrangements for a Conference for the Purpose of Reviewing the Charter*, 1961 and 1962 Reports: A/4877 and A/5193, respectively; (UNRIC 1946-2000): A/4877, A/5193. See also (Yearbook of the United Nations 1961): 172-173.

on asking the P5 members what they believed to be the common ground in regard to the conduct of the review conference, and on ensuring that its outcome would be acceptable to the P5, so that they would not cast a *no* vote. The subcommittee broke up into groups and individually approached the P5 and asked for their assistance and consultation.

It should be noted that the subcommittee, as originally proposed by Ghana, had a wider scope, including asking for Charter enhancement recommendations from all states, and particularly asking questions regarding the expansion of the membership of the SC for better regional representation. However, the US and Czechoslovakia raised a legal objection on terms-of-reference grounds, stating that the subcommittee was not able to exceed the functions and the objectives of its parent committee.⁴⁴⁰

In considering the long quest to hold a review of the UN Charter, it is important to pause here and recognise two critical developments that had occurred by the early 1960s, when the Ghana initiative was taking place.

First, the reformist camp had lost its only active P5 member—the US. In the late 1940s and the 1950s, the US was the only proactive P5 member seeking Charter review and revisions; however, by the early 1960s, all its enthusiasm had evaporated. After the anti-communist fever of the McCarthyist era of the 1950s, and by the time of the Cuban Crisis of the early 1960s, the US had lost interest in any developments at the UN which might lead to sovereignty-sharing, or any compromise of its P5 privileges.

As for the other P5 members, the USSR had always openly opposed changes to the Charter, while France, according to its voting records, was quietly but consistently proving to be a

⁴⁴⁰ See text accompanying ns 444 and 445 below.

Charter conservative. The Republic of China was struggling with legitimacy issues (in respect of whether the Taiwanese regime was a true representative of mainland China), and therefore followed US policy, since, from a security perspective, the US was its main protector. The UK had supported Charter revisions in the late 1940s, but, by the early 1950s, was acting more in accordance with the US in its proposals and draft resolutions, as opposed to being genuinely interested in, and an initiator for, Charter amendments. The UK's opposition to the Charter revisions elicitation debate of 1953 was already indicative of its transition to Charter conservatism.⁴⁴¹

As for the most powerful of the P5, the US, although never a veto abolitionist, had broken ranks with the other permanent members, supporting the 1953 draft proposal that would have elicited and compiled the desired Charter revision changes. That defeated resolution,⁴⁴² as feared by the Charter conservatives, would probably have given rise to the dynamics and the preparatory circumstances for the Assembly to convene the review of the Charter in 1955, as was expected, rather than delay it and refer it to a committee to decide the date and location. In other words, in the early years of the UN and of the Cold War, 1953 was probably more auspicious than 1955.

⁴⁴¹ During the early years (1945–1950) of the UN, the US had a unipolar view of the world, since it was by far the largest global economic and military power, and was also the only state with nuclear weapons. Possessed of such self-confidence, US policymakers genuinely supported the UN and its potential role in global governance and the rule of law. However, by the end of 1949, after communist advances around the world, including the Chinese communist takeover of mainland China, and the Soviet Union's first nuclear-weapons test, this self-confidence had ebbed away, to be replaced by insecurity. The US's view of the UN and its global governance role was beginning to change. By the early 1970s, after many of the newly independent states—most of which had anti-western stances—had become UN members, the US State Department had completely altered its view of the UN. The department's policy, under Nixon and Kissinger, was reinforced when the US Congress adopted a no-amendment policy on the UN Charter (see Chapter 9, Section 9.1). By then, the UN was being marginalised, becoming a tool, when useful, to justify the US's often unilateral international interventions.

⁴⁴² See the unwanted French amendment to the joint Six-Power draft resolution, which was later adopted at the 1953 GA session, discussed in section 7.2 above.

The US's conviction at that time, which was partly fuelled by its domestic popular and legislative drives, was so strong that, in addition to its support for soliciting Charter revisions from existing UN members, it had even proposed seeking the opinions of members-to-be: the states in the queue for admission, including a few of the old "enemy states" and the newly independent states. But, by the late 1950s and early 1960s, public sentiment in the US, and especially that of its political and legislative classes, actively involved in combating communism, had changed profoundly, with the UN then being suspected of becoming a communist tool. Furthermore, the US was losing its majority support at the UN and the controlling role in the GA which it had enjoyed in the late 1940s and the 1950s, particularly with the admission of ex-colonies as newly independent states, which were not necessarily supportive of the US's foreign policies.

Consequently, by the time of Ghana's draft resolution in 1962, the US was no longer interested in changes to the Charter, being instead satisfied with the *status quo*. In line with their change in policy, the US and UK were no longer proactively initiating draft resolutions in connection with Charter review. By this time, the Charter conservatives, although still a minority, had amassed the support of four of the powerful P5—all of which, by 1964, had developed nuclear weapons. With communist China still excluded from the UN, the US could also count on the vote of Taiwan (a proxy state) at the Council on any occasion. Therefore, in practice, not a single P5 state was still interested in substantive Charter reforms.

The second important development between the adoption of Resolution 992 (X) in 1955 and the 1962 draft resolution proposed by Ghana was the fact that the Charter reformists became more convinced than ever before that they required a lowest-common denominator acceptance of revisions from the P5 in advance in order for the review conference to get off

the ground. This conclusion was partly because of the apparent loss of interest on the part of the US and the UK—two of the P5 who had supported their cause⁴⁴³—and partly because of the observations that were being gleaned from the Article 108 amendment activities that were taking place in tandem in the early 1960s, and the real threat of a P5 veto blocking any proposed Charter amendment. During this time, resolutions were being debated on Charter amendments for expansion of the SC and ECOSOC memberships. While some of the P5 had expressed opposition, the USSR categorically and in advance had declared that it would cast a *no* vote and would not concur on the proposed amendments (see Section 9.4). Thus, the potential for defeat of any Charter revision proposal that lacked the support of even one P5 member was becoming more apparent.

As a result, the subcommittee created by the Arrangements Committee after the Ghana initiative of 1962 shifted its focus from seeking the views of *all* the members on Charter revisions, to asking *only* the P5 for their opinions on what Charter revisions were desirable, in order to find some common ground among the permanent members.

This shift was primarily because of the prevailing logic of the subcommittee members at that time—which was that the *initial* concurrence of the P5 “was indispensable to bring into effect any modifications of the present text of the Charter.”⁴⁴⁴ However, with the Charter amendments that were ratified (1963 to 1965), this presumption proved to be a fallacy, as is further discussed in Chapter 9.

⁴⁴³ (Scott 2005): 75-77.

⁴⁴⁴ (Repertory of the United Nations Practices-Supplement-3, 1959-1966): 257. See also (UNRIC 1946-2000): A/AC.81/L.4.

The subcommittee's findings, in the summer of 1962, were not favourable. Although it had identified some common ground, the conclusion was that there was *no unanimity* between the P5 on the question of the Charter review. In view of this report, the parent Arrangements Committee decided to recommend to the plenary session of the Assembly another two-year extension to enable it to fulfil "the functions entrusted to it by Assembly resolution 992(X) of 1955" and to resolve the question of the convocation of the review conference. The Committee's recommendation, presented as a draft resolution co-sponsored by Austria, Afghanistan and Costa Rica, was approved without any objections, as GA Resolution 1993 (XVIII), in December 1963.⁴⁴⁵

7.7 The Need Arises to Amend the Amender—Article 109: But Which Paragraph?

During the 20th session of the Assembly and the new round of the Arrangements Committee's Charter review activities, a remarkable turn of events took place—the Article which was supposed to be the basis for Charter changes became subject to amendment and change itself.

When the Article 108 amendment efforts to expand the SC's membership from 11 to 15 were being pursued, it seems that the Secretary-General's staff responsible for this matter, as well as the lawyers and the legal staff at the disposal of the member states, had failed to notice the effect of the SC's membership expansion on Article 109. The provisions increasing the membership of the two councils, the SC and ECOSOC, adopted as Charter amendments in 1963, had been ratified by the summer of 1965 and were now coming into force.⁴⁴⁶ The expansion of the membership in these two Councils had required the amendment of Articles

⁴⁴⁵ (Yearbook of the United Nations 1963): 75-77; (UNRIC 1946-2000): A/5487.

⁴⁴⁶ The GA resolutions in 1963 that increased the number of member states at the SC and ECOSOC are Res. 1991 A(XVIII) and Res. 1991 B(XVIII), respectively; (Yearbook of the United Nations 1963): 87-88.

23, 27 and 61 of the Charter to replace the old membership numbers with the new numbers. Hence, in the case of the SC, the membership was increased from 11 to 15 in Article 23, and the voting procedures of the SC in Article 27 were correspondingly updated to reflect the new qualification for what constituted a majority (from 7 to 9 members). However, the impact this had on the voting procedure in paragraph 1 of Article 109, and possibly also on that in paragraph 3, was neglected.

With the last amendment ratification, that of the USSR, being deposited with the Secretariat on 31 August 1965, the Secretary-General, Mr. U Thant, issued a protocol announcing to member states that the Charter amendments had come into force. Just three weeks later, he notified the Assembly that a consequential amendment to Article 109 to correct the numerical discrepancy was also required and, on 16 September 1965, asked for the item amending Article 109 to be added to the agenda of the GA's 20th session.⁴⁴⁷

The Secretary-General, in explaining the required changes, advised the Assembly that, in Article 109(1), the number *seven* should be changed to *nine* for designating a qualified majority for the convening of a general review conference, with no other changes. However, Mr. U Thant's proposal also stated that, according to GA Resolution 992 (X) of 1955, and the SC concurrence of the same year, paragraph 3 of Article 109 had already been acted on, and therefore that article could be considered "obsolete".⁴⁴⁸

During the Assembly discussions that followed, while the majority of representatives agreed that Article 109(3) had been operated on and was in progress, some other states—mostly from the Soviet Bloc, such as Czechoslovakia—stated that any future review conference

⁴⁴⁷ (Yearbook of the United Nations 1965): 233.

⁴⁴⁸ Ibid: 233. See also (Simma, Mosler, et al. 2002): 1369.

should only convene according to Article 109(1), implying that paragraph 3 had indeed become obsolete.

The majority view, however, was that, for both historical reasons and in order to make clear that the decision to hold the review conference based on paragraph 3 of Article 109 was still in effect, the paragraph therefore should not be deleted and should be left intact.

The representative of Australia, expressing this view, pointed out:⁴⁴⁹

That a practical purpose might be served by retaining paragraph 3 in its present form, as the decision at the Assembly's tenth session to convene a conference for the purpose of reviewing the Charter at an appropriate time had not yet been fully implemented. To delete paragraph 3 might give rise to the question whether the decision remained in effect.

After the debate at the Legal Committee, Greece proposed a draft resolution to support the Secretariat's recommendation and to amend Article 109(1) to include the higher number as qualification for a majority at the SC, while at the same time preserving Article 109(3) with *no changes* to its text.⁴⁵⁰

The Greek proposal was adopted at the Legal Committee and sent to the Assembly plenary, where it was adopted unanimously as Resolution 2101 (XX) on 14 December 1965.

The text of Resolution 2101 (XX) reads as follows:⁴⁵¹

The General Assembly,

Considering that the Charter of the United Nations has been amended to provide that the membership of the Security Council, as provided in Article 23, should be increased from eleven to fifteen and that decisions of the Security Council should be

⁴⁴⁹ (Yearbook of the United Nations 1965): 234. See also (UNRIC 1946-2000): A/5974.

⁴⁵⁰ See n 444 and the text accompanying n 447 above.

⁴⁵¹ (General Assembly Documentation Center 1946-2015): GA Resolutions 2101 (XX).

taken, as provided in Article 27, by an affirmative vote of nine members instead of seven,

Considering that these amendments make it necessary also to amend Article 109 of the Charter

1. Decides to adopt, in accordance with Article 108 of the Charter of the United Nations, the following amendment to the Charter and to submit it for ratification by the States Members of the United Nations:

In Article 109, paragraph 1, the word "seven" in the first sentence shall be replaced by the word "nine";

2. Calls upon all Member States to ratify the above amendment, in accordance with their respective constitutional processes, at the earliest possible date.

The amendment to Article 109, which was essentially to correct an oversight in an earlier amendment, came into force almost three years later in, 1968, after the required two-thirds ratifications were deposited.⁴⁵²

7.8 Scholarship on Article 109(3): Is the Paragraph Obsolete?

The scholarship on Article 109(3) and its effects is very scarce.⁴⁵³ This is perhaps partly owing to the fact that the questioning of the paragraph's status occurred at the height of the

⁴⁵² (Yearbook of the United Nations 1965): 234. See also (Repertory of the United Nations Practices-Supplement-4, 1966-1969): 391.

⁴⁵³ As far as modern scholarship (the last 40 years) is concerned, in reviewing academic works and professional journals in English on the subject, I have found only two principal sources that have at least a couple of pages of discussion of the subject. One is the three editions of *The Charter of the United Nations, A Commentary*, edited by Simma et al. These three editions of two volumes each have been published once a decade since 1994, with the co-author on the Article 109 commentary (for the last two editions) being Georg Witschel. The three editions are, respectively: (B. e. Simma 1994); (Simma, Mosler, et al. 2002); and (Witschel 2012).

The only other English language modern source I have been able to locate is Shirley Scott's *The Failure of the UN to Hold a Charter Review Conference in the 1950s: The Future in the Past?* (Scott 2005). However, this is more of a critical analysis of the US's and big powers' unwillingness to engage in UN reform, and their interventions to prevent this, than an examination of the legality of Article 109(3).

As far as the French language is concerned, the prominent French modern reference on the Charter, in a similar format to the Simma et al Commentaries, and also in its 3rd edition, is *La Charte des Nations Unies, Commentaire article par article*, by Jean-Pierre Cot et al. The section in the latest edition (2005) on Article 109(3) is by Jacques Dehaussy (Dehaussy 2005).

Cold War, and the orientation of writers at the time, in a bipolar world of a capitalist West and a communist East, was inclined towards accepting the UN and its governance as frozen.⁴⁵⁴

A critical review of the subject has so far been neglected, possibly in part because the way in which the article was operated on makes it especially complex. In other words, the partial implementation of the article; the many years of activity (or inactivity) in relation to it; and the multitude of parallel Charter and UN reform efforts, including the current ones, that trace their origins to the article makes the subject confusing and elusive.⁴⁵⁵ This complexity

The Simma et al Commentary has German versions, and the first edition was in fact originally published in German and then translated into English.

As far as older academic works and legal journals in English are concerned, three authors wrote on the subject in the 1950s and 1960s, when it was still in the process of developing. The first is Egon Schwelb, who wrote a series of law journal articles on the topic. See (Schwelb, Charter Review and Charter Amendment--Recent Developments 1958); (Schwelb, The 1963/1965 Amendments to the Charter of the United Nations: An addendum 1966); and (Schwelb, Entry Into Force of the Amendment to Article 109 of the Charter of the United Nations 1968). Secondly, there is Ralph Zacklin's *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* (Zacklin 1968-Reprint 2005). Finally, there is an article by Krishna Rao (K. Krishna 1955). The first two sources, Schwelb and Zacklin, seem to have been frequently consulted, and have influenced the Commentary writers on the topic.

In view of the importance of the subject, with the possibility of a review having a major impact on the statutes and functioning of the UN—and considering the possibility that I have missed a few sources—the available resources on the topic appear to be very limited and the subject neglected. Of course, the above resources do not include the voluminous and valuable UN reports and documents on the subject, which I have used frequently and as primary sources throughout this thesis. It should also be noted that some of the older books that are used frequently by the Charter Commentary authors contain errors. For example, Ruth Russell's *A History of the United Nations Charter* contains inconsistencies in comparison with the UNCIO documents, and erroneously reports the sequence of events and votes in Committee III/1, where the veto debate took place. (Russell 1958): 737-739.

⁴⁵⁴ In the 1960s with a number of newly independent states joining the UN that were, during the first years of their independence, mostly revolutionary and anti-western, criticism of the US and its allies was an almost daily occurrence at the Assembly. This was vividly imprinted on the minds of US legal scholars of the time, as was the case with Ralph Zacklin, whose 1968 book is one of the main resources used by modern commentaries on the topic of the Charter amendments and review. Zacklin had a Cold War era-cynicism in regard to the UN's global governance role and its possible reform, being of the belief that: "The veto, given the nature of the organization, is a political necessity". (Zacklin 1968-Reprint 2005): 129.

⁴⁵⁵ As there have been a multitude of committees and forums on UN and SC reform, it becomes difficult to distinguish between their mandates and their true scope of work. See Section 9.1.1. below. Some of these committees trace their origins to Res. 992 (X) and its mandate for the Charter review conference. For example, the current Special Committee on the Charter, which has met every year for almost 40 years, originates from its predecessor, the Ad Hoc Committee, which, although referring to 992 (X) in its preamble, traces its origins to the Colombian initiative of 1969, adopted in the GA's agenda as the *Need to Consider Suggestions Regarding*

(whether intentional or incidental) obscures the fact that no review has yet occurred, and also that the Charter has been effectively breached.

There are only a few critical sources on the subject, the most prominent of which is the section entitled “Chapter XVIII Amendments”, by Georg Witschel, in *The United Nations Charter: A Commentary*, edited by Bruno Simma et al.⁴⁵⁶ This book is in its third edition, and has been widely used since it was first published in the early 1990s. It is the only contemporary English-language commentary on the UN Charter, and is formally referenced by the UN as a recommended research source.⁴⁵⁷ Georg Witschel, a staff member of the German Foreign Office, in Volume II of the latest edition in 2012, has a two-page commentary on paragraph 3 of Article 109. In it, he states that Article 109(3) is “obsolete” and is “a classic example of a ‘UN burial’”.⁴⁵⁸

the Review of the Charter of the United Nations. (Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization 2014). See also (Repertory of the United Nations Practices-Supplement-5, Volume 5 (Amendments Section) 1970-1978): 196-197. The Colombian initiative was adopted because of the majority member states’ understanding that, in spite of the Arrangements Committee being placed in hibernation, the review was inevitable and would be taking place soon. In fact, the Charter *Repertory*, the authoritative source on the legislative history of the Charter, does not normally express opinions and adopts a neutral tone. However, in its 1970–1978 edition, the writers, while examining the activities relating to the topic of Article 109, including the latest committee activities on the Charter, note, in apparent shock, in relation to 1975, that: “**the concept of ‘review of the Charter’ has disappeared** from the name of the Special Committee itself and from the items of the General Assembly” [emphasis added]. Ibid: 197. This unusually critical comment occurred in the context of the writers tracing the mandate and the source of these reform committees, which, in their view (because of the link to 992 (X)), represented the continuation of activities concerning the implementation of Article 109(3). They therefore seemed to be expressing surprise, and hinting that the article might have been breached.

⁴⁵⁶ The obsolescence discussion in Simma’s third edition is in *Chapter XVIII-Amendments*. The text related to Article 109(3) is almost identical to that in the second edition, published in 2002. The contributors to the second edition, in addition to Witschel, were Karl and Mutzelburg, with Wolfram Karl as Witschel’s main collaborator on Article 109. (Simma, Mosler, et al. 2002): 1364-1372.

⁴⁵⁷ See <http://research.un.org/en/docs/charter>; accessed 6 November 2014.

⁴⁵⁸ (Witschel 2012): 2239. See also (Simma, Mosler, et al. 2002): 1369. Witschel’s comments seem to have been influenced by, and are almost identical to, those of earlier editions. The earlier editions’ commentaries seem in turn to have been influenced by the 1968 work of Egon Schwelb, with Schwelb having described the paragraph as “obsolete”. Based on his article and references, apparently Schwelb himself had formed his opinion mostly in relation to U. Thant’s first memo and his suggestion at the Assembly that the paragraph be deleted, since it could be considered obsolete. U. Thant later retracted this, and, indeed, the paragraph was subsequently not deleted. Even Schwelb qualifies his comment by stating that his proposition may “in theory be doubted”,

The basis of this commentary, as mentioned earlier, seems to be Secretary-General U. Thant's earlier memo, in 1965, to the Assembly (A/5974), which mentions that, since Article 109(3) has been operated on, it is "obsolete". Further, the Secretary-General's memorandum contained a proposed draft resolution for the consequential need to amend Article 109, while at the same time it also recommended that paragraph 3 be deleted. However, those scholars fail to mention that subsequently the Secretary-General's representative to the 897th meeting of the Sixth Committee, on 14 December 1965, announced the reversal of this opinion (A/6180), and specifically asked the Legal Committee *not to delete* paragraph 3, as had been suggested in the earlier memo.⁴⁵⁹

The main argument presented by Witschel (and his collaborator, Wolfram Karl, in the older edition of the book, the text of which is identical) is that "the obsolescence of the provision became apparent when it was not adjusted to the increase in the number of members of the SC—very much in contrast to Art. 109(1)."⁴⁶⁰

This argument has two weaknesses, however. First, paragraph 3 (unlike paragraph 1) had a time-triggered one-time application which had already expired and had been effectively operated on. Therefore, the numerical requirement for its adoption (the number of positive SC member votes needed) had already been satisfied and hence the paragraph did not require any consequential adjustment because of the subsequent SC expansion amendment.

although he saw the chances of a review being held as "infinitesimal". (Schwelb, Entry Into Force of the Amendment to Article 109 of the Charter of the United Nations 1968): 1012.

⁴⁵⁹ (Yearbook of the United Nations 1965): 233-234; (Repertory of the United Nations Practices-Supplement-3, 1959-1966): 255. See also (UNRIC 1946-2000): A/5974 and A/6180, paragraphs: 9, 11-13.

⁴⁶⁰ (Witschel 2012): 2240. For the identical claim in the previous edition, see (Simma, Mosler, et al. 2002): 1369.

Secondly, and more importantly, Witschel and his collaborators fail to follow the final debate that took place at the 6th Committee (the Legal Committee) on the subject, in which the decision was made to keep paragraph 3. The Australian representative's argument, representing the majority view, was that keeping paragraph 3 would help to clarify questions that might arise in the future, and would serve to make clear that in fact the paragraph "had not been fully implemented" and was still legally "in effect".⁴⁶¹

The Australian view and the Committee's decision prevailed. Ultimately, the Greek draft resolution that was unanimously adopted at the Assembly, modifying paragraph 1 but deliberately leaving paragraph 3 intact, is further proof that Article 109(3) was still applicable (not obsolete) and had been operated on and, at least up to that point (1965), was still in force.⁴⁶²

In technical legal terms, unless the review conference is held, or unless this is formally determined to be unnecessary in a future repealing or reversing resolution of the GA, Article 109(3) is not obsolete, but in fact remains in effect, partially breached and not fully implemented.

7.9 Setting the Date and the Place—the Last *Rendezvous*

At the 20th Session, in parallel with the GA's efforts to amend Article 109, the Arrangements Committee, created in 1955 to fulfil the terms of Article 109(3), continued its work. At its

⁴⁶¹ See Section 7.7 above.

⁴⁶² As illustrated in the rest of this chapter, the paragraph still has legal effect. The significance of elaborating on the misuse of the term "obsolete" here is the fact that the Commentary, as the most widely consulted and, indeed, only modern source in English is used not only by academics and researchers, but also by the UN's lawyers and professionals, very few of whom would read the original UN documents and *travaux*. Hence the danger of interpretations based on the commentators' usage of terms such as "obsolete" and "UN burial", which might lead to the wrong conclusion.

meeting of 16 December 1965, the Committee voted to recommend a draft resolution for the Assembly's consideration to extend its work for another two years.⁴⁶³

The Committee's draft proposal was adopted by the Assembly with no objections, as Resolution 2114 (XX), on 21 December 1965. The resolution's operative paragraph resolved "to keep the Committee in being", and asked the Committee "to report with recommendations to the Assembly at its twenty-second (1967) session."⁴⁶⁴ In other words, the answer to the question of the *auspicious* time, and the Arrangement Committee's task of fixing the *date* and the *place* of the Charter review conference, was delayed by yet another two years.

Resolution 2114 (XX) did not represent a breakthrough for the convening of the review conference – it just added a time extension. However, because its adoption occurred several days after Resolution 2101 (XX), which had amended Article 109, this further reinforced the rationale that paragraph 3 of Article 109 had never lost its legal effect and was in fact still in force.

Resolution 2114 (XX), like its predecessor resolutions on this subject, refers in its preamble to both Resolution 992 (X) and Article 109.⁴⁶⁵

The General Assembly,

Recalling the provisions of its resolutions 992(X) of 21 November 1955, 1136(XII) of 14 October 1957, 1381 (XIV) of 20 November 1959, 1670(XVI) of 15 December 1961, 1756(XVII) of 23 October 1962 and 1993(XVIII) of 17 December 1963 relating to the establishment, under Article 109 of the Charter of the United Nations, of the Committee on arrangements for a conference for the purpose of reviewing the Charter and to the functions entrusted to the Committee ...

⁴⁶³ See n 459 above.

⁴⁶⁴ (Yearbook of the United Nations 1965): 235.

⁴⁶⁵ (General Assembly Documentation Center 1946-2015): Res. 2114(XX).

It can be seen that the historical part of the preamble establishes a linkage. In reciting the purpose of the Arrangements Committee to arrange a Charter review conference in accordance with Article 109, it further links the Committee to its parent resolution, Resolution 992 (X), which, of course, makes reference to paragraph 3 of Article 109 as its justification.

In stakeholders' terms, when the necessity to amend Article 109 arose, the minority Charter conservatives, who were against any kind of Charter revisions, tried to seize the moment and delete paragraph 3, suggesting, as Czechoslovakia did, that any review conference should be based on paragraph 1 of Article 109—in other words, implying that the question of the review conference had been reset and a new decision had to be made based on a higher two-thirds majority at the Assembly.⁴⁶⁶

However, the majority Charter reformists' view that prevailed at the Legal Committee deliberately prevented the deletion of paragraph 3 in Res. 2101 (X), which amended Article 109. With the amended Article 109 being implemented and coming into force in 1968, this represented further legitimisation and verification as to the legal effect of paragraph 3 of Article 109, and reinforced the Assembly's quest to hold the review conference.

The GA's 22nd session, in 1967, seems to have been the last meeting of the Arrangements Committee.

The Committee met twice, on 11 and 12 September 1967, but was still unable to agree on whether the international-relations circumstances and P5 cooperation were favourable enough

⁴⁶⁶ See text accompanying n 459 above.

to allow the fixing of a date and venue for the conference.⁴⁶⁷ Therefore, it decided to propose a draft resolution to the Assembly plenary recommending that the Committee be kept in being, but this time with no deadline of when to report next on its findings.

The Committee further agreed that, at the request of any member state, the work of the Committee would resume. At the request of Canada's representative for clarification on how the Committee could be activated again, the Chairman expressed the Committee's understanding, based on the relevant recorded text, as follows:⁴⁶⁸

[T]hat every Member State was entitled to request the convening of the Committee and that such a request should be made to the Secretary-General who, on the basis of established procedure, would consult the Members and would convene the Committee if it was found desirable to do so.

The Committee's draft was adopted as Resolution 2285 (XXII) at the Assembly's plenary on 5 December 1967, with 85 votes in favour, 0 opposed, and 9 abstentions. The full text of the resolution follows:⁴⁶⁹

The General Assembly, recalling the provisions of its resolutions 992(X) of 21 November 1955, 1136(XII) of 14 October 1957, 1381 (XIV) of 20 November 1959, 1670(XVI) of 15 December 1961, 1756(XVII) of 23 October 1962, 1993 (XVIII) of 17 December 1963 and 2114(XX) of 21 December 1965 relating to the establishment, under Article 109 of the Charter of the United Nations, of the Committee on arrangements for a conference for the purpose of reviewing the Charter and to the functions entrusted to the Committee,

- 1. Decides to keep in being the Committee on arrangements for a conference for the purpose of reviewing the Charter;*
- 2. Requests that the work envisaged in paragraph 4 of General Assembly resolution 992 (X) should be continued.*

⁴⁶⁷ (Repertory of the United Nations Practices-Supplement-4, 1966-1969): 394.

⁴⁶⁸ (UNRIC 1946-2000): A/6865, paragraph 4. See also (Yearbook of the United Nations 1967): 290.

⁴⁶⁹ (General Assembly Documentation Center 1946-2015): Res. 2285(XXII). See also (Yearbook of the United Nations 1967): 290-291.

Consequently, after the decision of the majority of the UN member states at the GA's 10th session, in 1955, based on paragraph 3 of Article 109, to hold a review of the Charter, the Arrangements Committee in charge of setting the date and place for the review conference was, after 12 years of meetings and discussions, still unable to decide—citing the international climate, or, more explicitly, the lack of P5 cooperation on unanimity as the reasons why it was not an *auspicious* time. Thus, after a dozen years of active and periodic meetings and *eight* resolutions in support of arranging and convening the review of the Charter, the Committee became dormant.

My further research shows that, to date, no follow-up GA resolutions or formal memorandums have been issued with the effect of killing or repealing the Committee. In fact, from 1967, for almost 25 more years, the UN official records intended for external publication listed the Arrangements Committee as one of the ongoing GA-commissioned committees, albeit reporting that the Committee “did not meet” for that year. This announcement was reported in the UN Yearbook of activities, almost every year, from 1968 up to 1991, when it was last acknowledged.⁴⁷⁰

Therefore, in accordance with UN laws and procedures, the *Committee on Arrangements for a Conference for the Purpose of Reviewing the Charter* is “in being”, but dormant and waiting to be reactivated.

⁴⁷⁰ The UN Yearbooks researched were for the period from 1968 (the year after the 1967 resolution) to 2007, with the 2007 publication being the latest edition of the Yearbook available (as of March 2014). For over *three decades*, the name of the *Committee on Arrangements for a Conference for the Purpose of Reviewing the Charter* appeared in the annual UN Yearbook reports, with the last appearance being in 1991. See (Yearbook of the United Nations 1991): 1041.

7.10 Conclusion

The last four chapters have critically examined the legislative history of the UN in its democratisation and transformation efforts from the first year of its operation to the last attempts in 1967 to convene a formal review of the Charter.

The quest for UN reform in fact predates the inauguration of the UN and goes back to its founding, in San Francisco, where the promise of the review and reform of the Charter by a fixed date was grounded in Article 109(3).

The first years' aggressive attempts at reforming the SC, as well as most member states' UN constitutionalisation debates—mostly in the 1953 to 1955 period—were channelled towards, and focused on, the presumed upcoming 10th session's review conference.

Why, after seven decades, the UN has never had any Charter review conference, or any substantive amendments to its Charter to effect UN and SC reform, and why it is important that such an exercise is carried out, is the subject of the following chapters, with the next chapter, Chapter 8, focusing on the legitimacy of the Charter in general, and on the *good faith* performance of paragraph 3 of Article 109 in particular.

With the suspended operation of Article 109(3), some fundamental questions remain. Can just a single member state, in effect, ask for the convening of the review, or, as the Chairman of the Committee later clarified, in 1967, does the request have to be submitted to the Secretary-General, who in turn will consult with the other member states? If the latter, is a *simple majority* sufficient, or are we back to the *two-thirds* requirement of paragraph 1? Other than member states, can other organs of the UN, such as the Secretariat, the UN Environmental Programme (UNEP), or the ICJ play a role in assisting the Charter reformists

to trigger the arguably badly needed UN and Council Reforms? Based on the Charter amendments' experience of the 1960s, how critical is a P5 member's *no* vote in Chapter XVIII-related Charter changes?

Suppose the review conference were finally to be held, why would it be different from the other UN reform committees? Would it trigger a UN constitutionalisation process?

The above legal questions and the substantive constitutional ones are the subjects of the last chapter, Chapter 9.

PART III

LEGAL AND CONSTITUTIONAL ASPECTS

CHAPTER 8

THE LEGAL ASPECTS OF ARTICLE 109 PARAGRAPH 3: THE LEGITIMACY OF THE CHARTER, THE VIABILITY OF THE PARAGRAPH AND ITS GOOD FAITH PERFORMANCE

8.1 Introduction

This chapter discusses the legal aspects of the UN Charter as a treaty, its legitimacy, and the process for reviewing and amending the Charter. With respect to the latter point, paragraph 3 of Article 109 is examined—first as a *question of law* while the paragraph was being formulated in 1945; and, secondly, after the paragraph became operational in 1955, its legal status (whether it is still in force or not) is considered as a *law question*.

More generally, the legitimacy of the UN Charter as a treaty is analysed. This general global governance treaty is the only one of its kind that is universal (rather than multilateral or regional) in scope. It encompasses security, economics, human rights, social issues and scientific pacts. However, was it legitimately created by its member states? Or was it essentially a peace treaty plus global governance put on the table by the Big-3 victors of World War II, which probably would have violated the customary international law legitimacy test of treaty-making under coercion?

The 51 states that were the original signatories to the Charter are analysed in Table 2. They are categorised according to their foreign-policy independence or dependence, and therefore

according to the degree of influence exerted over them by the P5. A summary of the previous discussions on the *soft* and *hard* coercions employed by the major powers, both inside and outside of the Conference, illustrates the tremendous anxiety and duress that the majority of conference participants were subjected to.

As the law of treaties, especially the Vienna Convention on the Law of Treaties (VCLT) is widely used in this chapter as a fundamental interpretative tool, the source of the VCLT is considered, as well as its relation to the UN Charter, and the issue of the “non-retroactivity” of the Convention. It is concluded that the VCLT has a recursive relationship with the Charter, and the role of the VCLT as codifier of existing customs and a moulder of new ones is also established. Consequently, the VCLT serves throughout the chapter to clarify and give precision to the existing rules of customary international law as applicable to the UN Charter, as if the rules could be reproduced in terms of the Convention’s provisions.

In examining the making of the UN Charter as a treaty, Articles 49 and 50 of the VCLT will be considered in conjunction with the invalidity tests under Articles 50 and 51. This clearly points retrospectively to defects in the San Francisco Conference and the conclusion of the UN Charter (even if, in the final analysis, Articles 49 and 50 have not technically been breached). The dropping of two nuclear bombs by the US, and its depositing of the first ratification instrument in relation to the Charter—all in a matter of seventy-two hours—further reinforce this hypothesis (see Chapter 8, Section 8.4.4). The anti-veto majority at the Conference had allowed the Yalta formula to be adopted, while at the same time a large block of states had abstained in the vote as a protest.⁴⁷¹ Yet, while the anti-veto majority wanted

⁴⁷¹ See Chapter 5 on the voting pattern at UNCIO and results for Committee III/1 on the Yalta formula. In the end, a large block of 15 states, capable of defeating the formula but under pressure from the P5, changed their active opposition to passive objection and abstained. Similarly, the applicability of the veto on amendments in

escape clauses in the Charter—a veto-proof amendment provision and a withdrawal clause—it nevertheless agreed to forgo both, subject to the condition of a fixed revision date for the Charter.

In this chapter, I will argue that the great compromise of San Francisco manifested in paragraph 3 of Article 109, which was favourably operated on in 1955, retains its legal force. My argument consists of two parts: (1) the teleological interpretation of the paragraph; and (2) the effect of how it was operated on and its current legal status.

The VCLT's interpretation rules, particularly those contained in Articles 31 to 33, which reflected customary international law, are applied to establish the absence of *good faith* in the performance, and the aborted execution, of Paragraph 3.

In view of the above possible breaches, the chapter ends by asking whether the UN Charter should be renegotiated, or, in view of the fact that UN membership has quadrupled since the organisation's founding in apparent acceptance of its statutes, whether its existing Charter should be reviewed.

8.2 The UN Charter and its Legitimacy: A Peace Treaty, a Security Pact or a Quasi-Global Government?

The question we might ask first, before analysing the UN Charter as a “treaty”, is: can the UN Charter, according to international law, be termed a treaty?

The answer can be found in the formal definition of “treaty”, contained in Article 2(1a) of the VCLT:⁴⁷²

Committee I/2 was allowed to be adopted by a margin of only one vote. See also Prime Minister Fraser's report, on his return to New Zealand, referring to the symbolic protest votes at the Conference: (Fraser 1945): 13-14.

⁴⁷² (Vienna Convention on the Law of Treaties (with Annex) 1969): Sect. 1, Art. 2 (1a).

"Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

[Emphases added.]

The UN Charter, being obviously an international agreement and in writing, we next have to decide if the instrument has the ingredient of being “concluded”. Conclusion, in the context of treaties, is considered to encompass the whole treaty-making process—from negotiation to finalisation of the text, to the final consent of the state parties to be legally bound by the treaty.⁴⁷³ (For more details on “conclusion” of treaties, see Section 8.4.4.)

As was explained in Chapters 4 and 5, the Charter passed through all these phases. Moreover, Article 110 of the Charter, by explaining the ratification rules, made clear at what stage a state’s consent is given, and defined the legally binding point at which the instrument would enter into force. This moment was reached on 24 October 1945, when the Charter entered into force, with binding effect, and “governed by international law”. As to the title or “designation”, it seems that, as long as the other requirements in Article 2(1a) of the VCLT are satisfied, “whatever” designation is given to the 1945 UN agreement is not important, and the title cannot inherently alter the nature of that instrument as a treaty.⁴⁷⁴

Therefore, according to the VCLT’s terms of reference, the UN Charter, as an “international agreement concluded between states”, in “writing”, and “governed by international law”, and regardless of its “designation”, can be considered a treaty.⁴⁷⁵

⁴⁷³ (Hollis 2014): 19-21. See also n 559 below.

⁴⁷⁴ Ibid.

⁴⁷⁵ In the “Definition of Key Terms” in the *UN Treaty Collection*, where the UN Charter is deposited as one of the organisation’s treaties, it is stated that: “The term ‘charter’ is used for particularly formal and solemn instruments, such as the constituent treaty of an international organization”, further suggesting that the term has “emotive” and historical connotations. In addition to the UN Charter, another example is the Charter of the

In this thesis, depending on the context and the legal significance, the term “treaty” in some instances is used in place of the commonly used “charter” to designate the constitutive instrument of the UN.

8.2.1 Two-for-One: Security Pact for the Victors, and Victors’ Peace Treaty for Others

The San Francisco Conference began on 25 April 1945, while the war on the European front was still being fought. The delegates at the Conference were fully aware of the devastation that this use of force was causing, and of the day-to-day shifting of geopolitics during those extraordinary times. Furthermore, they could watch the images and the impact of widespread coercion on the nightly news reels shown at the Conference’s Cinema.

Two days into the Conference, on 27 April 1945, Mussolini was captured and summarily executed the following day. And, almost three weeks into the conference, on 8 May 1945, Hitler’s Germany surrendered.⁴⁷⁶ However, on the Asian front, while Japan was on the retreat, the war was still in full force with no end in sight.

The delegates were also fully aware that the entire origins of the UN (its first iteration), as signed in 1942, was primarily a military alliance against the Axis powers.⁴⁷⁷ In fact, the Big-3, in their Conference invitation to the states, requested that, by March 1945 (and before the

Organisation of American States (OAS). See:

https://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#charters .

Further, the *UN Treaty Collection*, under the heading of *Multilateral Treaties Deposited with the Secretary-General*, has as its first treaty listed as the “Charter of the United Nations and Statute of the International Court of Justice”. See: <https://treaties.un.org/Pages/CTCs.aspx>.

⁴⁷⁶ (Schlesinger 2003): 173.

⁴⁷⁷ (Bosco 2009): 13.

time of their attendance), the invited states must have declared war on the Axis forces and joined the UN as a pre-condition to attending the event.⁴⁷⁸

For the first time, at the Tehran Conference of 1943, the Big-3 leaders—Roosevelt, Churchill and Stalin—met face to face to discuss the new international organisation. The last time they met to discuss the topic was at the Yalta Crimea Conference in February 1945. Both China and France were excluded from these two conferences.

As the war progressed, the objective of the victors shifted from how to wind down the war and handle the enemy states, to how, in the future, to resolve conflict among themselves and their protectorate states.

It was at Yalta that the three powers agreed that all SC decisions would be made based on their consensus. This implied a veto if any of the three did not want to go along with a majority decision of the Council. At the time, this requirement seemed existential to the Big-3, who could all foresee an after-the-war competition between the Communist East and the Capitalist West.

At the last meeting in Yalta, the uncompromising veto privilege of the Big-3 was agreed on and added to the Dumbarton Oaks proposal. As part of the Yalta agreement, the USSR committed to enter the war against Japan. The pact was sealed for delivery to San Francisco, and the veto privilege was later extended to China and France—the two co-opted permanent members.⁴⁷⁹

⁴⁷⁸ (UN Web Services Section 2014).

⁴⁷⁹ Most of the historical information in this section, and some of the commentary, is drawn from S. Schlesinger's *Act of Creation*, particularly the chapter on "Yalta and the Aftermath: Roosevelt's Last Acts" (Schlesinger 2003); as well as from D. Bosco, *Five to Rule Them All* (Bosco 2009): 10-38.

Therefore, first and foremost, the UN was a military alliance and a *security pact* between the US, USSR and UK.

The second objective of the formation of the UN, in the eyes of its sponsoring governments, was how to maintain peace and security for the large bloc of nations that would be invited to UNCIO, but were in one way or another under the Big-3's sphere of influence. In fact, with the exception of some states, mostly in Latin America; as well as New Zealand and Australia; and the war's "enemy states", the rest of the world at the time was under the influence of the permanent members, as depicted in Table 2 in Section 8.2.2.

The majority of the states invited to San Francisco from Europe, Asia, Africa and the Middle East were either: (1) the losers of the war in their fight with the Axis powers, which were then freed by the Big-3 and under their military protection and presence; or (2) outright colonial dependent states that were being groomed to gain their independence and were selectively chosen to participate at UNCIO (Table 2). In both cases, therefore, for these loser states and the hand-picked colonial states, the UN Charter was primarily a *peace treaty* through which they would gain their independence and freedom, and be saved from the "scourge" of war and occupation.⁴⁸⁰

⁴⁸⁰ The suggestion that the UN Charter's objectives included, among others, functioning partly as a peace treaty and a new security regime between the permanent members and the rest of the world stems from the vision of the SC proposed by the Charter's US architects. The US envisaged that the Military Staff Committee (Article 47) would have a permanent standing military force from armed forces and staff contributions of the permanent members under the command of the Council, and would police global conflicts anywhere in the world. Thus, under this SC regime, for the rest of the world, arms could be regulated, thereby leading to disarmament. In fact, in three Charter articles: Article 11 (GA), Article 26 (SC), and Article 47 (SC-Military Staff Committee) the terms "regulation of armaments" and/or "disarmament" are specifically mentioned. In this regard, a pertinent comment from Roosevelt is cited by D. Bosco and his secondary sources, in Bosco's *Five to Rule Them All*, made during the course of a dinner at the White House, and as recounted by the then British Foreign Secretary Anthony Eden:

The small powers, the president [Roosevelt] said, 'should have nothing more dangerous than rifles.'
The real decisions 'should be made by the United States, Great Britain, Russia, and China, who would

8.2.2 The Charter as a Multi-Level Global Governance Treaty

The UN Charter, as it was being formulated and finalised by the Big-3 at Dumbarton Oaks, under American insistence and leadership, had already taken on some aspects of global governance. It is well known that, of the P5, it was the US, the UK and the Soviet Union that wrote the UN DO proposal for a General International Organisation. A lesser known fact, however, is the asymmetry in the Big-3's roles in this massive undertaking. The US performed the bulk of the work, including, conceptualisation and implementation, and was doing practically all the research work, task-force activity and policy formulations. Essentially, the US was the master-framer of the draft of the UN Charter draft, and, in addition, managed the coordination and organisational efforts. The US also primarily paid the associated expenses.⁴⁸¹

China was a signatory to the DO, and, together with the Big-3, was considered one of the four sponsoring governments in San Francisco. However, China had very little to do with the drafting of the DO and, in fact, like France, was excluded from the Yalta Conference, where the Big-3 wartime leaders met in person to finalise the draft Charter before its presentation to the rest of the world for co-option.

The Big-3's role in framing the DO proposal can be summarised as follows: the US was the originator, sponsor and the *framer* of the UN; the UK was the advisor and the *collaborator*; and the Soviet Union was the *legitimiser*. In other words, the US designed and created, the UK collaborated by reviewing and giving feedback, and the USSR—not trusting the other

be the powers for many years to come that would have to police the world.' An assembly of all states could meet once a year, he told the British, so that the smaller powers could 'blow off steam'.

(Bosco 2009): 15.

⁴⁸¹ (Schlesinger 2003): 111-126

two, but also not wanting to be left out—presented its lowest-common-denominator criteria to legitimise the proposed organisation.

President Roosevelt and his advisors had started work on the design of the UN in 1941. They had idealistic quasi-world government plans for the then UN member states and perhaps the rest of the world. However, by 1943, they had abandoned those ideas and were focusing more on a global collective security pact based on the continental regions.⁴⁸²

Yet Roosevelt and his advisors were fully aware that the violation of human rights, large disparities in economic conditions, and injustice were the main factors in fuelling wars. They would therefore vacillate, reverting at times back to the good-governance and global-government aspects of the proposed world organisation.⁴⁸³

The end result was that the DO had mixed objectives and incorporated broader goals, such as achieving “international cooperation in the solution of international economic, social and other humanitarian problems.”⁴⁸⁴ To achieve these ends, in addition to the GA and the ICJ, the US included, in tandem with the SC, an Economic and Social Council (ECOSOC) in the final DO proposal. With these objectives, the UN, before the adoption of its formal name, was referred to in San Francisco as the General International Organisation.⁴⁸⁵

⁴⁸² For proposals of world-federation and world-legislative features for the UN while the organisation was being considered by the US State Department in 1941–1943, see (Baratta, *The Politics of World Federation: United Nations, UN Reform, Atomic Control* 2004): 97-99. For a shift in US foreign policy, in 1943, limiting the broad scope of the vision of the UN in its initial design phases, see (Bosco 2009): 14-15.

⁴⁸³ Ibid. During the 1941 to 1943 period, President Roosevelt was promoting his Four Freedoms inclusive of all humans in the world: *freedom of speech*, *freedom of religion*, *freedom from want*, and *freedom from fear*. In the same period, the US Congress was proactive in pushing for creation of a “general” world organisation, and in some ways adopted a more progressive position than that of the administration. Separate resolutions were adopted in both the Senate and the House in favour of stronger international organisations with wider scope (Schlesinger 2003): 31, 41 and 45.

⁴⁸⁴ (UNCIO - Volume III: *Dumbarton Oaks Proposals, Comments and Proposed Amendments 1945*): DO, Chapter I, paragraph 3.

⁴⁸⁵ The term “general” was in the title of the DO. Ibid.

To comply with the general model, the Charter, as a multi-purpose, multi-functional statute, calls for different organs that have a degree of separation of powers and that create their own subsidiaries. In the case of the GA and ECOSOC, these bodies can even enter into multilateral conventions and treaty agreements. The UN system has become in fact a large international-law-making processor and source of law. From the GA to ECOSOC, to the specialised agencies, soft law and regulatory and administrative laws are constantly being created. In the case of the SC, as discussed in Chapters 2 and 3, the UN has been generating hard law, creating criminal laws, setting up courts, and adopting legislative actions.

Therefore, in the case of the Council, invoking Chapter VII, the Charter empowers the UN to become a supranational *sovereignty-sharing* global institution. In Articles 2(7), 24 and 25, the member states, in the “application of enforcement measures under Chapter VII,” explicitly delegate their rights to the SC.⁴⁸⁶

By now, it should be clear that the UN Charter is no ordinary treaty. It is more than just the sum of its functional, collective security, economic and social, and technical cooperation components. It is a “general” global-governance, and in fact *quasi*, constitution for a supranational government, with sovereignty-sharing concepts similar to those in the EU treaties.⁴⁸⁷ The question is whether such a Charter, so general and universal, and having such a significant impact, was constituted legitimately.

⁴⁸⁶ Further detail on Charter articles relating to the supranational character of the SC measures pertaining to Chapter VII decisions can be found in Chapter 3. For additional elaboration of these points, see Chapter 9.

⁴⁸⁷ The sovereignty-sharing features of Council decisions under Chapter VII are, of course, universal, but exclude the permanent members: in their case, empowered with the veto, Council decisions are made and applied only if all of the P5 are in agreement. As to the conceptual similarity of sovereignty-sharing between the UN and the EU, the EU institutions have been evolving and are a lot more developed, with sovereignty-sharing and subsidiarity being main pillars in their design. In contrast, the UN’s supranational characteristics surfaced more by mutation, and almost half a century after the Charter was inaugurated. Nonetheless, the reality is still the same—under a Chapter VII decision, the whole world is sharing sovereignty. For a discussion of the law-making powers of the Council, see Chapters 2 and 3.

8.3 Charter Legitimacy—Legitimacy of States and Their Invited Governments

In evaluating the legitimacy of the UN Charter, I will first review some background material relating to the legitimacy of the states' governments present at the Conference, in view of the extraordinary circumstances of the time.

Table 2 serves as a useful reference tool that, together with its notes, provides a country-by-country analysis of the legitimacy status of the governments invited. The objective, by defining and applying dependency criteria, is to identify the states that were *Under the Influence (U)* of the permanent members at the start of, or during, the Conference and up until the treaty's conclusion and ratifications.

Table 2 in total depicts the 51 States (including the P5) that were the original signatories of the UN Charter. This includes states whose credentials were approved by the Big-3 (and therefore the Credentials Committee) while the Conference was in session. The table also includes Poland, which was originally denied attendance at the signing ceremonies, but signed at a later date and was formally considered one of the original 51 states.

Extrapolation of some figures (not necessarily mutually exclusive) is presented below.

Excluding the P5, the number of original Charter signatories is 46. Out of these 46 states, 27 (more than half) had a significant **military** presence of one or more of the P5 in their territory (the M-factor). There were 14 P5-installed or **puppet** regimes (the P-factor) in attendance.

Another seven were **government-in-exile** regimes (the EX-factor) or emergency cabinets that

were not elected based on their national constitutions, and dependent on the P5 for legitimisation and support.⁴⁸⁸

Furthermore, there were five colonial states. Although they had varying degrees of autonomy and were being groomed for independence, they were formally and in fact **colonies** (the C-factor) of either Britain or France. In the case of the Philippines Commonwealth, it was a formal US dependant.

To identify the Under Influence criterion (the U-factor), the qualifying parameters were defined as the M, EX, P and C factors. The presence of the M-factor (military presence) alone did not necessarily imply the state was under the influence of one of the major powers. This is true, for example, in the case of Cuba, which had a historical treaty with the US allowing the US military bases at Guantanamo that predated the two World Wars. Therefore, the M-factor is an important indicator, but not a determining criterion for being Under Influence.

However, if a government representing a state at the Conference had an EX-, P- or C-factor, then this, individually, was sufficient to identify the invitee government as being Under Influence. These generally included governments-in-exile, puppet regimes, and the colonial states.

With this analysis in mind, I now suggest a precise definition for the U-States participating at UNCIO in San Francisco:

An UNCIO-participating state Under Influence (U-State) is defined as a state which, in terms of its foreign relations and policy, was directly or significantly

⁴⁸⁸According to the Atlantic Charter and the first UN declaration signed in 1942, the number of European governments-in-exile states (mostly located in London) amounted to nine: Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, Yugoslavia and representatives of General de Gaulle of France. See the *UN Charter History* site: http://www.un.org/en/aboutun/history/atlantic_charter.shtml; accessed 3 March 2014.

controlled by one or more of the permanent members at any time during the period between the initiation of the UN Charter (11 February 1945—the end of the Yalta round, and the start of invitations) including the period of the UNCIO in San Francisco (April-June 1945) and the Treaty's conclusion and coming into force (24 October 1945).

The final country-by-country analysis and further notes on the parameters and factors mentioned are explained in Table 2 on the following pages.

Table 2

Conclusion of the UN Charter as a Treaty—State Parties Under Influence

Distribution of States as Independent or Under Influence of the Permanent Members

(P5 Dependents or Representing Their Interests) *

UNCIO, 11 February to 24 October 1945

State	Status at UNCIO I= Independent U= Under Influence	Under Influence Category
Argentina	I	–
Australia	I	–
Belarus	U	M, P
Belgium	U	M, EX
Bolivia	I	–
Brazil	I	M
Canada	I	–
Chile	I	–
Republic of China	P5	–
Colombia	I	–
Costa Rica	I	–
Cuba	I	M
Czechoslovakia	U	M, P
Denmark	U	M, EX
Dominican Republic	I	–
Ecuador	U	M
Egypt	U	M, P
El Salvador	I	–
Ethiopia	U	M, EX
France	P5	–

Greece	U	M, EX
Guatemala	I	–
Haiti	U	M, P
Honduras	I	–
India	U	M, C
Iran	U	M, P
Iraq	U	M, P
Lebanon	U	M, C
Liberia	U	M, P
Luxembourg	U	M, EX
Mexico	I	–
Netherlands	U	M, EX
New Zealand	I	–
Nicaragua	U	M, P
Norway	U	M, EX
Panama	U	M, P
Paraguay	I	–
Peru	U	M
Philippines	U	M, C
Poland	U	M, P
Saudi Arabia	U	M, P
South Africa	U	C
Syria	U	M, C
Turkey	I	–
Ukraine	U	M, P
USSR	P5	–
United Kingdom	P5	–
United States	P5	–
Uruguay	I	–
Venezuela	I	–

Yugoslavia	U	M
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* Source: Various sources; see footnote.⁴⁸⁹

⁴⁸⁹ Perhaps pioneering the legitimacy angle of research on the UN Charter, the data for this section were not found in any concentrated source(s), and had to be collected from various places. Two categories of general sources were used. The first consisted of a review of the political history of each state—particularly at the end of the war period—to determine primarily whether they were independent or under the influence of the P5 (I- and U-factors). If a U-State, then the government’s parameter for being in the dependence category, as to C-, P-, and EX-factors, were identified.

The exception was information on the Latin American states. Information on their political history as a group (continent) was more readily available. For a single source on the Latin American States’ World War II international politics and military involvement, see (Leonard and Bratzel 2006).

With respect to a government’s dependence, the EX- and C-factors were more easily identifiable as being states Under Influence. The EX were all the states that were governments-in-exile that had been relocated from abroad or installed by the Big-3. The European states in this sub-category, such as Belgium, Czechoslovakia, Greece, Luxembourg and the Netherlands, were eight in total (excluding France), and were easily identifiable. In fact, these states were formally designated as such (government-in-exile) in the Atlantic Treaty. Those governments in the 1945 period under my evaluation were still mostly operating from London and were not necessarily democratically elected according to their national parliamentary procedures and constitutions. See n 488 above.

An example of these caretaker governments is the Schermerhorn-Drees cabinet in the Netherlands. This cabinet was mostly known as the “royal cabinet,” or the “emergency-cabinet,” since it was appointed by the queen rather than being constitutionally elected. It was only after UNCIO, in November of 1945, that the Dutch parliament started functioning again. **See:**

http://www.parlement.com/id/vh8lnhronvwl/kabinet_schermerhorn_drees_1945_1946.

For interference by the Big-3 in the political processes of some of the EX-states, see, for example, the use of force by the UK in an incident in Greece less than six months prior to UNCIO that left 28 people dead: <http://www.theguardian.com/world/2014/nov/30/athens-1944-britains-dirty-secret>. Both accessed 30 December 2015.

For a general assessment of the “free” governments of Europe in 1945, and the view that the wartime circumstances had made them “morally corrupted”, as well as the legitimacy deficit of the EX-states—for example in the cases of imprisoning tens of thousands in Belgium, Greece and the Netherlands as “collaborators”, even though they were mostly part of the political opposition—see Ian Buruma, *Year Zero: A History of 1945* (Buruma 2013): 169-171, 205, 207.

The other easily identifiable U-States were the colonial (or C-states) invited to the Conference, although they were in effect still colonies. In the C-state case of India, for example, at the time of UNCIO, most of the Indian National Congress leadership, including Jawaharlal Nehru, were in jail. In fact, Madame Pandit (Nehru’s sister and India’s future UN ambassador) was leading a parallel unofficial effort in San Francisco, representing the National Congress and “Quit India” and Mahatma Gandhi’s views. Gandhi, in his letters and interviews relating to UNCIO, had called for an end to imperialism everywhere, international disarmament, and establishment of a world government with a pooled police force. India did not gain its independence until 1947. For information on India’s global views at the time of UNCIO, as expressed by its excluded leadership, see Manu Bhagavan, *Showdown in San Francisco* (Bhagavan 2013): 33-49.

The Philippines, in this analysis is categorised as a puppet regime rather than a colony, since the US referred to the Philippines as an associate “commonwealth” state rather than a colony; Philippines did not achieve its independence from the US until 1946.

Table 2 Notes

Definitions:

I = Independent of P5: by and large, the UNCIO-participating state could, in terms of its foreign policy and relations, act independently. However, this category does not imply that the state's government at the time was run democratically or that the state had no degree of economic dependence on the P5.

U = Under Influence (U-State): by and large, the UNCIO-participating state was, in terms of its foreign policy and relations, directly or significantly controlled (in terms of coercion or threat of coercion) by one or more of the permanent members. The state did not enjoy sufficient sovereign equality and freedom while concluding the treaty or at the time of giving

Egypt and Iraq, which had a certain amount of formal independence after World War I, were actually British colonial states in transit (the British troops had not actually left until 1947). In the case of French colonies, during the wartime French Vichy regime the French had lost central control of their colonies, including Lebanon and Syria. The government-in-exile of Charles de Gaulle supported the independence of Lebanon and Syria, and at De Gaulle's request these two states were invited to the Conference as independent states. However, while the Conference was still in progress, French troops violently reasserted control over these two countries, thus in effect re-occupying them. The French troops did not leave until 1946. In addition to references in Chapter 4, see also (Buruma 2013): 322-325.

The second general category used to determine dependency was whether there was a significant degree of presence of one or more P5 military forces (the M-factor) in a given state's territory at the time of the Conference. The data had to be collected from military records and the presence of the P5 armed forces across the globe. Historical military records for both the US and the UK were relatively comprehensive and readily available on government-published military history databases. In particular, the following two sources on the British and US military and naval forces were used to construct the Table: with regard to the UK: *British Military History*, <http://www.britishmilitaryhistory.co.uk/>; accessed 28 May 2014; on the US, Stephen Howarth, *To Shining Sea: A History of the United States Navy, 1775-1998*. (University of Oklahoma Press, 1999.)

Wikipedia, which has an extensive WW II country-by-country short report, provides primary sources that I also consulted. Finally, the Conference documents, as well as its auxiliary documents published with the 22-volume UNCIO set, were used. Examples of these UNCIO auxiliary documents were the associated *daily journals* and the selected newspaper articles of interest to the participants, and media coverage that was selectively but regularly published by the Conference organisers. In particular, the Conference media coverage proved to be very useful, because it captured the international political events at the time that had direct or indirect effects at the Conference: changes of government and delegates, uprisings, military advances, and East–West rivalries. Examples of prominent international developments which occurred during the two months that the Conference was in session include: the quickly shifting borders in Europe between the USSR and the Western powers, the change in government in Denmark, the situation in Poland and Yugoslavia, and the French military intervention in Syria and Lebanon.

its formal consent through ratification. The type of dependence or control is further defined in the categories below.⁴⁹⁰

U-State –Under Influence Categories:

M = Military Presence: this category indicates that a significant military presence (minimum of a brigade or five thousand military personnel) of one or more of the P5 existed in the U-State’s territory at the time of UNCIO. There are several scenarios under which a P5 military presence occurred. For example, there might have been a massive number of troops active as part of a military operation liberating a state from Axis forces. Belgium, Belarus, Denmark, Ethiopia, Luxemburg, the Netherlands, Norway, the Philippines and Ukraine provide examples of this scenario. Or, in other circumstances, there might be a smaller contingent of P5 troops, but their presence still posed a potential military threat to the host country. This was the case in many Latin American U-States. Yet another scenario is where the P5 military presence in a previously independent state resulted not from liberating the U-State from Axis occupation, but instead had another objective, such as regime change, or some logistical or strategic goal. This scenario played out in Iran in 1942, with the Soviets invading from the north and the British invading from the south, and both occupying the country.

However, a P5 military presence by itself did not necessarily constitute being Under Influence. Brazil and Cuba provide examples of this. This could have been because of the remoteness of the base (a distant port, or island base) or the existence of a historical lease or treaty relating to the use of the base that predated the two world wars (for example, Guantanamo in Cuba).

EX = the state government represented at the Conference was a **government-in-exile**.

Therefore, the government-in-exile was essentially legitimised by its permanent-member host

⁴⁹⁰ Extensive discussion of what constitutes coercion and “threat or use of force” and non-military types of coercions follows in Section 8.4. For an ICJ case on prohibition of the use of force to influence a state’s “formulation of foreign policy”, see (Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) 1986): paragraphs 201-205. See also n 556 and n 600 below.

country, rather than having been formally elected by its people or representing its nation through a constitutional process.

P = the U-State was a **puppet** regime installed by a permanent member. Many of the U-States fell under this category. The start date for this condition of regime dependence could have been before, during or immediately after the war, but was still in effect at the time of the treaty's conclusion. Examples included Belarus, Czechoslovakia, Haiti, Iran, Iraq, Liberia, the Philippines, Poland, Saudi Arabia and Ukraine.

C = Colonial: the U-State, at the time of the Conference, was (1) still formally a colony; or (2) had been granted independence, but was still in effect a colony. An example of the former is India, which did not gain its independence from Britain until 1947, but at the Conference represented itself as a sovereign state. In fact, at the time of UNCIO, most of the leadership of the Indian National Congress and the independence movement, including Nehru, were still in the prisons of their British colonial masters. Examples in the latter category are Egypt, South Africa, Syria and Lebanon. Although the UK or France had formally granted independence to these nations, the former colonisers had not, either because of a treaty arrangement or the use of force, actually relinquished all of their powers.

My analysis, summarised in Table 2, indicates that the majority of the states in San Francisco were either under the direct influence of the P5 or were significantly subject to their influence in respect of their foreign relations. Of the 46 states (excluding the P5) that were invited to the Conference and that participated in drafting the Charter, 27 were U-States (59 per cent). And once the P5 are added to this total at the time of voting and adoption of the DO amendments, this represents a 63 per cent guarantee of favourable votes, should they have needed it, for the adoption of the P5's wishes and resolutions.

Most of the invitee states were fully aware that they were not on an equal footing at the Conference and that they would probably have to acquiesce to the WW II victors' plans for a UN. However, while the US was being careful to paint a picture of fairness at the Conference, some of the other permanent members had no compunction about showing who was in charge. According to Carlos Romello, representative of the Philippines, "even while the Soviets preached the rhetoric of liberation from oppression, they behaved toward all of us representatives of smaller countries as though we scarcely existed. They acted as if they owned the world"⁴⁹¹

In attempting to co-opt member states into signing their global-governance Charter, the Big-3's task was made easier by the fact that only 37 per cent of participants at the Conference were Independent States that could have opposed their plans. Therefore, it would seem to have been easy sailing for the Big-3 to achieve their desired result. Nevertheless, the

⁴⁹¹ Cited from Carlos and Beth Romulo, *Forty Years: A Third World Soldier at the UN*, 1986, 9-10, in (Schlesinger 2003): 171. Another instance of the Big-3's private belittling of the lesser powers concerns the powerful US representative to San Francisco Senator Connally. During the latter part of the Conference, around the time of the *anti-veto* rebellion, he exclaimed: "these little countries are going to bellyache and raise hell no matter what you do about it. We're doing all this for them. We could make an alliance with Great Britain and Russia and be done with it." Cited from *Stettinius Papers. Notes for 29 May*, University of Virginia Library, in (Schlesinger 2003): 171.

permanent members still employed other means, both within and outside of the Conference, to intimidate representatives and place the states' governments under duress. This resulted in the unanimous adoption of the Charter.

8.4 Charter Legitimacy—the Test of the Vienna Convention on the Law of Treaties

Section 2 of the 1969 VCLT contains a series of articles that may delegitimise and therefore nullify a treaty. The primary principle that the VCLT adheres to is the “equal sovereignty” of states and states’ “consent” in contracting a treaty.⁴⁹² Therefore, in this section, I will examine the UN Charter in light of VCLT Section 2, Articles 49 to 51, to test for the breach of states’ consent at UNCIO, and will also discuss the validity of the Charter in the context of these articles.

8.4.1 The UN Charter, VCLT Recursion and Retroactivity: Do the Vienna Convention’s Provisions Apply to the UN Charter?

First, it is necessary to examine whether the VCLT constitutes a competent source and a relevant set of rules to act as a yardstick for the Charter’s credibility or to evaluate the good faith of its execution.

In fact, there is a circular constituent legitimisation relationship between the UN Charter and the Vienna Convention. Article 4 of the VCLT, on the “Non-retroactivity of the Present Convention”, may be interpreted as excluding older treaties from its scope. However, the VCLT was sponsored by the UN, and drafted by the ILC (set up by the GA). In the absence of a constitutional court, and from a rule-of-law perspective, it can only make sense that the

⁴⁹² The principle of “sovereign equality” is cited in the preamble (chapeau) of the VCLT, and the emphasis on states’ “consent,” in addition to being included in the preamble, appears in several other places in the treaty: for example, in the articles in the introductory section to Part I. (Vienna Convention on the Law of Treaties (with Annex) 1969).

legal norms and principles established by a subsidiary would also apply to its creator. Dick Ruiter, in analysing law as the interplay of norms of conduct and power-conferring norms, reminds us of the common occurrence and the nature of “legal systems as recursive structures”.⁴⁹³

On the other hand, the prohibition of coercion and the use of force in concluding treaties has existed in international law since the 1920s, clearly predating the VCLT and the UN Charter.⁴⁹⁴ And both the Charter and the VCLT proclaim themselves to be “international law” compliant.

⁴⁹³ (Ruiter 1993): 23. This interplay of the law of treaties and the UN, particularly in relation to the SC, rapidly becomes intricate and complex. As was discussed in Chapter 3, the Council, without regard to the VCLT, can make *instant* treaties. For example, the creation of the UN Compensation Commission, and the requirements under Res. 1370 and Res. 1540 regarding terrorism and WMD regulations, were all decided by adoption of resolutions, and all created legal obligations for states that have the full effect of treaties. But, in addition to *pseudo treaty-making* powers, the Council can also affect treaties in other ways. It can presumably use coercion—the only lawful type according to VCLT Article 52—to make treaties. The Council can also *break* treaties: for example, in the case of Libya in the Lockerbie and the Montreal Convention case, or in the case of Serbia and the Danube Convention in the 1990s (conflicts in the former Yugoslavia). It can *enforce* treaties. One of the more recent examples is the Res. 1929 (2010) sanctions on Iran. It asked Iran to comply with its NPT and UNCLOS treaty obligations, as well as “ratification” of the Comprehensive Nuclear-Test-Ban Treaty. The Council can also *validate* treaties that are otherwise in breach of the VCLT. This can occur when an unlawful war (coercion) has led to a treaty, but then the Council adopts a resolution asking the contracting states to the treaty to comply with its terms. This is, in effect, validating an unlawful (per Article 52) treaty. Examples of this include: the Congo (DRC) war that led to a peace treaty in 1999, and the Kosovo conflict, in the 1990s. For these latter examples, see (Corten 2011): 1217-1218; for former cases and examples, see (Wood 2011): 245-255; and S. Talmon, the *Security Council Treaty Action*, footnote 12.

⁴⁹⁴ The beginning in international law of the prohibition of the use of force in settling international disputes or in treaty-making is conventionally dated to post-World War I activities, such as the creation of the League of Nations and, in particular, the Pact of Paris, also known as the Kellogg–Briand Pact, of 1928. According to the ILC and the VCLT *travaux*, an exact date for the prohibition of use of force, and therefore an unequivocal date for the applicability of Article 52, was discussed but not set. However, in the discussions on the intertemporal law, the Special Rapporteur referred to 1928 (the year of the Pact of Paris) as the effective approximate date to be used as a guide for prohibition of the use of force. In any case, the Vienna Convention implies that the UN Charter is fully linked to the international law and customs that precede the Charter. Oliver Corten, in his Commentary, cites this link as the reason for the particular expression “international law” being included in the final draft of the preamble of the VCLT, to illustrate that prohibition of the use of force predated the UN:

It is for this reason that the aforementioned amendment to replace the expression 'principles of the Charter' for 'principles of international law embodied in the Charter' was accepted, as its objective was to affirm the emergence of a regime prohibiting the use of force before the creation of the United Nations.

(Corten 2011): 1216. See also the secondary source on the ILC (YILC, 1979, vol. I, 1558th meeting, p 132, para. 35), in N119.

In Article 1, “Purposes and Principles” of the UN Charter, conformity with “the principles of justice and international law” is stated. The VCLT chapeau, while recognising the “international law embodied in the Charter of the UN,” affirms that “the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.”⁴⁹⁵

Further, VCLT Article 4, at the beginning of its single paragraph, states that this “Non-retroactivity” clause exists “without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention”.⁴⁹⁶ In other words, the rules of the VCLT, as the general law of treaties and principles that govern both the treaty-making process and the subsequent interpretation of the performance of treaties, apply at any time to any treaty that is still in force and not in contradiction of the current international law and customs. The fact that the VCLT is primarily the codification of the customary law of treaties, and that its rules are retroactively applicable to existing treaties, is well established in the ICJ’s and other tribunals’ rulings.⁴⁹⁷

⁴⁹⁵ (Charter of the United Nations 1945-2015): Article 1, paragraph 1; (Vienna Convention on the Law of Treaties (with Annex) 1969): Preamble.

⁴⁹⁶ The full text of Article 4 is:

Article 4. Non-RETROACTIVITY OF THE PRESENT CONVENTION
Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Ibid: Article 4.

⁴⁹⁷ In fact, as soon as the Vienna Convention had completed its work in 1969, the ICJ began to apply the VCLT’s rules as instant international law and customs that were thus applicable to pre-VCLT treaties and international agreements. This was before the convention had even entered into force (which happened just over a decade later, in 1980). One of the earlier instances in which this happened was the 1971 advisory opinion concerning South Africa’s presence in Namibia—in respect of South Africa’s older treaty mandates. (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) 1971): 46-47, Para. 94 and 96.

Throughout this chapter I have utilised the VCLT primarily in two areas. First, in relation to the invalidity of the UN Charter (treaty) based on the use of force (Articles 51 and 52).

Second, I have utilised VCLT treaty interpretation rules to apply Article 26 to evaluate the good faith performance of Article 109(3) of the UN Charter. On the question of the validity of my approach, there are several rulings on the customary international law applicability of the VCLT provisions to older treaties. However, before discussing some of them, the scholarship on the subject will be reviewed.

Frederic Dopagne, in his discussion of Article 4 in the prominent *Commentary*, edited by Oliver Corten and Pierre Klein, concludes that the main principle laid down in the article is that contained in the introductory part of its paragraph: “without prejudice to the application of any rules set forth in the [Vienna] Convention to which treaties would be subject under international law independently of the Convention”. Dopagne then argues that the Convention “has in some respects codified pre-existing customary international law while in some other respects contributing to the (subsequent) moulding of customary rules”.

Therefore, “what is important here is that the rules of international law 'independent' of the Vienna Convention be in force **at the time when the question pertaining to the law of treaties arises**”.⁴⁹⁸

In conclusion, Dopagne, noting that “since the immediate effect *seems* to be the general principle for every norm of international law, regardless of its source”, posits that the VCLT and the current law of treaties apply to all treaties, even if they were concluded prior to the “emergence” of the current treaty-making rules.⁴⁹⁹

⁴⁹⁸ (Dopagne 2011): 84-85 [emphasis added].

⁴⁹⁹ Ibid. Dopagne concludes his discussion of Article 4 as follows:

Kresten Schmalenbach, in his commentary on the Vienna Convention, after stating that the VCLT codified established customs, argues that the Convention's approach to not enumerate or “identify customary treaty law leaves room for the future transformation of ‘progressive rules’ into settled customary law.”⁵⁰⁰ Schmalenbach also argues that, in the context of treaty interpretations, the “inter-temporal law doctrine is generally not acceptable”.⁵⁰¹ In other words, according to Schmalenbach, in contrast to criminal law, and similar to the immediate effect of some legislation, for a treaty still in force, the treaty law is applicable, as is.

Accordingly, “[t]he non-retroactivity rule is *dispositif*. A past treaty can be subsequently subjected to the VCLT provisions, either ad hoc in case of a dispute or by another form of subsequent consent.”⁵⁰² Schmalenbach reinforces his arguments by citing the *lex specialis* character of VCLT in relation to other laws of treaties, and by referring to the fact that “Art. 4 itself underlines the self-regulatory character of the Convention”.⁵⁰³ This is presumably based on the first part of Article 4, in which “treaties would be subject under international law independently of the Convention,”⁵⁰⁴ thereby giving it a dynamic and self-regulating nature. In support of his arguments, Schmalenbach cites the ICJ’s *Namibia* opinion as being a case of dynamic interpretation of a treaty, and the Court’s decision in *Armed Activities on the Territory of the Congo* as a case of retroactive application of the VCLT.⁵⁰⁵

As a result, the scope of the limit set by the first words of Article 4 seems to be (too?) far-reaching so it could even be contended that, paradoxically, this limit tends to overshadow the principle to which it relates. Ibid: 85.

⁵⁰⁰ (Schmalenbach 2012): 81.

⁵⁰¹ Ibid: 87.

⁵⁰² Ibid.

⁵⁰³ Ibid: 88.

⁵⁰⁴ (Vienna Convention on the Law of Treaties (with Annex) 1969): Art. 4.

⁵⁰⁵ (Schmalenbach 2012): 81-88.

In another commentary on Article 4, Mark Villiger also emphasises the significance of the first part of the article, which, he says, has the function of “unequivocally ‘reserving’ customary law and any general principles of law underlying the Convention.”⁵⁰⁶ As to the second part of the article, he suggests that it is in fact intended to reinforce Article 28 of the Convention, on the general “non-retroactivity” principle of contracts (non-retroactivity of obligations), which is also enshrined in the treaty’s Article 28.⁵⁰⁷ In summary, after citing relevant Court cases, Villiger concludes that: “Article 4 cannot as such prevent customary rules underlying the Convention from enjoying ‘retroactive’ effect, nor can it attribute any such effect.”⁵⁰⁸

In its judgment in the *Gabcikovo-Nagymaros* case, the ICJ applied relevant provisions of the VCLT to the 1977 treaty between Hungary and the then Czechoslovakia.⁵⁰⁹ In that case, the Court, while recognising that the 1977 treaty predated the VCLT, held that:⁵¹⁰

99. ... Consequently, only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty.

Whereas, in paragraph 46, the Court had cited a number of prior cases where it had retroactively applied the VCLT:⁵¹¹

46. The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the

⁵⁰⁶ (Villiger 2009): 114.

⁵⁰⁷ Ibid: 113-115.

⁵⁰⁸ (Villiger 2009): 108-115.

⁵⁰⁹ (Mansell and Openshaw, *International Law: A Critical Introduction* 2013): 88.

⁵¹⁰ (*Gabcikovo-Nagymaros Project (Hungary/Slovakia)* 1997): paragraph 99.

⁵¹¹ Ibid: paragraph 46.

provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62 (see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports. 1971, p. 47, and Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 18; see also Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I. C. J. Reports 1980, pp. 95-96).

With the seeming applicability of the Vienna Convention and its principles to the UN Charter, both in terms of giving precision to existing customs and defining new ones, what of court rulings on use-of-force provisions regarding older treaties? In the context of Articles 51 and 52 and the Declaration, used in this chapter, have those provisions been retroactively applied?

There is case law in support of the prohibition of the use of force in contracting agreements, regardless of the non-retroactivity of the VCLT or the fact that a party to a dispute has not acceded to the Vienna Convention.

In the ICJ's *Icelandic Fisheries* decision, the Court ruled "that under contemporary international law an agreement concluded under the threat or use of force is void." This judgment was delivered after the Vienna Convention was signed (1969) but before it had entered into force (in 1980).⁵¹²

The *Dubai-Sharjah Arbitration Tribunal* echoed these remarks, while expanding the applicability of the VCLT to non-state-parties, noting that, "based on customary rules of

⁵¹² (*Icelandic Fisheries* 1973): p. 14, paragraph 24.

international law”, Articles 51 and 52 are applicable even to states that have not ratified the Vienna Convention and are seemingly not bound by the VCLT regime.⁵¹³

As to the legal effect of the Declaration (defining political- and economic-type force), in strictly technical legal terms, the VCLT’s treaty interpretation rules, particularly that contained in Article 32, consider supplementary documents such as the Declaration to be part of the treaty. In other words, the mere existence of the Declaration has legal relevance.

Perhaps, in the *Nicaragua v. USA* case, the Declaration was the driving factor in the Court’s finding that:⁵¹⁴

A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. [Emphases added.]

This wider interpretation of use or threat of use of force, post VCLT, was possibly one of the reasons why the US, after *Nicaragua*, decided to withdraw from the compulsory jurisdiction of the ICJ.

Consequently, because of the aforementioned UN-VCLT recursive relationship, and since most of the principles of treaty-making and interpretive rules contained in the VCLT form part of customary international law, including the inadmissibility of coercion, the VCLT rules are in force and largely apply to the UN Charter.⁵¹⁵

⁵¹³ *Dubai-Sharjah Border Arbitration, (In the Matter of an Arbitration concerning the Border between the Emirates of Dubai and Sharjah)*, awarded 19 October 1981, 91 *ILR* (1981) 543, at 569 (1981). See also, (Corten 2011): 1204.

⁵¹⁴ See n 556 and n 600 below.

⁵¹⁵ For another opinion that the VCLT had immediate effect and created instant customary international law, see (Pazarci 2011): 6.

It should also be noted that the VCLT article numbers used below act as a shorthand reference to their basic customary international law principles and equivalents, such as non-interference, sovereign equality, prohibition of use of force to procure the conclusion of treaties, and good faith.

8.4.2 Fraud—VCLT Article 49

Article 49 states:⁵¹⁶

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

The Vienna Convention does not provide a formal definition of fraud, and the VCLT's *travaux* simply refers to fraud in this context as “deceit or wilful misrepresentation”.⁵¹⁷

The world peace and the good governance objectives of the UNCIO sponsoring governments, particularly those of the US, cannot be doubted. US foreign policy at the time, and the discourse of its political establishment and that of Presidents Roosevelt and Truman prior to the Conference, point to the US's desire to apply the rule of law in resolving international conflicts. Therefore, the Article 49 *invalidity* test does not seem to apply.

However, certain practices before and during the Conference mentioned in Chapter 4, particularly relating to organisational and procedural legitimisation, seem to raise questions as to whether the sponsoring governments crossed the fine line of fraudulent conduct. Some examples follow:

⁵¹⁶ Ibid: Article 49.

⁵¹⁷ United Nations Conference on Law of the Treaties, OFFICIAL RECORDS, First Session 1968, p 258, para. 65; ILC website: http://legal.un.org/diplomaticconferences/lawoftreaties-1969/vol/english/1st_sess.pdf . See also (Villiger 2009): 617.

- The secret pact between the Big-3 leaders in Yalta that the veto was not subject to negotiation at the Conference should have been openly revealed to the participants. This unannounced pre-condition for the Charter, as well as having other implications, wasted days and weeks of the weaker states' limited time and resources that were diverted to the veto fight. This was at the expense of other topics and other Yalta formula countermeasures and remedies, such as those relating to withdrawal and amendments, which were subject to another commission and other committees. These important topics had to be postponed and negotiated under more strenuous time constraints.⁵¹⁸
- Once the Conference had begun, but unknown to the participants, all the important “main” committees were dominated by US officials. The high-impact Executive Committee and Steering Committee were appointed and chaired by the US. These two powerful committees set the agendas (top-down), decided on voting and procedural issues, and nominated the chairs to the conference's four commissions and 12 technical committees. Moreover, the powerful Executive Committee, which had responsibility for most Conference activities and decisions, was exclusive and not open to all the states. At the Executive Committee in addition to the omnipresent P5, there were only seven other state representatives elected to represent the weaker states.⁵¹⁹

The Secretary General of the Conference, Alger Hiss, was also from the US State Department. These self-appointments (presented in terms of being provisional at first)

⁵¹⁸ On the Big-3's dictation of the veto and the SC's structure, see Chapter 5.

⁵¹⁹ (UNCIO - Volume V: Delegation Chairmen, Steering Committee, Executive Committee 1945): 4. See also (Schlesinger 2003): 114.

and the US's domination of the administration of the Conference was unexpected even to the other sponsoring states. US dominance had been further extended to chairing the plenary sessions, until, finally, at the objection of the Soviet Union, it was decided that at least the plenary sessions would be chaired by the sponsoring states on a rotational basis.⁵²⁰

- One of the cardinal principles of international law and the VCLT is “sovereign equality.” The VCLT allows the outcome of a treaty negotiation to result in a treaty where decisions are made based on weighted voting (for example economic or population considerations). However, while the treaty is being negotiated, the decisions must be based on “sovereign equality” and the states’ consent. However, in San Francisco, the invitee states were presented with the bulk of the Charter as the DO proposal, which had effectively needed only *three* concurrences—those of the US, the UK and the USSR (with some input from the Republic of China). At UNCIO, however, voting procedures required any amendments to the DO to be carried with a two-thirds majority. Therefore, based on the 50 member-state conference participants (51 counting Poland) a two-thirds majority required 34 votes for a statutory change or an addition to be adopted, whereas, for the bulk of the Charter—presented as the DO Proposal at the beginning of the conference—only 3 affirmative votes had been necessary. This exclusion of all the other states from the DO proposal meant that only

⁵²⁰ (United Nations Yearbook 1946-1947): 13, 47. See also (Delegates and Officials of the UNCIO - Doc 639 G/3(2) 1945): 1–6. The top-down flow of agenda items, the difficulty for smaller states of getting their items on the main Committees’ agendas, and the fast pace and time pressures of the Committee meetings were publically noted at the Conference by the delegates, and later further elaborated on in their memoirs. For example, on Dr. Evatt’s objections to the adoption method of the agenda items at the Conference, see (UNCIO - Volume V: Delegation Chairmen, Steering Committee, Executive Committee 1945): 253-254. On Iraq’s objection to the Executive Committee not being open to all the states, and on its composition, see *ibid*: 291-292. For a description of the difficulty of keeping up with the multiple concurrent committees and their pace, owing to the smaller states’ lower number of delegates at the Conference, see Fraser’s recollection in (Hensley 2009): 389.

3 versus 34 states' votes were needed for adoption of bulk of the Charter provisions.

In effect, this favoured the Charter wishes of the US, the UK and the USSR by a factor of almost ten-to-one—hardly resulting in “sovereign equals” during Conference negotiations.

- This disproportional representation also manifested itself in the referral by Conference organisers of controversial topics to ad hoc-created subcommittees. The Conference procedures were such that the higher-level Commissions did not discuss new measures or motions, and would only receive the committee rapporteurs' reports and then vote on what was rolled up to them from where the actual critical work and discussions were taking place—in the committees or subcommittees. Unlike the 12 committees, which were fixed in number and were open to all the participating states, the subcommittees were created as needed, and were generally limited to 15 members only—five of which had to be the permanent members. Thus, in subcommittee discussions and decisions, the P5 ensured themselves 5 out of 15 or one-third representation, whereas if they had allowed the motion to remain in the regular committees, the P5 representation would have been limited to 5 out of 50 states (10 percent).⁵²¹

⁵²¹ The P5 used this divide-and-conquer technique to push the two main issues being fought by the anti-veto majority to subcommittees that had been created *ad hoc*. The Yalta formula was pushed to Subcommittee III/1/B; and questions relating to the Charter review and amendments were dispatched to Subcommittee I/2/E. In addition to the disproportional representation of the P5 in the subcommittees, it seems that, in the procedural legitimisation of the outcome of the conference, the P5 had deviated from the *two-thirds* majority to only a *simple* majority in adopting the subcommittee decisions. In other words, the P5 needed only 3 or fewer additional states to cast a positive vote for their resolutions to be adopted (8 out of 15 positive votes or fewer if there were abstentions). For example, in Subcommittee I/2/E, concerned with voting arrangements for future Charter amendments (Article 108), when, on 14 June 1945, the motion to require a *two-thirds* majority to adopt any future Charter amendments was introduced, once put to the vote, it was adopted by only 6 votes in favour and 5 against (only one more additional vote than those of the P5). (UNCIO - Volume VII: Commission I, General Provisions 1945): 567.

Returning to the analysis of VCLT Article 49, case law addressing fraud is rare in international law. This is mostly because its occurrence voids the whole treaty and must be taken seriously, and partly because it demonstrates a certain naiveté on the part of the contracting states that were defrauded and may lead to public humiliation and political uncertainty.⁵²²

Was Dumbarton Oaks and its most important component—the SC—*misrepresented* as a “proposal”, rather than a dictation?

Another irregularity, or at least a source of confusion at the Conference, concerned voting procedures, especially during the first two weeks of the Conference. For example, at the first meetings of the Steering Committee and the Executive Committee, it was assumed that the amendments to DO submitted by the sponsoring governments would require only a simple majority to pass, whereas amendments from the other nations would require a two-thirds majority to be adopted. At the objection of the lesser powers, this was changed to a two-thirds qualified-majority requirement for all *substantive* Conference proposals to be adopted. At later meetings, and at the final voting procedure decision made by the Steering Committee of 9 May 1945, it was decided that the voting outcome would be based on those present and voting. (UNCIO - Volume V: Delegation Chairmen, Steering Committee, Executive Committee 1945): 187-190.

Based on the adoption behaviour of the Conference Committees, especially in relation to some controversial decisions, it seems the Conference had a loose interpretation of the two-thirds and “present and voting” requirements, which excluded abstentions from the total count. For example, on the veto and the Yalta formula applicability to SC decisions and to Charter amendments and review outcomes at the ratification stage, once put to the vote, the large number of protest abstention votes were treated as being *absent*. Although this loose definition of “present and voting” is also used in some legislative processes, the fact that abstentions will be counted as *not being present* is usually defined at the outset. Further, based on my research, it seems the Conference not only failed to explicitly define the two-thirds qualification, but also failed to establish any *quorum* for its Committee decisions. The failure to provide these definitions also means that the *two-thirds* rule could be interpreted as implying that the explicit consent of two-thirds of the total states participating was required.

This explicit state consent becomes particularly significant when constituting an IO. Otherwise, with this imprecise interpretation of the two-thirds majority requirement at the Conference, it could be implied that, out of the 50 states participating, if 49 states happened to be absent or abstained from a particular vote, just *one* positive vote would satisfy the two-thirds majority requirement. This is hardly in keeping with the spirit of the US Constitution, the model so frequently cited by the US and other states’ leaders at the Conference. Under the US Constitution, an absolute two-thirds majority of the 50 states is required to amend the US Constitution by means of a States Convention. In fact, in the alternate way of amending the US Constitution (Article V), which is by the adoption of *two-thirds* of both houses of Congress, any member that is present but abstains does not have his/her vote discarded as being absent. On the contrary, it is included in the *non-affirmative* votes, which has the same effect as a *negative* vote. For a US Congressional interpretation of amendment procedures to the US Constitution, see *Constitution of the United States of America: Analysis, and Interpretation - 2002 Edition - S. Doc. 108-1*; (The US Congress 2002): 937-956.

⁵²² (Villiger 2009): 620.

As was explained in the legislative history section of this thesis (Chapters 4 and 5), the DO draft at San Francisco was presented by the Big-3 as a proposal and subject to negotiation. However, it soon became clear to the anti-veto opposition states that the SC section was not subject to any form of negotiation at the Conference and its terms were in fact being dictated by the War's victors. Chapters 4 and 5 further highlighted some of the procedural legitimisation and irregularities of the Conference favouring the sponsoring governments, who were to be the permanent members. In other words, it seems that the Conference's procedures and irregularities treated purportedly equal states unequally, in violation of the principle of equality of states required at the outset of any international convention.

Whether this was intentional and fraudulent on the part of the permanent members remains unclear. But the question of the possible consequences of those irregularities and the degree of their impact on the formation of the Charter remains.

8.4.3 Corruption—VCLT Article 50

Article 50 of VCLT on *Corruption of a Representative of a State* reads as follows:⁵²³

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

There is no formal definition of corruption in the VCLT. Jean-Pierre Cot, in his *Commentary* to this article in the VCLT, states: “Article 50 of the Vienna Convention aims to state a new defect of consent that results from the corruption of the representative of a state and has led to the state's consent to be bound.”⁵²⁴ The main objective at the Convention, in devising this

⁵²³ (Vienna Convention on the Law of Treaties (with Annex) 1969): Article 50.

⁵²⁴ (Cot 2011): 1169. The Convention Reports, however, clarify that “a small courtesy or favour shown to a representative in connexion with the conclusion of a treaty” is acceptable. Ibid: 1173.

article, was to distinguish between two categories of fraudulent acts: one directed against the state (Article 49) and the other directed against the individual representing the state (Article 50), and so to make “provision for a specific defect of consent by corruption, since some considered this not to be a particular case of fraud.”⁵²⁵

In the post-colonial period, corruption-related cases and allegations in treaty-making have been very rare. However, they were quite common during the colonial period, when colonial masters used corruption to obtain favourable treaties. Hence, the provision of Article 50 at the Convention was primarily for the protection of smaller states when they were negotiating treaties with more powerful and economically stronger states.⁵²⁶

In the context of the UNCIO, I will not make allegations that intentional and systemic corruption existed. However, in common with VCLT Article 49 and the case of fraud, there seems to be substantive evidence and borderline cases, which, when taken together, may be sufficient to establish violation of states’ consent at the Conference.

As examples, I will provide two incidents of possible misconduct by the US. This is not to imply that the Soviet Union, with its Eastern European puppet regimes, or the imperial UK or France, with their colonies and states under their influence, did not, in their pursuit of favourable results at the Conference, attempt favouritism, or engage in conduct that may be considered corrupt or borderline corrupt. However, I chose the two US incidents for two reasons: (1) there are more publicly available sources and information on the subject; and (2) as the main sponsor and the host of the Conference, the US was better situated logistically, financially and resource-wise to influence the delegates, the events, and the outcome.

⁵²⁵ Ibid: 1169-1173.

⁵²⁶ (Villiger 2009): 623-624.

The first example of US conduct is the well-known fact that the US government paid for the entire conference, including the state representatives' expenses. It is difficult to ignore the fact that most delegates to the Conference were either substantially or totally dependent on the US government for support, including in respect of the long and difficult journey, at that time, to and from San Francisco. For the few lucky representatives who had the privilege of flying, it still meant multi-stop flights; and for the rest of the over 2,000 delegates and staff, it meant a voyage to the east of the US and then a four-day train ride to California. Then, at the Conference itself, the US State Department and military provided lodging, meals, logistics, translation, telephone and telegraphic communication, and transportation. During the evenings and times off, the US provided shopping trips (personal expenses were formally excluded), sightseeing tours, and, in addition to selected news, nightly Hollywood films up to the midnight hours at the UN Cinema. For some delegates, the financial and livelihood dependency was so great that US officials even bought them walking shoes.⁵²⁷

The second example of US conduct at the Conference that may be relevant to Article 50 corruption relates to the US's unusual relations with most of its Latin American neighbours. Although the US had turned isolationist after World War I, the Monroe Doctrine still prevailed in the American continent. The US had great influence over the Latin American states and considered those states to be part of its well-guarded regional domain and off-limits to the European colonialists. One influential US family involved both in lucrative private business and US politics, as well as having connections with the leadership of many

⁵²⁷ S. Schlesinger's chapter on *Americanizing the Conference* and its secondary sources (memoires and oral history) provide telling details of the unusual size and extent of the Conference, as well as the state delegates' dependence on the US organisers. (Schlesinger 2003): 114-118. Another excellent source highlighting the extent of US government-provided services to the delegates, including the daily side events, tours, movies, shopping trips, and other extracurricular activities, are the Conference *daily journals* that were formally distributed to the delegates. (UNCIO - Volume II: General 1945). See also, (Hensley 2009): 385.

Latin American countries during the first half of the twentieth century, was the legendary Rockefeller family. Nelson Rockefeller was at San Francisco and played an important behind-the-scenes role in the Latin American interactions relating to the making of the Charter.⁵²⁸

Mr. Rockefeller, like many of his cousins and relatives, owned profitable investments and other interests in Latin America. Rockefeller also headed the US State Department's Inter-America Affairs section. Although he was not a member of the official US delegation to the UNCIO, he did hire a charter flight to fly 12 Latin American envoys and numerous other of his Latin American diplomatic and influential acquaintances to San Francisco.⁵²⁹ These Rockefeller allies hovered around the periphery of the Conference and conducted themselves as described below.

Mr. Rockefeller hosted, entertained, provided services, and even got the US Naval staff to attend to some of the delegates' personal affairs. Rockefeller, both in his official and personal capacity, tried to influence the Latin votes by paying special attention to his Latin American guests and delegates. Conducting their own meetings, hosted by Rockefeller, they followed their own Conference topics and agenda, apparently not all of which was coordinated with the State Department. In short, Rockefeller, partly using his own resources and at times those of the US government, was conducting a semi-official and unusual relationship with a large number of the Latin American delegates—both before and during the Charter negotiations.⁵³⁰

⁵²⁸ For a discussion of the Monroe Doctrine and, more generally, an examination of the US's hegemonic behaviour in this period, see (Chomsky 2004). For US regional activities in 1945, and Nelson Rockefeller's role in the UNCIO Conference, see (Schlesinger 2003): 129-130, 175-176.

⁵²⁹ Ibid.

⁵³⁰ Nelson Rockefeller was very well connected both within the US and Latin America. He was known to have had the resources to bypass formal procedures and government officials in order to get his way. For example, the FBI and US naval staff support he was given was not coordinated with, and was independent of, the State

8.4.4 Coercion—Articles 51 and 52 and the VCLT Declaration (Annex)

In this section, I will examine the possible use of coercion at the UNCIO. Whether the coercion was directed against state representatives (Article 51), or against a state or a number of states, and whether the coercion was of a military or of an economic and political nature (Article 52 of the VCLT and the Vienna Convention’s Declaration Annex) are examined simultaneously. The main reason for examining Articles 51 and 52 together (to test the validity of the UN Charter) is the interdependency of the coercion factors used, and because establishing its use is more pertinent to this analysis than its type.⁵³¹

For example, a state representative as a sovereign may have been psychologically intimidated and threatened, or the representative’s phone may have been tapped and his/her confidential communications listened to. In addition, not only the representative, but the state itself might have been under duress either militarily, economically, or politically. For example, in the case of a colonial or puppet state invited to the Conference, probably all these coercion types would hold true.

Therefore, successfully establishing that coercion was used, whether under Article 51 or 52, should satisfy the VCLT’s test in possibly invalidating the UN Charter.

With this in mind, I will now examine the text of the two articles. VCLT Article 51, *Coercion of a Representative of a State*, reads:⁵³²

Department Conference organisers. Ibid: 95, 129-130. For a description of apparently excessive partying and nightlife activities engaged in by the Panama delegates, possibly hosted by the Rockefeller team, as reported by their hotel mates—the New Zealand delegation—and recorded by NZ Prime Minister Peter Fraser, see (Hensley 2009): 385.

⁵³¹ In fact, the Convention acknowledges that the two types of coercion set out in Articles 51 and 52 may coincide. Further, Villiger points out the overlapping role of the state representative, who acts “in a dual capacity: (i) as an individual; and (ii) as an organ of State.” (Villiger 2009): 633, 637.

⁵³² (Vienna Convention on the Law of Treaties (with Annex) 1969): Art. 51.

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Although coercion in this context can encompass both physical and moral violence against a state representative, it is generally regarded as involving the latter, with the individual concerned having been subjected to threats or intimidation. In fact, G. Distefano, in Corten and Klien's Commentary, goes so far as to state that the Article 51 type of coercion is strictly of the *moral* kind:⁵³³

In the light of an analysis of the ILC travaux préparatoires, in which fear is discussed, we are inclined to affirm that only moral violence may be invoked in the application of Article 51.

Adopting this interpretation of Article 51, it seems that coercion at UNCIO was abundant. The Big-3 publicly and privately belittled the weaker states at the Conference. The Russians were more public in this, as expressed in Foreign Minister Molotov's speeches and comments, as later revealed by General Romulo of the Philippines.⁵³⁴

The US was trying to present an image of fairness at the Conference. However, its most powerful political personality at the Conference, Senator Connally, exclaimed: "These little countries are going to bellyache and raise hell no matter what you do about it. We're doing all this for them."⁵³⁵

⁵³³ United Nations Conference on Law of the Treaties, *Official Records*, First and Second Sessions, 1968-1969, pp 65-66; ILC website:

<http://legal.un.org/diplomaticconferences/lawoftreaties-1969/vol/english/confdocs.pdf> .

See also (Distefano 2011): 1193. This does not imply, however, that the use of physical violence against a state representative is considered acceptable; it is just that "absolute violence does not feature among the grounds for invalidating an international agreement, but rather as a cause of their non-existence. For it will not be a true conventional legal act, but rather a unilateral act imposed by the violence of another State." Ibid.

⁵³⁴ See the text accompanying n 237 above and also n 491 above.

⁵³⁵ (Schlesinger 2003): 171.

The UK's chief negotiator at the Conference, and the UK's permanent under-secretary for foreign affairs, Alexander Cadogan, recalls in his memoirs that, in order to quell the Yalta formula rebellion, he had teamed up with Senator Connally: "I tell [Connally] he is our heavy artillery and I am the sniper ... It works quite well and we wiped the floor with a Mexican last night: I think we must have shut him up for a week or so."⁵³⁶

As disclosed almost 50 years after the Conference, practically all the invitees were wiretapped and under surveillance, without their knowledge. More worrying was the fact that some of the delegates were directly subjected to intimidation.⁵³⁷ One compelling example was the case of the Philippines' head delegate, General Romulo. Initially, he had aligned himself with the anti-veto camp, but there then occurred an unusual visit from US State Department representatives. After this visit, the Philippines' vote on the subject of the Council's structure and the veto powers of the permanent members fully conformed to the P5's wishes.⁵³⁸

Modern international law yields no case law for an Article 51 breach.⁵³⁹ However, Villiger, in his Commentary on VCLT Article 51, while defining different acts or threats as constituting moral pressures of different kinds, does discuss the threshold of when conference

⁵³⁶ (Bosco 2009): 35.

⁵³⁷ The US Army Signal Security Agency (SAA), the predecessor of the NSA, was in charge of wiretapping and, together with the FBI, was responsible for spying on the Conference delegates. The details of this conduct was disclosed after almost half a century under the Freedom of Information Act, in the early 1990s. (Bosco 2009): ix, 93-94. For one example of how this spying proved useful to the US in influencing the outcome of the Conference (related to the proposed SC decisions of *substantive* versus *procedural*), see Ibid: 194. See also Chapter 4.

⁵³⁸ Most of the other coercion cases cited in this section were referenced earlier in this chapter, as well as in Chapters 4 and 5.

⁵³⁹ Prior to World War II and the twentieth century, there had been cases of coercion of state representatives. However, in modern international law, there has not been any jurisprudence on VCLT Article 51. Perhaps this is a favourable indication that coercion of state representatives no longer occurs. However, the *obiter dictum* of two later tribunals can be cited. The *Dubai-Sharjah Border Arbitration* case (1981) and the ongoing *Iranian-US Tribunal* (in its arbitral award of 1990) both gave rise to incidental judgments and opinions on violations of Articles 51 and 52 as grounds for nullifying a treaty. (Distefano 2011): 1188-1189.

argumentation and persuasion, when carried to extremes, can result in “undue pressure” and therefore coercion.⁵⁴⁰

Certainly, Senator Connally’s conduct, detailed previously, is an example of placing state representatives under duress and “undue pressure.” Just before a crucial vote on the powers of the permanent members, and in his capacity as Conference host, the Senator told the delegates that their time was up and that they could “go home,” while tearing the draft Charter in pieces and looking at each delegate “belligerently”, exerting “undue pressure”. The Senator’s conduct applied sufficient pressure that one-third of the delegates accepted life under the shadow of the veto. They changed their intended *no* votes to a protest *abstention* vote and therefore allowed the adoption of the P5-sponsored resolution.⁵⁴¹

As to the coercion category related to VCLT Article 52 and its companion Declaration as an Annex to the Vienna Convention, this is where the UN Charter as a legitimate treaty appears to fail and register its highest defect.

Article 52, *Coercion of a State by the Threat or Use of Force*, states:⁵⁴²

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

As mentioned earlier in the chapter and illustrated in Table 2, a large number of states present at UNCIO were under the direct military presence and occupation of the P5. This included Belgium, Belarus, Czechoslovakia, Denmark, Ethiopia, Egypt, Iran, Lebanon, Luxembourg,

⁵⁴⁰ (Villiger 2009): 633; See also Note 13, by A. Pellete, on the same subject. Ibid.

⁵⁴¹ See Chapter 4, Section 4.5.4.

⁵⁴² (Vienna Convention on the Law of Treaties (with Annex) 1969): Art. 52. In addition to the text of Article 52 and the Declaration (the Annex), the “prohibition of use of force”, as well as its derivative, the “non-interference in the domestic affairs of States”, are stated principles in the VCLT *chapeau*.

the Netherlands, Norway, the Philippines, Syria and Ukraine. In some of these states, this military occupation might have been welcomed and possibly considered a friendly occupation: examples are most of the Western European states and the Philippines. But for some of the other states, this military occupation amounted to a hostile takeover. In these states, domination and regime change was the prime motivation behind the interventions of the Big-3 and France. Examples are provided by Belarus, Czechoslovakia, Egypt, Iran, Liberia, Lebanon, Poland, Syria and Ukraine. In both cases, and whether friendly or not, as far as UN Charter-making goes, the fact remains that these states were subject to the direct military presence or occupation of one or more of the P5 members.

The Declaration, by “*Reaffirming* the principle of the sovereign equality of States” and affirming “... that States must have complete freedom in performing any act relating to the conclusion of a treaty,” defines “force” as being of three general types: *military*, *political* and *economic*. In the relevant part, the Declaration:⁵⁴³

1. ***Solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent,***
2. ***Decides that the present Declaration shall form part of the Final Act of the Conference on the Law of Treaties.***

With this qualified and expanded definition of the “threat or use of force”, and in the context of UNCIO, it becomes apparent that a number of other states now fulfil the criteria of having been coerced, including, among the Latin American states, Ecuador, Haiti, Nicaragua,

⁵⁴³ (Villiger 2009): 651 [emphases added]. Note also that both Article 52 and the Declaration were adopted at the Vienna Convention by an overwhelming majority, with no State casting a negative vote. Ibid: 639, 652.

Panama and Peru. They were either US puppet regimes or were subjected to significant US military presence.

In other regions, previously unlisted, Ethiopia, Greece, Iraq, Saudi Arabia, South Africa and Yugoslavia can now be categorised as having been exposed to the use of or threat of use of one or more of the force categories (military, economic, or political) by one or more of the permanent members. We also have to recognise the U-factor of the colonial states that were invited to the conference as independent states, such as Egypt, India, Lebanon, the Philippines and Syria. As colonies, they inherently suffered from all three forms of the use of or threat of use of force—economic, political and military—while negotiating the Charter under the shadow of their colonial masters.

Before World War I and the League of Nations, the use of force and coercion in the drawing up and conclusion of an armistice or a treaty was acceptable in international law.⁵⁴⁴ In other words, “war was considered continuation of politics by other means.”⁵⁴⁵

After World War I, prohibiting intimidation and use of force to secure contractual obligations was becoming customary and *lex lata* in international law. This was further reinforced by the Pact of Paris of 1928, and adopted by the League of Nations in 1932.⁵⁴⁶

Recent case law is scarce on the subject of voiding a treaty or an international contractual obligation based on coercion of the participant states. This is for two reasons. First, typically a regime change is imposed on the coerced state, and therefore the newly installed regime is dependent on the aggressor state and has no reason to file a legal suit which in effect will

⁵⁴⁴ Ibid: 640.

⁵⁴⁵ (Weissner 1994-1995): 594.

⁵⁴⁶ (Corten 2011): 1202-1203.

delegitimise itself. This was particularly true immediately after World War II and during the Cold War era, when, in the East–West race, many vulnerable states were coerced and co-opted into the communist or anti-communist blocs. It is also possible that the independence treaties made between colonies and their colonial masters that did not involve third-party arbitrators, like the UN Trusteeship Council, also fell into this category.

Despite many acts of political and economic coercion, and even the outright use of military force, the second and primary reason we do not find Article 52 invoked is that some of those acts are usually authorised by the Council. The last part of Article 52 prohibits use of force or its threat, but only if it is “in violation of the principles of international law embodied in the Charter of the United Nations.” A reasonable interpretation of this is that the Vienna Convention allows coercion if the use of force is authorised by the SC.

We observed in the previous chapter that the Council makes international law through Chapter VII quasi-legislative resolutions. Therefore, SC laws are enforceable without requiring a formal treaty. For example, in the Council-authorized First Gulf War, the Council’s decision to create the UNCC and tax Iraqis and pay billions of dollars to certain states (and non-state actors) was based on Council Resolution 687 (1992). These actions did not require a treaty with Iraq.⁵⁴⁷

Without a treaty, it seems that there is no recourse to the Vienna Convention on the Law of Treaties and its Article 52 coercion provision. The VCLT provides no mechanism for the state of Iraq to limit or void the UNCC regime.

⁵⁴⁷ (UN Security Council Resolutions 1946-2015): S/RES/687. For a detailed discussion of the tort-type resolutions of the Council in the case of Iraq in the First Gulf War and the creation of the UNCC, see Chapter 3, Section 3.6. For a discussion of the invalidity of using coercion (of any type) in the context of Article 52, and as a consequence creating reparation obligations, see *ibid*: 1209.

Despite the use of force in obtaining state contractual obligations, there is, as just discussed, no case law on the subject. Nonetheless, at least two international tribunals have acknowledged the prohibition of coercion in treaty-making.

The first relates to the ICJ judgment in the UK v. Iceland case, *Icelandic Fisheries*. Iceland had claimed that, essentially owing to the British Royal Navy's use of force, it had exchanged a series of Notes with the UK government "under extremely difficult circumstances".

In that case, the Court observed:⁵⁴⁸

This statement could be interpreted as a veiled charge of duress purportedly rendering the Exchange of Notes void ab initio, and it was dealt with as such by the United Kingdom in its Memorial. There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void.

A similar reaffirmation of the prohibition of use of force to obtain international agreements is found in the *Dubai-Sharjah Arbitration Tribunal* case. In examining the border dispute between Dubai and Sharjah, and whether VCLT Article 52 applies to treaties between states that are not state parties to the Vienna Convention, the court of arbitration held:⁵⁴⁹

Articles 51 and 52 of the Vienna Convention of 1969 reflect, in the view of the Court, customary rules of international law which are binding upon States even in the absence of any ratification of that Convention.

This applicability of the article beyond the state parties to the VCLT should also apply to the Declaration's other category types of force: political and economic coercion.

⁵⁴⁸ (*Icelandic Fisheries* 1973): p. 14, paragraph 24.

⁵⁴⁹ *Dubai-Sharjah Border Arbitration, (In the Matter of an Arbitration concerning the Border between the Emirates of Dubai and Sharjah)*, awarded, 19 October 1981, 91 *ILR* (1981) 543, at 569 (1981); see also, (Corten 2011): 1204.

In fact, the main objective of the *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, adopted at Vienna, was to clarify and apply the generally accepted principles of customary international law, particularly the *non-intervention* principle as it pertains to the making of treaties.⁵⁵⁰

According to Corten, “this principle is today widely established by the doctrine, which generally admits that economic or political coercion can be contrary to the principle of non-intervention.” Therefore, the existence of any type of coercion in treaty negotiations violates “the sovereign rights of a State par excellence”.⁵⁵¹

Granted, however, that it is more difficult to prove or to measure political and economic coercion than is the case, say, with a direct military intervention.

Perhaps for this reason, the Vienna Convention *travaux* shows resistance by some ex-colonisers and powerful states to the inclusion of these other types of coercion, as proposed by lesser powers as a 19-state amendment, to the main text of Article 52. The compromise reached was the adoption of the Declaration, depicting the other coercion types in the formal annex and part of the “final act” of the VCLT.⁵⁵² The adoption of the Declaration was by the overwhelming majority of 102 votes in favour, none against, and four abstentions.⁵⁵³

With the Declaration not being a separate article on its own or being incorporated as part of Article 52, what are the legal implications? What is the legal status of the Declaration, and

⁵⁵⁰ (Corten 2011): 1209.

⁵⁵¹ Ibid: 1209.

⁵⁵² (Corten 2011): 1207-1209; and (Villiger 2009): 651-657.

⁵⁵³ (Villiger 2009): 652.

what does it mean to be formally adopted and presented as an annex, and be part of the Final Act of the Vienna Convention?

Both Corten and Villiger, in their separate VCLT commentaries, express the view that the Declaration-type coercions do not have the same legal effect of “force” mentioned in Article 52 in nullifying a treaty. Moreover, cases involving political and economic coercion would be more difficult for a court to interpret. Villiger goes as far as suggesting that the Declaration is probably not binding, but that with state practice it may become so in the future.⁵⁵⁴ However, Corten, highlighting the non-intervention principle, and citing two of the many GA resolutions on the subject, as well as the related emerging custom, concludes that the legal applicability of the broader interpretation of Article 52 includes political and economic coercion.⁵⁵⁵

The emerging custom and the interpretation of “threat or use of force” to include other coercion types, and as being something other than direct military intervention and violating the non-interference principle, has also been confirmed in the *Nicaragua* case. In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, in 1986, the ICJ, *inter alia*, ruled that “the activities in question,” such as naval mining and economic sabotage, did constitute coercion and were against the international law principle of non-interference. The Court stated:

A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these

⁵⁵⁴ Ibid: 656-657.

⁵⁵⁵ (Corten 2011): 1209-1210.

*is the choice of a **political, economic, social and cultural system, and the formulation of foreign policy.***⁵⁵⁶ [Emphases added.]

In any event, the Declaration annex seems to be a valuable interpretational aid for any Article 52, non-military coercion violations raised before a tribunal. Section 3 of the VCLT, and Article 31 on the rules of “Interpretation of Treaties,” specify that any treaty interpretation must be made in context, and should include not only the text of the treaty, but also its preamble and annexes. Article 31 of the VCLT, in setting out the “General Rule of Interpretation” for treaties, in Paragraph 2(a), states:⁵⁵⁷

*The context for the purpose of the interpretation of a treaty shall comprise, **in addition to the text, including its preamble and annexes:***

*(a) **Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty** ...* [Emphases added.]

In summary, as regards Articles 51 and 52 and the Annex, coercion of a state or its representative in concluding a treaty is, both under the Vienna Convention and by virtue of post-World War I customary international law, a critical defect and subjects the treaty to nullification.⁵⁵⁸

⁵⁵⁶ (Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) 1986): paragraphs 201-205. Furthermore, the Court acknowledged that:

Expressions of an opinio juris regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find.

To support this claim, the Court provided examples of these *opinio juris* and customary international law cases, including GA Res. 2625 (XXV), the *Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States*, and the *Corfu Channel* case. *Ibid.* Also in the context of the UNCIO, and relevant to our *Under Influence* analysis, it should be noted that the ICJ’s decision in relation to types of coercion specifies independence in “formulation of foreign policy” as a state right, and therefore not to be subject to “prohibited intervention” by another state.

⁵⁵⁷ The Declaration is a formal annex to the VCLT. (Vienna Convention on the Law of Treaties (with Annex) 1969): Article 31, and the Annex.

⁵⁵⁸ Further, VCLT Article 44, paragraph 5, on the subject of “Separability of Treaty Provisions”, states that, in the event of treaty nullification: “In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.” *Ibid.*: Art. 44.

Returning to our discussion of “conclusion”⁵⁵⁹ of the UN Charter, as mentioned earlier, and as reflected in Table 2, there was rampant use of soft and hard coercion in violation of

⁵⁵⁹ Below are some notes on the interpretation of the Vienna Convention’s use of the term “conclusion” in reference to treaty-making. For all the VCLT text references below, see (Vienna Convention on the Law of Treaties (with Annex) 1969): Arts. 6-18. [Emphasis added.]

Recall that the coercion specified in Article 52 of VCLT, voiding a treaty, is applicable “if its **conclusion** has been procured by the threat or use of force”. The Vienna Convention does not explicitly define “conclusion” or list it in the “use of terms” section of Article 2. However, it does contain a large amount of information on what actions and events constitute “Conclusion of Treaties”, under Part II, Section 1, which consists of Arts. 6-18, a total of 13 articles: From Art. 6, on “Capacity of States to Conclude treaties”, to “Adoption of the Text” in Art. 9, to “Means of Expressing Consent to be Bound by a Treaty” in Art. 11, to “Consent to be Bound by a Treaty Expressed by Ratification” in Art. 14, and other provisions up to and including Art. 18 on “Obligations not to Defeat the Object and Purpose of a Treaty Prior to its Entry into Force”. Therefore, the above acts and processes are all categorised under the “Conclusion of Treaties”.

To determine if treaty ratification, if so required by the treaty text, is indeed part of what constitutes the “conclusion” process Articles 11 and 14 are of relevance. Article 11 reads as follows:

MEANS OF EXPRESSING CONSENT TO BE BOUND BY A TREATY

*The consent of a State to be bound by a treaty may be expressed by **signature**, exchange of instruments constituting a treaty, **ratification**, acceptance, approval or accession, or by any other means if so agreed.* [Emphases added.]

Therefore, ratification and the other methods, such as “signature”, are all acceptable ways for states to express consent, as long as the criteria for acceptance are mutually agreed in advance. In the case of the UN Charter, the agreed method, according to Article 110 of the Charter, is “ratification”. Article 14 of the VCLT sets out the criteria to be used in establishing states’ consent by means of ratification. Article 14(1) states:

The consent of a State to be bound by a treaty is expressed by ratification when:

- (a) The treaty provides for such consent to be expressed by means of ratification;*
- (b) It is otherwise established that the negotiating States were agreed that ratification should be required;*
- (c) The representative of the State has signed the treaty subject to ratification; or*
- (d) The intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.*

For the above VCLT texts, see (Vienna Convention on the Law of Treaties (with Annex) 1969): Part II, Sec. 1, *Conclusion of Treaties*, Arts. 11 and 14.

Although it appears that any of the above tests would satisfy the consent criteria being based on treaty ratification, in fact, the text and the legislative history show the UN Charter had all the above elements in requiring treaty ratifications as a means of establishing states’ final consent.

Adopting this interpretation of “conclusion”, coercion violations can occur anytime during the treaty’s conclusion process, which includes negotiations, finalisation of the text and signatures, and ratification, or any other agreed means that establishes the member states have given their final consent and are bound by the treaty. See also (Villiger 2009): 77-79. Sir Humphry Waldock, the ILC rapporteur at the Vienna Convention, was also of the view that “conclusion” constitutes the whole process of negotiations and preparation of the final text, progressing to the later stage of “definitive engagement that the parties are bound by the instrument under international law”. (Hollis 2014): 21; esp. footnote 55.

Articles 51 and 52. Discounting the Declaration, and even if adopting a narrower definition of force or coercion, many states in Table 2 fall under the classic category of “boots-on-the-ground” and the military presence of the would-be permanent members.

A large number of states at the time of the making of the UN Charter were under the direct military occupation (friendly or hostile) of the P5. Many states had regimes that were recently installed (or moved from exile) by the permanent members, and several colonies (dependent states) were purportedly participating as independents.

With the exception of some Latin American countries and a few other states, 26 states out of the 50 states at San Francisco were under the direct influence of the permanent members. In terms of voting power—counting the five permanent members plus their dependants’ votes—the P5 commandeered 31 votes, or a guaranteed 62 per cent majority, to push their agenda and to ensure the inclusion of their special privileges in the UN Charter.⁵⁶⁰

On the other hand, there are those scholars, such as Duncan Hollis, who argue that, “for all practical purposes” at the end of treaty negotiations and finalisation of the text, the point of “conclusion” is reached, and that the treaty may not need to go into force, with the signing of the final text marking the conclusion of the treaty. (Hollis 2014): 21. See also (Gardiner 2014): 484. Anthony Aust, while holding similar views, makes an exception in the case of treaties “which are brought into force by signature”, suggesting, in those cases, “that ‘concluded’ refers to entry into force of the treaty”. (Aust 2013): 86. This is, in effect, the kind of requirement stated in Article 110(3) of the Charter.

In this thesis, I subscribe to the former view: that treaty conclusion is a multi-stage process, in which a treaty reaches its final stage and is “concluded” (born) when the states, as specified by the treaty, have explicitly given their consent to be bound by it. Therefore, in the UN Charter treaty-making context, used in Chapters 8 and 9, the VCLT term “conclusion” means the negotiation stages, finalisation of the text, and up to and including the ratification stage. It should be noted, however, that, discounting the two nuclear attacks, most of the coercion cases mentioned in this chapter, and all the Under Influence cases listed in Table 2 in relation to the possible breach of Articles 51 and 52, are, in fact, of the stricter interpretation of “conclusion”, which was applicable during the two months’ duration of the San Francisco Conference while the Charter text was being negotiated and finalised.

⁵⁶⁰ These numbers are extrapolated from Table 2. Poland was not included in the tally because of its absence at the Conference voting sessions. However, Poland’s vote should be included when calculating the ratification requirements, since Poland was formally considered a Conference signatory (as the 51st state).

Returning to the wartime setting of the Charter's conclusion and the unusual circumstances at San Francisco, the question arises as to why some of these states, which were under duress during the signing of the treaty, did not opt-out at the ratification stage. This is commonly done with many treaties (including the VCLT), and some of the independent states at San Francisco, such as New Zealand and Chile, had mentioned the possibility of doing so. When the states could have taken time to further consider their votes, why was there unanimous ratification of the treaty in such a short space of time? The required number of ratifications was submitted by 24 October 1945—only four months after the signing of the Charter.

A major part of the answer seems to lie in another dramatic use of force, and the threat of future use of force, by one of the permanent members. On 6 August 1945, the US dropped the first atomic bomb on Hiroshima, instantly killing tens of thousands of people—mostly civilians. Two days later, on 8 August 1945, the US government submitted its ratification of the UN Charter—becoming the first state to do so. In fact, the dramatic show of additional force, to both the Japanese and the rest of the world—seemingly callous and redundant—was the dropping of the second atomic bomb on Nagasaki, on 9 August, one day after the Charter ratification submission.

This significant sequence of events can hardly be a coincidence. Rather, it was a show of force—not only to the Japanese to expedite their surrender—but also to the rest of the world regarding the type of world order options available to the then soon-to-be UN member states and the potential future ones.

Both nuclear bombings inflicted destruction of apocalyptic proportions. Thousands of Japanese civilians died instantly, and the radiation-related human suffering and economic devastation persisted for decades. The use of the atomic bombs showed the effect of using

this type of new force for decades to come, and certainly served as a constant reminder to all the states. It was a strong message and a reminder to those states contemplating whether or not to ratify the UN Charter. It was also a strong message to those states not invited to San Francisco, and to all the other future would-be member states of the UN.

After the chronological sequence of the dropping of the first bomb, the US depositing the first ratification instrument of the treaty two days later, and then the dropping of the second nuclear bomb the next day, the world was in shock, and an avalanche of ratifications of the UN Charter followed. In just 11 weeks, all the required ratifications were deposited, including from states whose parliaments were showing signs of hesitation, such as New Zealand, as well as the required concurrence of the other four permanent members. All the necessary ratifications were deposited by 24 October 1945.⁵⁶¹

Ironically, the UN Charter, this most primary, supreme, and general of the global governance charters, has all the characteristics of being negotiated under duress and thus possibly being void. What then happened to the Charter's review and revision process that had been due to take place 10 years after it came into force, and which so many states, acting under duress, had opted for—with the consent of the permanent members.

⁵⁶¹ For the dates of states' deposit of the UN Charter ratification instruments, see (United Nations Yearbook 1946-1947): 34. On Chilean and New Zealand representatives at the Conference, among others, going on record to state that, without the provision to revise the Charter in the future, they would have a difficult time getting the Charter adopted by their respective parliaments, see (UNCIO - Volume VII: Commission I, General Provisions 1945): 212, 250. On New Zealand's public, parliament and media losing interest in the proposed UN, and the slow pace in debating the Charter ratification, which was evident by late July of 1945 (but before the atomic explosions), see (Hensley 2009): 401-403. In fact, on 31 July, Prime Minister Fraser had complained about New Zealand's media in relation to the San Francisco Conference, and had said that the press should speak of New Zealand's role "more as a champion and less as an apologist and mourner". Ibid. New Zealand deposited its Charter ratification instrument on 19 September 1945. (United Nations Yearbook 1946-1947): 34.

8.5 Article 109 Paragraph 3—Teleological Interpretation and *Pacta Sunt Servanda*

In Chapters 4 and 5, I discussed paragraph 3 of Article 109, which provided for a review of the Charter at a specified later date. However, it is now necessary to establish the *original intent* requirement, which, taken together with the paragraph becoming operational in 1955, allow us to test for *pacta sunt servanda* and the exercise of good faith.

8.5.1 Article 109 and its Paragraph 3—Original Intent

Let us revisit the exact text of Article 109, particularly paragraph 3 as it was adopted, highlighting its keywords to demonstrate original intent.⁵⁶²

The objective of Article 109 is stated in paragraph 1:⁵⁶³

A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven [amended to 9] members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

⁵⁶² Original intent is an interpretation theory or method, mostly applicable in constitutional judicial review, aimed at determining the original intent behind a specific clause at the time of its drafting. (Black 1994): 1133. Therefore, by definition, original intent should not be concerned about possible changes in intent over time, unless through constitutive amendments re-establishing the intent. Even proponents of the evolutionary interpretation of treaties seem to share some common ground with the original intent approach, in that both seek to uphold the original intent of the text. Eirik Bjorge, in *The Evolutionary Interpretation of Treaties and Evolutionary Interpretation and the Intention of the Parties*, argues that “evolutionary interpretation is inexorably linked to the objectivized intention of the parties. ... In that sense evolutionary interpretation relates to the intention of the parties in the same way that contemporaneous interpretation does.” (Bjorge 2014): 139. See also <https://www.ilsa.org/jessup/jessup15/Second%20Batch/EirikBjorgeCh3.pdf>; and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159657.

⁵⁶³ (Charter of the United Nations 1945-2015): Article 109, paragraph 1 and paragraph 3. Paragraph 1 above is the original 1945 text as it was adopted in San Francisco and was still effective in 1955. That paragraph was later amended in 1965 (coming into force in 1968) to increase the SC members’ required votes needed for adoption from 7 to 9. As explained in Chapter 7, this was a consequential amendment to Article 109 to correct a numerical discrepancy mistake, made earlier when the SC was expanded from 11 to 15 members. The expansion amendment resulted from GA Res. 1991 A (XVIII), adopted in 1963, which came into force into 1965.

Paragraph 2 of Article 109 deals with the ratification procedure for any revisions adopted at the Conference. Paragraph 3 proposes a deadline and an easier voting procedure for deciding to hold such a conference:

*If such a conference has not been held before **the tenth annual session** of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference **shall be placed on the agenda** of that session of the General Assembly, and the conference shall be held if so decided **by a majority vote** of the members of the General Assembly and by a vote of any seven members of the Security Council.*

In view of the coercive practices and wartime circumstances that characterised the Conference, the polarised camps of permanent members and non-permanent members compromised. They agreed to accept the proposed Council *as is* and to review and revise the rules governing its structure and operation at a later date. The UNCIO formal documentation and *travaux* report the review as a compromise and “incentive” for the acceptance of the veto arrangement.⁵⁶⁴ In fact, to end the stalemate on the veto, the concept of the review and the possibility of Charter revisions was introduced by the main Big-3 sponsor of the Conference—the US.

The provision to hold a review of the Charter was introduced by the head of the US Republican delegation to the Conference, Harold Stassen, at a late stage during the Conference, when the veto fight was deadlocked.⁵⁶⁵ The proposal was first put by the US to the other sponsoring governments and, after their agreement, it was presented to the weaker states. John Foster Dulles, the US delegate to the Conference and the future Secretary of State, acknowledged that it had “only been possible to secure acceptance of the Charter at

⁵⁶⁴ In addition to the UNCIO documentation on Commission III/1 and I/2 on this topic, see, for example, the P5 statement that, “the proposal was offered in the spirit of conciliation and good-will”. See Chapter 7 (n 74). For a post-mortem, see (United Nations Yearbook 1946-1947): 25. See also (K. Krishna 1955): 361.

⁵⁶⁵ (Schlesinger 2003): 161.

San Francisco by a provision assuring that there would be an opportunity to review it in the light of experience.”⁵⁶⁶

At the conclusion of the conference, in a statement by the delegation of Australia—the *de facto* state-rapporteur for the *anti-veto* camp—Mr. Forde, Vice-Premier of Australia, said:⁵⁶⁷

In drawing this Charter, we have recognized that it must be flexible—that we must be able to undo later anything which proves unworkable or clumsy in new circumstances, or to readjust particular features of the Organization to the happier world which we believe a lasting peace will bring into being.

Rather than repeat the legislative history and the San Francisco spirit to “undo” the Yalta formula which were mentioned in the previous chapter, I will now attempt to link the keywords highlighted in the above text of paragraph 3 directly to the original intent behind them.⁵⁶⁸

Article 109(1) Keywords: “Reviewing the present Charter”

- It was clear to the majority of the states at the Conference that the Charter-making process was not complete. The 23 questions posed by the weaker states to the sponsoring governments, and which the P5 deliberated over for three weeks of the

⁵⁶⁶ (Scott 2005): 74. See also the secondary source used by Scott, Note 15, “Address by the Honourable John Foster Dulles, Secretary of State, made in General Debate of the United Nations Assembly, New York Thursday, September 17, 1953”, State Department Press Release No 505 AA A1838 851/10/1 Part 1. Ibid.

⁵⁶⁷ (UNCIO - Volume II: General 1945): 164, 177.

⁵⁶⁸ The legislative history of Article 109 and the support of the permanent members for that provision, including the US host’s support for conducting a review of, and implementing revisions to, the Charter, is detailed in Chapter 5, which covers the US position and statements by: (1) President Roosevelt; (2) the US delegates at the Conference (the Republican head-delegate, Commander Stassen, and the US Congressional Joint chief delegate, Democratic Senator Connally); (3) the US delegate and future Secretary of State, John Foster Dulles; and (4) the then US Secretary of State and the Secretary General of the Conference, Edward Stettinius. This chapter also describes the favourable views of the P5 members France, the UK and China. Furthermore, the following non-permanent states had, by submission of motions or recorded statements at the Committee meetings, gone on record in advocating the need for a review of the Charter: Argentina, Australia, Brazil, Canada, Cuba, Chile, Ecuador, India, Peru, Turkey, New Zealand and the Union of South Africa. (References for all of the above can be found in Chapter 5.)

conference's time (primarily because of disagreement among them), were left unanswered. Fundamental issues such as how the Secretary-General is elected, or how a new member state is admitted, were not resolved (see Chapter 5, Section 5.3).

- The majority of the P5, especially the Conference organiser, the US, had publicly—before, during, and after the conference—stated that a review and amendment procedure would be normal, useful and expected. Both President Roosevelt and the Secretary General of the Conference and Secretary of State, Edward Stettinius, had cited the importance and frequency of amendments to the US Constitution, particularly in earlier years, as an expected and necessary process of constitutional development. They believed that such a process would also apply to the UN Charter.
- The anti-veto majority states had agreed to the Yalta formula—as long as it was later limited or abolished by means of a Charter amendment, and therefore had compromised on adopting the veto as a temporary measure until a later review of the Charter.
- The review provision (Article 109) was not part of the original DO proposal. It was added in San Francisco, where the overwhelming majority of the states, including the permanent members, recognised that the Charter being created was a work in progress and that future revisions were desirable and expected. In fact, Committee II/1, in debating whether to add the Charter review to the DO, adopted the relevant resolution overwhelmingly, with just a single negative vote.⁵⁶⁹

⁵⁶⁹ The text that was subsequently adopted by the Commission and the plenary, and incorporated into the final draft as paragraph 3 of Article 109 of Chapter XVIII of the UN Charter, was adopted with 42 votes in favour, 1 against, and 3 abstentions. (UNCIO - Volume VII: Commission I, General Provisions 1945): 249-253.

The conviction at UNCIO was so strong regarding holding the review to reform the Charter's known defects that some states referred to it as the "revisionary conference".⁵⁷⁰ In fact, the French translation of Article 109(3) (French being one of the formal languages of the Conference) refers to the Conference as a *revision* rather than a *review* conference.⁵⁷¹

Article 109(1) Keywords: "General Conference"

The "amendments" process in Article 108 was designed to be different from the "review" process in Article 109, although both could serve the same function. In the amendments procedure, one or two changes were expected, but in the review exercise, a series of changes to, and consequently major revisions of, the Charter were anticipated. The review of the Charter at a conference, which would place the whole instrument—including its preamble, objectives, and the SC's structure and voting procedure—under scrutiny and subject to amendment, was certainly expected to have a wide scope. Therefore, the term "general" was added as a qualifier to the name of the conference.

It was anticipated that such a large conference, with so many attendees and a broad scope, would require its own logistics and a dedicated location available for a lengthy period of time. Hence the "fixing of the date and place" mentioned in paragraph 1. Indeed, in one of the last plenary sessions of the UNCIO, it was decided, by an informal vote, to hold the next general review conference of the Charter back in San Francisco.⁵⁷²

Article 109(3) Keywords: "The tenth annual session"

⁵⁷⁰ (Fraser 1945): 37.

⁵⁷¹ For the use of the French term *révision* (rather than *revue* or *examiner*) in the Charter, see (La Charte des Nations Unies 1945), and later discussion in this chapter.

⁵⁷² (UNCIO - Volume VI: Commission I, General Provisions 1945): 251.

All the permanent members (with the exception of the USSR), as well as the anti-veto majority, understood and were fully aware of the perceived temporary nature of the SC's structure and the Yalta formula as set out in the DO proposal when it was being adopted.⁵⁷³

The formula and the privileges enjoyed by the P5 were debated in terms of lasting only a number of years. The majority states favoured an expiration date ranging from five to 10 years, with the permanent members preferring a later one. The P5 claimed a longer period was necessary so that their status would not be delegitimised as they carried out their peace-keeping missions in the near future.

The Brazilian–Canadian motion to hold a mandatory review in a minimum of five and a maximum of 10 years received 23 votes in favour and 17 against. This was a majority, but not a two-thirds majority.⁵⁷⁴ The US reintroduced the measure, altering it to the upper limit of 10 years, but automatically placing the proposal to hold the review on the GA's agenda after this 10-year period had passed. It was adopted with only one negative vote cast.⁵⁷⁵ Therefore, the nearly unanimous intention of the states in San Francisco was to hold the review, “if such a conference has not been held before”, at the “tenth session”.

Article 109(3) Keywords: “By a majority vote”

Paragraphs 1 and 3 of Article 109 essentially seek to accomplish the same thing—the holding of a review conference. The difference between the two, in the text and according to the legislative history of the Conference, is the deadline specified and the facilitated voting procedure provided for in paragraph 3. In paragraph 1, the initiation of a review is not

⁵⁷³ See Chapter 5 for sources, including the related UNCIO *travaux* references, esp. Sections 5.6 and 5.7.

⁵⁷⁴ (UNCIO - Volume VII: Commission I, General Provisions 1945): 219.

⁵⁷⁵ *Ibid*: 249-253.

associated with a specific period or date; furthermore, it requires a two-thirds majority vote of the Assembly to be adopted.

The review to be held under the paragraph 3 provision, however, was referred to in San Francisco as the “special” review conference: first, because of the deadline specified in the paragraph for initiating a proposal to convene such a conference, and secondly—and more significantly—because it could be held following a simple “majority vote”.

Therefore, the textual analysis of paragraphs 1 and 3 of Article 109 illustrates that the choice of the keywords in its text was not coincidental. The wording reflects the legal spirit and the intention to hold a “general” review of the statutes of the UN 10 years after the Charter’s conclusion.

8.6 Operating on Article 109 Paragraph 3—Implemented or Breached?

One of the principles of international law is *pacta sunt servanda*: that state parties must abide by their agreements. The Vienna Convention defines *pacta sunt servanda* as: “Every treaty is binding upon the parties to it and must be performed by them in good faith”.⁵⁷⁶

Pacta sunt servanda is one of the oldest and most fundamental principles and the “basic norm” in our essentially “co-archival, consent-based and consent-driven” international law system.⁵⁷⁷ There is no known case or judgment of a tribunal that has repudiated it.⁵⁷⁸ Yet, under the same international law system and the power-of-law at the disposal of the powerful states, violation of the *pacta sunt servanda* principle is not uncommon.

⁵⁷⁶ (Vienna Convention on the Law of Treaties (with Annex) 1969): Art. 26.

⁵⁷⁷ (Weissner 1994-1995): 567.

⁵⁷⁸ (Villiger 2009): 363.

To test for *good faith* in keeping to the letter and spirit of Article 109(3), I will use the customary international law principle of good faith in adhering to treaty provisions in the Vienna Convention context and will primarily apply these rules of the law of treaties. Before doing so, however, I present a brief review of the main points relating to how paragraph 3 was operated on at the GA, and whether its implementation was carried out to completion or miscarried.

In 1955, after the 10-year period specified in paragraph 3 had elapsed, and after many years of anticipation and preparatory work, the Assembly adopted Resolution 992 (X), with which the SC concurred. This resolution was intended to implement paragraph 3 and arrange for the general review conference to be held. The overwhelming adoption of this measure by the GA and SC, despite the USSR's negative vote, was by more than just the needed simple majority, and even surpassed the two-thirds mark (as required under paragraph 1 of Article 109) in both of the UN chambers.⁵⁷⁹

However, the operative paragraph of the resolution did not actually convene the review. Although this may have been the original intent, paragraph 1 of the resolution merely “Decides that a General Conference to review the Charter shall be held at an appropriate time”. In operative paragraph 2 of the resolution, a preparatory Committee is created, and paragraph 3 “Requests the Committee to report with its recommendations to the General Assembly at its twelfth session”, giving it two years for “fixing a time and place for the Conference”.⁵⁸⁰

⁵⁷⁹ (General Assembly Documentation Center 1946-2015): Res. 992(X). See also (Yearbook of the United Nations 1955): 76-77.

⁵⁸⁰ Ibid.

The preparatory committee that was set up by Resolution 992 (X) reported back after two years that the time was not “auspicious”, and requested an extension of its mandate. The Assembly then adopted Resolution 1136 (XII) to extend that mandate. This process of sometimes annual and sometimes biennial extensions of the Committee’s mandate to report the venue of the conference continued for 12 years and resulted in eight GA resolutions. The last such resolution was Resolution 2285 (XXII), in 1967.⁵⁸¹ This resolution’s operative paragraph simply stated that it “Decides to **keep in being** the Committee on arrangements for a conference for the purpose of reviewing the Charter [emphasis added]”.⁵⁸² This resolution essentially put the Committee into hibernation and indefinitely deferred the timing and location of the general review.

As discussed in the previous chapter, this blocking of the review was primarily the wish of the permanent members. If power rather than “good governance” is considered as the main motivation, the P5 had potentially the most to lose should a review have been held.

The Soviet Union was opposed to a review from the outset. However, by 1955, some of the other permanent members, and in particular the US, thought that a revision of the Charter could address defects and deficiencies the UN had experienced in global governance over its first 10 years. In particular, a Charter revision had the potential to improve the UN’s mission of maintaining peace and security. However, by 1967, US and British policy (and, prior to that, French policy) on the UN had changed. These states now wanted to preserve their privileges and supremacy, and therefore they opted for a frozen Charter and the status quo at

⁵⁸¹ The eight resolutions, including the first one, are: 992(X) of 21 November 1955, 1136(XII) of 14 October 1957, 1381 (XIV) of 20 November 1959, 1670(XVI) of 15 December 1961, 1756(XVII) of 23 October 1962, 1993 (XVIII) of 17 December 1963 and 2114(XX) of 21 December 1965, and (the last one) 2285(XXII) of 5 December 1967. (General Assembly Documentation Center 1946-2015).

⁵⁸² Ibid: GA Res. 2285(XXII).

the Council.⁵⁸³ Consequently, 12 years after the adoption of Resolution 992(X), the question of when to hold the review had—for all of the P5—become an undesirable political question.⁵⁸⁴

Despite the P5's true wishes and the *realpolitik*, it appears that, in technically legal terms, the good faith in Article 109(3) of the UN Charter—as far as the permanent members are concerned—has been violated, and the completion of its operation has been breached.

However, as a whole, and as far as the GA membership is concerned, it can be concluded that paragraph 3 of Article 109 has been partially implemented and is still legally in force. This finding is evaluated below through the application of the rules of the Vienna Convention, particularly Articles 26 and 31 to 33.

In the Vienna Convention, in addition to its *chapeau*, where the principle of “good faith” is specified, in Part III, Section 1, “Observance of Treaties,” the good-faith performance of Charter obligations is briefly referred to in Article 26.⁵⁸⁵

‘PACTA SUNT SERVANDA’

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

According to Mark Villiger, the ILC purposefully chose a simple yet powerful statement to demonstrate the cardinal importance of *pacta sunt servanda*: “the provision is forcefully, yet

⁵⁸³ The reasoning behind, and the evolution of, US foreign policy during those 12 years was discussed in Chapter 7, Section 7.6. For information on the UK's and some other states' views during the same period, see (Schwelb, *Charter Review and Charter Amendment--Recent Developments* 1958): 308-311. For further details on US and UK policy in regard to the UN at the time, and the US's loss of interest in Charter review, see (Scott 2005): 73-78.

⁵⁸⁴ Zacklin referred to this repeated delaying of the decision on the timing of the review by the P5 as the “classic example of the institutional internment of an undesirable subject matter.” (Zacklin 1968-Reprint 2005): 118

⁵⁸⁵ (Vienna Convention on the Law of Treaties (with Annex) 1969): PART III, OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES, Section 1, Article 26.

elegantly drafted, containing no exceptions or conditions which could lead to debates calling in question its validity.”⁵⁸⁶

Complementing Article 26’s simple binary test regarding the implementation of paragraph 3 and its apparent violation are the Vienna Convention’s rules for “Interpretation of Treaties”. These rules are primarily contained in Section 3, Articles 31 to 33. Examination of these articles further bolsters the argument that the paragraph 3 provision has been in effect partially breached and not fully implemented.

The relevant text of the above three articles is analysed separately below, and in each case the supporting arguments are presented.

8.6.1 General Rules of Interpretation: VCLT Article 31

Paragraph 1 of Article 31 reads as follows:⁵⁸⁷

1. *A treaty shall be interpreted in **good faith in accordance with the ordinary meaning** to be given to the terms of the treaty in their context and in the light of its object and purpose* [Emphasis added.]

The *ordinary* meaning of paragraph 3 was perfectly clear. If no review of the Charter had been conducted prior to the tenth session of the Assembly, then at the tenth session a simple majority could decide to hold the review.

In fact, in 1955, when the text of the joint draft (led by the US and the UK) of GA Resolution 992 (X) came to the floor for debate, a few states discerned the intent of the *yes-but-not-now* contradiction in the resolution. Norway, for example, argued that there was a distinction between actually calling for the conference as was provisioned, and calling for the conference

⁵⁸⁶ (Villiger 2009): 368. See also the secondary source cited in *Waldock Report VI, YBILC 1966*, at Footnote 46. *Ibid.*

⁵⁸⁷ (Vienna Convention on the Law of Treaties (with Annex) 1969): Article 31 Para 1.A.

to be held at an “auspicious” time, as the resolution suggested. Similarly, Yugoslavia objected to the indeterminate nature of the conference date as presented in the draft resolution. Pakistan noted “the paramount importance of the tenth session consists in that it is the favourite of the UN Charter.” Pakistan further argued that “[I]t is not possible to engraft an additional procedure on to paragraph 3 of Article 109, because to do that would be to read more into the language of the Charter than is warranted.”⁵⁸⁸

Sir Leslie Munro of New Zealand, while in favour of the Resolution 992(X) text (deferral of the exact date), reminded the Assembly of the spirit of the Charter on conducting the review, and further reiterated: “We would not wish to rule out—or even to appear to rule out—the possibility of holding a constructive and useful review conference within the foreseeable future.” The US fully endorsed Sir Leslie’s statements.⁵⁸⁹

8.6.2 Supplementary Means of Interpretation: VCLT Article 32

The main part of Article 32 states:⁵⁹⁰

*Recourse may be had to supplementary means of interpretation, including **the preparatory work of the treaty and the circumstances of its conclusion**, in order to confirm the meaning resulting from the application of article 31 ... [Emphasis added.]*

⁵⁸⁸ For arguments presented by Pakistan, Norway and Yugoslavia, see (Yearbook of the United Nations 1955): 75-76; (Repertory of the United Nations Practices-Supplement-1 1954-1955): 447. For one of the very few law journal articles on the subject at the time, see (Schwelb, Charter Review and Charter Amendment--Recent Developments 1958): 308-311. See also (UNRIC 1946-2000): A/544, A/545.

⁵⁸⁹ On the New Zealand and US statements, see, respectively, GA reports (ODS 1993-2012): A/PV.545 and A/PV.547. For link access:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL5/502/95/PDF/NL550295.pdf?OpenElement>;
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL5/502/97/PDF/NL550297.pdf?OpenElement>. Both accessed 17 May 2014.

See also, (Schwelb, Charter Review and Charter Amendment--Recent Developments 1958): 310.

⁵⁹⁰ The remainder of Article 32 of the VCLT reads as follows:

... or to determine the meaning when the interpretation [sic] according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

(Vienna Convention on the Law of Treaties (with Annex) 1969): Article 32.

It will be recalled that much of Chapter 5, on the statutory promise of San Francisco, was devoted to the legislative history of the compromise that gave rise to paragraph 3. Therefore, Article 32's reliance on "the preparatory work of the treaty and the circumstances of its conclusion" as a means of interpretation confirms Chapter 5's findings. These are that a review and possible revision of the Charter at a later date, not exceeding 10 years, was part of the outcome of the 1945 San Francisco Conference and the intent of Article 109(3).

According to Conference rapporteurs and the UNCIO reports, what India's Ramaswami Mudaliar expressed as India's stance towards the end of the Conference—at a crucial anti-veto-rebellion moment and turning-point in San Francisco—was perceived by the majority states to embody the anti-veto compromise.⁵⁹¹

*[T]hat while they were prepared to **agree to the Yalta formula over the next ten years**, it would be a very proper proposition on their part to urge that the whole position should be reexamined... And we felt that if **this unanimity rule were not to be applied at the end of ten years to any proposal regarding the amendment of the Charter**, we could safely, and **with good conscience and with complete trust and confidence in the five great powers, agree to the complete Yalta formula during the intervening period of ten years.***

Moreover, Dr. Evatt of Australia, at a committee meeting before the crucial vote on the text of paragraph 3, in clarifying the difference between the text of that paragraph and the text of paragraph 1, stated that "the choice before the Committee was to hold a revision conference at one specific time or at an indefinite period."⁵⁹² The members states, being fully aware of the distinction between paragraphs 1 and 3 of Article 109 and the options before them, opted

⁵⁹¹ (UNCIO - Volume XI: Commission III, Security Council 1945): 173-175. [Emphases added.]

⁵⁹² (UNCIO - Volume VII: Commission I, General Provisions 1945): 211.

for a specific review date and incorporated it into the Charter. The founders had already decided on their choice.

The “preparatory work” relating to the adoption of Article 109(3) can probably be cited as a classic (and dramatic) case of satisfying the test set out in VCLT Article 32, in linking the paragraph to the UN Charter and the “circumstances of its conclusion”. This is true not only of its substance—of when the Charter’s defects were to be addressed (which were known while the treaty was being drafted) —but also in its symbolism of being adopted almost at the eleventh hour (after midnight, in the early hours of Sunday morning) during the last working days of the Conference, as a compromise to ensure its successful conclusion.⁵⁹³

8.6.3 Interpretations of Treaties Authenticated in Two or More Languages: VCLT Article 33

French was one of the five official languages at UNCIO.⁵⁹⁴ The formal text of the UN Charter in French regarding Article 109(3) specifies that, at the tenth session, a “révision” conference will be held—not the expected French term *revue* or *examiner*, which is closer to the English word “review”.⁵⁹⁵ This raises the question of what happens if there is a discrepancy among the official languages of a treaty. Which interpretation prevails?

⁵⁹³ Ibid: 249, 253, and 261. See also Chapter 5.

⁵⁹⁴ Although there were five official languages, there were only two working languages: French and English. (United Nations Yearbook 1946-1947): 14.

⁵⁹⁵ The related text in the French version of the UN Charter is:

*Une conférence générale des Membres des Nations Unies, aux fins d'une **révision** de la présente Charte, pourra être réunie au lieu et date qui seront fixés par un vote de l'Assemblée générale à la majorité des deux tiers et par un vote de neuf quelconques des membres du Conseil de sécurité. Chaque Membre de l'Organisation disposera d'une voix à la conférence.* [Emphasis added.]

(La Charte des Nations Unies 1945): Article 109, paragraph 1 ; <https://www.un.org/fr/documents/charter/chap18.shtml>.

The provision of the Vienna Convention codifying customary international law contained in Article 33(1), first recognises that “1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.” Given that at the UNCIO English and French were the only two “working” languages, that the Charter does not specify which language is more authoritative, and that there is a difference between *review* and *révision* in these two “equally authoritative” languages, which version prevails? Article 33(4) explains how to resolve such conflicts:⁵⁹⁶

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

In other words, the general treaty interpretation rules of Articles 31 and 32 described above still apply. In this case, recourse can be made to the preparatory work of the Conference, the circumstances of the treaty’s conclusion, and, of course, the principle of good faith.

Returning to the legislative history, it should be recalled that France was not one of the sponsoring governments at San Francisco, and at the outset of the Conference was in favour of liberalising the SC. In fact, France, earlier in the Conference, had introduced an amendment to the DO proposal limiting the use of the formula (it was later withdrawn).⁵⁹⁷

The use of the term *révision* (rather than *revue* or *examiner*) was not an accident. It reflected the French-speaking states’ view at the Conference that, if, at the tenth session, the GA

⁵⁹⁶ (Vienna Convention on the Law of Treaties (with Annex) 1969): Article 33, paragraphs 1 and 4.

⁵⁹⁷ (UNCIO - Volume III: Dumbarton Oaks Proposals, Comments and Proposed Amendments 1945): 665. As to France entering the Conference and, at the beginning, siding with the weaker states, see Chapter 4; and also (Schlesinger 2003): 101–102.

decided to adopt the proposed general conference, it would not be just a review. Instead, it would trigger a process leading to Charter *revisions* limiting the permanent members' powers. This was the majority states' understanding at the Conference at the time.⁵⁹⁸

With such an awareness at the Conference, it is most likely that the Coordinating Committee in San Francisco, which was in charge of diligently scrutinising the final text of the Charter for precision, common usage and conformity with the official languages, did not object to the use of the term *révision*.⁵⁹⁹

The objective here is not to quibble over semantics. Instead, I merely highlight the issue in order to indicate beyond reasonable doubt that, for the majority member states at UNCIO, the original intent of paragraph 3 was to revise rather than merely review the Charter.

8.7. Conclusion

In this chapter, I first examined the UN Charter (treaty) as to its type, finding it atypical and, in fact, of the “general” and supranational type. I then scrutinised the legitimacy of the UN Charter in different stages of its conclusion, and found possible defects under Vienna Convention Articles 49 and 50, so far as they reflect customary international law, and demonstrated the use of coercion and circumstances of duress referenced in Article 51. In view of the widespread “threat or use of force” at the time, in clear violation of Article 52 of the VCLT, I hypothesised serious defects in the conclusion of the UN Charter.

⁵⁹⁸ Jacques Dehaussy, in his *Charter Commentaries* on the French text, while reaffirming the Article's concessionary origins, emphasises the *intent* behind the use of the term *revision* rather than review in the text of the Article, «Le terme ‘révision’ semble appeler à une large reconsidération du traité constitutif. ». (Dehaussy 2005): 2219-2220.

⁵⁹⁹ The Coordinating Committee was one of the four main committees at UNCIO, in charge of drafting the final text of the Charter, and reporting to the Executive Committee. (United Nations Yearbook 1946-1947): 13.

Both the relevant scholarship and case law point to the fact that the VCLT has mostly codified custom, including that relating to coercion (Article 52), with immediate effect, and is therefore potentially applicable to all treaties currently in force.⁶⁰⁰ With the dictation of the Charter by the powerful sponsoring states apparent at the UN's founding, the recourse chosen by the contracting state-parties was to provide, within the Charter itself, a facilitated means to review and possibly revise the treaty.

In this regard, the second part of the chapter analysed the Charter review process enshrined in Article 109 of the Charter, and in particular the execution of its paragraph 3, finding that in effect the provision has not been fully implemented. This finding is in two parts: first, that the permanent members, based on their practices as well as their adopted policies since 1955, might be in breach of the completion of Article 109(3); and, secondly, and more generally—as it pertains to the UN membership and the GA—it can be concluded that Article 109(3) has been partially implemented and is legally still in force.

Paragraph 3 was intended to correct some of the defects of the Charter—known at the time of its conclusion, but due to be reviewed and possibly revised at a fixed date in the future. In legal terms, this violation of good faith is evident in the context of VCLT Article 26 and the rules of interpretation set out in Articles 31, 32 and 33.

⁶⁰⁰ With regard to the Declaration (which defines non-military coercions of the economic and political type as forms of prohibited *threat or use of force*), it was adopted as part of the “final act” of the VCLT. In this respect, since Article 31 of the VCLT specifies that treaty “annexes” are considered as part of the treaty, it can be argued that this article recursively applies to the VCLT itself, meaning that the Declaration forms part of the VCLT's rules. (see Section 8.4.4 above.) The fact that the prohibition of non-military types of coercion has become custom, as part of the *non-intervention* principle, seems to have been established in the ICJ's ruling in *Nicaragua v. USA*, concerning, *inter alia*, the US's blockade of Nicaraguan harbours, and dealing with a treaty that predated the VCLT. (Again, see Section 8.4.4.) That said, my application of the *Declaration* in this chapter serves only to expand the possible number of states under duress in San Francisco. However, the bulk of the Under Influence States (UI-States), depicted in Table 2 of Section 8.3, were in fact subject to the classic “boots on the ground”, military-type use of force.

With this conclusion, there is a basic question that can now rightfully be asked. Given that the UN Charter has defects, and given the interpretive rules set out in Section 2 of Part V of the VCLT in relation to the invalidity of treaties, particularly in relation to a breach of Article 52, the legitimacy of the Charter can be questioned and perhaps, for some of its founding state parties, be considered void.⁶⁰¹ And, assuming that a united-nations type of organisation is still required, then potentially a new general global-governance treaty can be negotiated. Why, then, worry about Article 109(3) and its good-faith performance? Mindful of the fact that the UN's membership has grown almost four-fold since its founding, and presumably with the free consent of the states acceding the Charter since 1945.

further discussion of this question and a suggested answer can be found in the next chapter.

⁶⁰¹ The grounds for invalidity in the VCLT are generally considered as either “relative” to certain state parties, or “absolute”, which would have a nullifying effect on all the state parties. Invalidity of the kind specified under Articles 51 to 53 is generally considered to be of the “absolute” kind. (Fitzmaurice 2006): 190-194.

CHAPTER 9

CONSTITUTIONALISATION OF THE UN AND INTERNATIONAL LAW

9.1 UN Reform and Constitutionalisation

This chapter is the main normative part of the thesis and expands on some of the topics covered in the introductory Chapter 1, with the focus on United Nations and international law constitutionalisation. With that normative lens concepts of UN constitutionalism will be examined and the legal strategies to invoke a review of the Charter as a trigger towards its constitutionalisation will be explored.

Assuming that a conference to review the Charter finally occurs, two substantive questions arise. First, should the P5 veto be feared, which, technically, would kill any Charter revisions proposed by such a review, thus rendering its efforts useless? And, secondly, even without the application of the veto, should we expect the first review of the Charter to produce a critical mass of constitutional changes to trigger the transformation of the UN and therefore international law? In other words, is it reasonable to expect that the review would indeed give birth to a “constitutional moment”?

Before attempting to answer these questions, the Chapter first considers the age-old question of UN reform: that is, can the UN be reformed and pass through a series of gradual changes, either procedurally or through charter amendments, to circumvent its known shortcomings and produce a more effective UN, which would in turn be able to fill in the global governance gaps? Or, as some feared in San Francisco, is the Charter “immutable” and “frozen”, so that

only a review conference of the magnitude of that first conference would be able to accomplish its transformation?⁶⁰²

At the end of the chapter, a concluding abstract of the thesis is presented.

9.1.1. The Elusive UN Reform: “Every State” Wants it?

The notion of UN reform is as old as the UN itself. In 1945, the Big-3’s dictation of parts of the Charter at San Francisco had already prompted a future reforms wish list. The past and current UN reform topics encompass many areas, including democratisation of the Council, human rights, the environment, the compulsory jurisdiction of the ICJ, and merit-based election of officers at the UN (including the SG).⁶⁰³ However, the focus in this section will be on changes to the SC, which is the oldest and most sought-after part of UN reform. Hence, UN and Council reforms have been mostly used interchangeably. After all, the primary objective of the UN is to maintain international peace and security, assigned to the Council, and that is where it seems the UN is failing the most.

Some of the more recent questions and collective efforts regarding Council reform include the need for an expanded and more representative SC, as was recommended by the High-Level Panel on Threats, Challenges, and Change, in its diligent 2004 report to the Secretary-General;⁶⁰⁴ and the recommendations of the 2005 World Summit, in which the world’s

⁶⁰² For UNCIO references, see Chapter 5, especially section 5.5.

⁶⁰³ The historical records of some of the UN reform wish lists in the first decade of the UN, and the “constitutional” questions raised in San Francisco and in New York on the 10th anniversary of the UN, in 1955, and at the 10th session of the GA (when Article 109(3)) was invoked are covered in Part II of the thesis, particularly Chapters 5 and 7.

⁶⁰⁴ (High-level Panel on Global Sustainability 2012).

leaders called for the “early reform” of the Council. Will these initiatives lead to any concrete results?⁶⁰⁵

In parallel to the independent experts and collective efforts on SC reform, there are also blocs of states pursuing their interests in targeted reforms. For example, the Group-4 states: Germany, Japan, India and Brazil, as current major world powers, and whose weight, in terms of the size of their populations or economies, or both, surpasses some of the existing permanent members (the UK, France and Russia) have proposed becoming additional permanent members, and have led a bloc of states in devising a new formula for the Council’s expansion.⁶⁰⁶

There are also SC reform proposals which are veto-limitation type reforms: for example, those arising from the more current and urgent situations relating to humanitarian intervention and the R2P.⁶⁰⁷

Among these efforts are those of a bloc of states led by the Small Five (S5) states, who are appealing to the P5’s moral obligations and their “responsibility not to veto” Council

⁶⁰⁵ (Rensmann 2012): 59-63; and (Blum 2005): 632-649.

Kofi Annan, in circulating the report of *The High-level Panel on Threats, Challenges and Change*, dated 2 December 2004, to the GA said:

I have long argued the need for a more representative Security Council. It is disappointing that, for more than ten years, little or no progress has been made towards this. The Panel’s report offers two formulas for expansion of the Council. I hope that these will facilitate discussion and help the membership to reach decisions in 2005. (High-level Panel on Threats 2004): 3.

Both alternative recommendations of the *High-level Panel* on SC reform would expand the size of the Council to 24 members based on geographical representation. However, the two plans are somewhat different with regards to the permanent seats; *ibid*: 67-68.

⁶⁰⁶ The Group-4 proposal includes six additional permanent seats, including seats for the regions of Africa and Asia/Pacific, plus four new non-permanent seats, bringing the total size of the Council to 25. (Rensmann 2012): 63-64.

⁶⁰⁷ For a short description of the humanitarian intervention and the R2P doctrines, see Section 2.3.3, n 102.

decisions involving humanitarian situations. Their goal is to, in effect, limit the powers of the P5 and “frame” their use of the veto.⁶⁰⁸

Reform can, of course, take many shapes. For example, there can be changes or reforms that do not require Charter amendments: by means of interpretation, non-constitutive agreements, or as a matter of fact and in practice.⁶⁰⁹ The notion of UN reform employed in this section, however, is of the more substantive type that would normally require formal constitutive revisions and Charter amendments.

The topic of radical reforms to the Council in fact surfaced at the very first session of the GA, in 1946. The Philippines and Cuba introduced motions to “delete” the veto. By the second Assembly session, in 1947, it had become obvious that the veto would be used frequently and that the Council was unable to deal with the multiple international conflicts that had erupted after the war, thereby rendering it to a large extent dysfunctional. With the anti-veto rebellion of 1945 still fresh in members’ minds, under Argentina’s initiative, a group of member states decided to confront the P5 directly and submitted motions to “abolish” the veto and other

⁶⁰⁸ The S5 initiative on SC reforms, led by Switzerland, was submitted in a GA draft resolution that claimed to have the support of 100 states, and in fact included a wide range of proposed changes. Among others, the S5 proposal included: the requirement that the P5 refrain from the use of their veto to block any action aimed at preventing or ending genocide, war crimes, and crimes against humanity; giving the GA a greater role in selecting the Secretary General; and improving the due process in sanctions lists. (Meeting Coverage and Press Release: Sixty-sixth General Assembly 2012). See also <http://www.bbc.com/news/world-us-canada-18123768>, accessed 2 November 2014. For a brief overview of the latest, mostly unsuccessful, efforts (at the September 2014 GA session) to “frame use of veto” in relation to “massive” crimes and R2P, see the report of the Swiss Mission at the UN:

<https://www.news.admin.ch/message/index.html?lang=en&msg-id=54613>. See also the Egyptian *Daily News*: <http://www.dailynewsegypt.com/2014/09/19/shourky-attend-un-meetings-nuclear-weapons-eradication-right-veto/>. Both accessed 2 November 2014.

⁶⁰⁹ For these *other* types of reforms which have taken effect, a prominent example is the abstention of a P5 member from a SC vote. By the 1950s, this came to be interpreted as not constituting a negative vote, and this view has prevailed ever since. Another example was the adoption of GA Res. 267 (III), at the UN’s third session in 1949, which clarified the internal workings and procedures of the Council, saving it from becoming completely dysfunctional. (See Chapter 6, Section 6.2.) For a more general discussion on these non-constitutive types of reform, see (Zacklin 1968-Reprint 2005): 171-197; and (Rensmann 2012): 28-33.

motions to conduct a full review of the Charter under Article 109, when the UN was only two years old.

Details of those reform movements that were active during the early years of the organisation, from 1946 to 1967, can be found in Chapters 6 and 7. As was explained, with the exception of the Soviet Union, some degree of Council reform was supported by all the other P5 powers. In the case of the US, from 1946 to 1955, both popular and governmental opinion and attempts was in fact in favour of strengthening and democratising the UN.⁶¹⁰

However, probably as a result of the following factors: not being able to muster the two-thirds support to hold a review conference; strong opposition from the USSR to such a conference; and the belief that it was too early for any reforms to the veto, and that attempts to change the Charter at that time would mean “wrecking” it, these reform initiatives were instead postponed and funneled towards the promised review of 1955.

With the 1955 activation of Article 109(3) and the adoption of Resolution 992 (X), the convening of the review conference was set in motion. Or was it?

As pointed out in Chapter 7, when, in 1967—12 years after the founding of the UN—the work of the Arrangements Committee was put into hibernation, without the holding of the conference, this in effect represented a breach of Article 109(3) by the P5 and a failure to fully implement its provisions. Chapter 7 also explained how France, and then the UK, and, finally, by the late 1960s, the US had lost any interest in genuine SC reform and had joined their fellow P5 member the Soviet Union in opposing any type of review or revision to the Charter that would jeopardise their unequal rights.

⁶¹⁰ See n 636 below.

Although this P5 policy of a frozen Charter continues to date, other member states, taking a gradualist approach, did not give up their struggle for Council reforms.

First, recognising that the review was being delayed, they opted for amendments to the Charter under Article 108. In all, four amendments were successfully introduced in the 1960s, with modest success. Two related to the increase in the size of the membership of ECOSOC, and one, GA Resolution 1991A (XVIII) of 1963, increased the membership of the Council from 11 to 15. The fourth Charter amendment was of no significance, and was in fact a technical amendment to correct an oversight when the resolution on the expansion of the Council was adopted (although the occurrence of the error and the *travaux* leading to adoption of its corrective amendment are relevant and significant to this thesis).⁶¹¹

Analysing the impact of states' representation at the Council in quantitative terms, Resolution 1991A (XVIII) increased the SC membership ratio from 11 out of 51 States in 1945, to 15 out of 117 states in 1965 (based on membership ratifications for that year)—in other words, a drop from a 22 per cent rate of representation at the time of the UN's founding to 13 per cent after 20 years. Comparing this with the current membership of 193 states, the figure appears even worse, with only 8 per cent of member states being represented at the Council as of 2014.⁶¹²

The fact that the amendment did not remove any of the permanent members' unequal privileges, coupled with the actual reduction in proportional representation of the member states compared with the 1945 ratios, seems to have represented a step backward. However,

⁶¹¹ See Chapter 7, Section 7.7.

⁶¹² The historical membership data is extracted from the UN site: <http://www.un.org/en/members/growth.shtml>, accessed 30 October 2014. This dismal figure looks better when populations are taken into account. For example, the 2013 population of all 15 members of the SC equated to approximately one-third of the total member states' population. See Chapter 3, Section 3.7.2, ns 199-200.

in view of the informal regional representation arrangement that was part of the resolution's *travaux* and agreements, as well as the fact that weaker states were able to get the amendment ratified despite the expressed opposition of some of the P5, perhaps this revision can be considered a modest achievement.

The intransigence of some of the P5, if not all, regarding Council-related changes that might jeopardise their privileges, coupled with the requirement of a two-thirds majority and concurrence of all the P5 (non-application of the veto) for bringing an amendment into force, seems to have been the main reason why, since the late 1960s, and for almost 50 years, there have not been any further formal attempts, under either Article 108 or 109, to amend the Charter.

With the US, as the main potential change agent in the UN, joining Russia in opting for the status quo, and being the main force in putting the adopted Article 109(3) Charter review process into hibernation in 1967, it would appear that achieving the reformed UN that seemingly everybody wants has become a frustrating experience and an elusive goal.

In the last 50 years, member states' UN reform efforts have not been conducted in a united fashion, but have been fragmented, apparently diverging in different directions. These reform initiatives have taken the form of multiple and sometimes parallel efforts, often lasting many years (with some lasting decades), and without challenging the P5's unequal privileges constitutively. On the other hand, the permanent members, while paying lip service and lending passive support, have become more entrenched in their foreign-policy resolve to prevent any reforms that would diminish their exclusive and superior powers.

For example, the tactic of some of the P5, if not all—and particularly that of the US—has been to allow reform efforts in terms of multiple, “special” and “open-ended” (endless) UN committees and forums to operate, but to make sure that the terms of reference of these bodies do not include Charter amendment or review. Thus, any reform efforts have been effectively sterilised.⁶¹³

To illustrate the development and adoption of this seemingly intentional P5 strategy in derailing Council reform efforts, a few examples will be cited, beginning from the time the review process was put into hibernation.

In 1969, the weaker states, on the initiative of Colombia, and still being under the impression that a review conference under Article 109(3) was imminent, placed the “Need to consider

⁶¹³ One of these “open-ended” forums, in addition to the “special” committees and “High-Level” panels, and some regular GA sessions which take up the subject of Council reform, is the *Open-ended Working Group to consider all aspects of the question of increase of the membership of the Security Council and other matters related to the Security Council*, created by GA Resolution 48/26 of 3 December 1993. Five years after the adoption of this resolution, in 1998, the GA decided that any decision relating to the Working Group would need to be adopted by a two-thirds majority of all the member states (General Assembly Documentation Center 1946-2015): A/RES/53/30.

However, in a later adoption of the decision-making procedures of the working group, the text of the adopted voting procedures referred to being “mindful of Chapter XVIII”, and therefore adopting a method of “general agreement”, which might be interpreted as consensus. Or, if using the exact Charter Chapter XVIII rules, then the procedure can be interpreted as requiring a *two-thirds* majority and the “concurrence” of the P5. In either case, this would mean no decision without the P5’s consensus, whereas no GA decision or that of one of its committees, such as the working group, is normally subject to the veto. One can only conclude that the P5 strategy in advocating this formula was, most likely, either to confuse the member states on their voting rights, or, perhaps, to warn them that their decisions will eventually be subject to the veto. (Open-ended Working Group to consider all aspects of the question of increase of the membership of the Security Council and other matters related to the Security Council 2008): A/AC.247.

Lastly, when it comes to the dynamics of Charter reform, the pattern that seems to be repeating is circular in motion with no forward thrust. The P5 hypocritically seem to cooperate and participate in a multitude of parallel reform committees and forums, and then, by threatening the use of their veto card, push these committees to consensus decision, which means standstill and inaction. Then, after many years of frustrating attempts, member states give up and search for other forums or revert back to the plenary of the GA for discussion and guidance. The GA then inadvertently, once the reform interest in some variation or form gains momentum again, creates new “special” committees and “open-ended” working groups and “high-level” expert forums, and the cycle continues.

suggestions regarding the review of the Charter of the United Nations”, on the GA’s agenda. The GA, and especially its Sixth Committee (Legal Committee), took up the subject in 1970, 1972 and 1974, gathering the member states’ views on the essence and type of Charter revisions needed.⁶¹⁴

In 1974, the work of the GA and its Sixth Committee, through the adoption of GA Resolution 3349, was delegated to a newly formed committee, the *Ad Hoc Committee on the Charter of the United Nations*. The resolution’s operative text, in paragraph C, empowered the Ad hoc Committee to consider all kinds of Charter matters and UN reform suggestions, but, paradoxically, only as long as they would “not require amendments to the Charter.”⁶¹⁵ A year later, in 1975, the GA created another committee under the title of the *Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organisation* with the same mandate as the *Ad hoc Committee*: in other words, with the stated objective of changing and reforming the UN, but without amending and changing the Charter.⁶¹⁶ Where did this contradiction in intent and terms come from?

In the case of the US, starting in the late 1960s, at the time of the Nixon administration, the US State Department, under Henry Kissinger, had adopted an anti-Charter-revision policy. In 1975, the administration’s view as a long term strategy was conveyed to Congress for backing and was adopted in the House Concurrent Resolution 206 of the 94th Congress. It was also included in the final recommendation of *the Subcommittee on International*

⁶¹⁴ (Office of Legal Affairs, Repertory of Practice of United Nations Organs, Supplement 5, Articles 108 and 109 1970-1978): 196.

⁶¹⁵ Ibid: 196-197. See also (General Assembly Documentation Center 1946-2015): A/RES/3349.

⁶¹⁶ See n 614 above. In fact, by examining the 2013 year-end report of the Special Committee, it becomes apparent that the Committee’s main activity was related to “assistance to third States affected by the application of sanctions under Chapter VII”—hardly related to UN reform (Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization 2014).

Organisations of the House of Representatives, of 26 November 1975. Since then, the general policy of the US on UN reform has effectively been to support “reforms which do not require Charter revisions”.⁶¹⁷

The GA’s *Special Committee* has met every year for the past 40 years, but since its decisions are made on a consensus basis, and its terms of reference exclude Charter amendment proposals, this has made the reform of the Council’s deficits via that forum virtually impossible.⁶¹⁸

It therefore seems that UN reform efforts of the new millennium, without being formally channeled through constitutive changes (Articles 108 or 109), remain similar to reform efforts of previous decades—mostly just a wish-list.

To illustrate the way in which a Council reform proposal, once it becomes serious and gains momentum, is frustrated by the P5, the latest S5 effort is described.

Paul Seger, the head of the Swiss Mission to the UN, headed the S5-initiated GA draft resolution to reform the SC’s working methods, including blocking the veto in R2P type circumstances. This collective effort was one of the more recent casualties in the dead-end path to democratisation of the Council.

⁶¹⁷ The US 94th Congress, *the Question of UN Charter Review*, report by *the Subcommittee on International Organizations of the Committee on International Relations*, 26 November 1975, the US House of Representatives; (Subcommittee on International Organizations 1975): 5-7. For a relatively recent reaffirmation and policy recommendation that the Council expansion does not serve the US’s and, indeed, the P5s interests, and that the status quo should be maintained, by a semi-governmental think tank, see the special report by *the Council on Foreign Affairs: the UN Security Council Enlargement and U.S. Interest*, 2010; (McDonald and Stewart 2010): 12-18.

⁶¹⁸ (Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization 2014). Despite the existence of other SC reform forums and the *Working Group*, and in addition to GA resolution-type activities on the subject, the Special Committee has at least twice in the past (in a case raised by Cuba and another case initiated by Libya) explicitly considered SC reform proposals, without any decisions; (Office of Legal Affairs, *Repertory of Practice of United Nations Organs*, Supplement 10, Articles 108 and 109 2000-2009): Para. 5-11.

Seger withdrew the draft resolution just before it was put to the vote, on 16 May 2012, and made a frank statement to the Assembly. The S5 draft, which apparently had the support of close to 100 member states, had been withdrawn, Seger complained, primarily because of the “wrangling” and the pressure they were facing from the P5, which included putting “complex and confusing” legal roadblocks in their way should they decide to go ahead with the resolution.⁶¹⁹ A disappointed Seger then said that, while they would continue to work with the P5 on the issue, reforming the Council was a work in progress, or rather, as he put it, a “work not in progress”.⁶²⁰

9.1.2. Leave the Treaty, or Renegotiate and Constitutionalise?

Recognising that the permanent members of the SC are unrelenting in maintaining their exclusive power at the UN, and in view of their unwillingness to accommodate gradual democratisation of the Council, what then are the legal options for the member states?

One radical option for states might be to leave the Charter (treaty) and either join other multilateral functional economic and collective security arrangements or enter into a new UN-type of global treaty arrangement, giving the P5 the option of acceding in a more equal setting.

⁶¹⁹ See n 608 above.

⁶²⁰ (Meeting Coverage and Press Release: Sixty-sixth General Assembly 2012). For another first-hand experience of the frustrations of dealing with the P5 at the UN and the P5’s unrelenting apartheid status, see the relatively recent book by the ex-President of the Security Council from Singapore, Kishore Mahbubani, who states that the P5 regard the non-permanents as “tourists”, and that all of the P5 are united in their uncompromising stand on Council changes— “total control is what they seek”. (Mahbubani 2013): 232. See also n 762 below. The disappointment of member states and NGO advocates in not achieving a democratic UN and Council is further aggravated by the fact that many of the UN lawyers and scholars, by referring to the applicability of the veto to even Charter amendments, also argue that the Charter is frozen. For example, Loraine Sievers and Sam Daws, using the same reasoning, argue that it is unlikely that the “Council will ever be changed”. (Sievers and Daws 2014): 6. For a counter-argument on the invincibility of the veto, see Section 9.4 below.

As the Charter does not have a withdrawal provision, leaving it may be easier said than done. Based on the previous chapter's arguments on the legitimacy of the war-time Charter, and based on the customary International law prohibition of the threat of use of force in concluding treaties that predates the Charter (from the time of the 1928 Paris Pact) —as well as the coercion tests modelled on the Vienna Convention guidelines that point to the apparent defects in the conclusion of the UN Charter—why not propose the *invalidity* and *termination* of the Charter? However, this may imply the “ripping” the instrument.

In fact, the physical act of ripping up the Charter in front of member states was first performed by Senator Connally at San Francisco, in 1945, and, more recently, was carried out by Muammar Gaddafi during his 2009 speech to the Assembly.⁶²¹ These symbolic (or belligerent) gestures, of course, represented two completely opposing views—the *necessity* versus the *fairness*—in submission to the SC with its existing structure and voting procedure.

In addition to the problem of procedural indeterminacy in contesting the validity of the Charter, there are at least two other substantive reasons to avoid this approach. First, many more states have joined the UN since it was founded—presumably of their own free will. Current UN membership stands at 193, whereas the original founding members amounted to 51. This is almost a four-fold increase, with 142 new states having acceded to the Charter since 1945.

Of course, it could be argued that the great majority of these 142 states' accessions were in fact instances of existential actions on the part of newly born states: that they had broken

⁶²¹ On Senator Connally's uncompromising stance on the veto, see Chapter 4, Section 4.5.4. In the case of Gaddafi, while criticising the SC structure and its voting rules, he also likened the permanent members to an Al Qaida-like “terrorist” gang: <http://www.theguardian.com/world/2009/sep/23/gaddafi-un-speech>; accessed 26 October 2014. Two years later, in October 2011, the rebels against his dictatorship, aided by Council resolutions (under Chapter VII), captured and killed Gaddafi—without a trial while in captivity.

away from their colonisers and were acting under duress, and that legitimising their independence and that of their regimes was the main cause of their rush for UN recognition.

Turning to the original 51 state founders of the Charter, in Table 2 of Chapter 8, it was shown that at least 27 states out of the original 46 (excluding the P5) or 59 per cent in attendance at San Francisco were acting under duress, because their foreign-policy decisions were under the influence of one or more of the P5. Indeed, the depositing of the US ratification of the Charter between the two nuclear bomb attacks on Japan, before any other state had expressed its final consent by ratification, was an act that placed all the other non-permanent member states under duress. This would bring the total to 46 states, as the original signatories, that could claim invalidity of the Charter on coercion grounds.

Therefore, excluding the colonial-states argument, and assuming that all the other 142 UN member states that have acceded to the Charter have done so freely, it can be concluded that the possible claim for the Charter's invalidity is limited to the founding members.

Consequently, in the hypothetical case of legal pursuits, this, if successful, could lead to possible withdrawal of a certain number of UN member states rather than the dissolution of the Charter.

However, there is a second and more overarching reason why the route of invalidating the Charter should be avoided. Considering the pivotal role the UN plays in global governance, and all the *good* things the UN system and its related organs do, the notion of invalidating the Charter, and its suspension or dissolution, even if only temporary and until another UN-like institution is formed, seems at best chaotic, and at worst catastrophic.⁶²² Even temporary

⁶²² There are numerous books and reports on the UN's positive global impact, mostly empirical and on non-security matters. An excellent source is the UN system's various websites. However, for a more independent

interruption of the UN and its specialised agencies' works and services would be intolerable.⁶²³

If the path of pursuing Charter invalidity is neither feasible nor desirable, then what is the alternative?

Frederic Megret, in his Commentary related to *The Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, reminds us that nullification of treaties based on coercion is a drastic step and that most “unequal treaties”, particularly in the areas of economic, trade, or financial agreements, have, in the past, been renegotiated rather than invalidated.⁶²⁴

If Charter renegotiation is the remedy for substantive UN reform and achievement of the normative objectives of constitutionalism mentioned in Chapter 1, the end product of its review and renegotiation, regardless of the extent of revisions, would, once presumably freely adopted by the member states inherently have the implied benefit of removing the Charter legitimacy deficiency mentioned earlier. This would be because, presumably, the injured original founding states would then have a chance, at the renegotiation, to freely recommit

and conceptual assessment of the positive global impact of the UN, see Richard Jolly, Louis Emmerij and Thomas Weiss, *UN Ideas That Changed the World* (Jolly, Emmerij and Weiss 2009). For a negative (and somewhat bizarre) view of the UN, not generally accepted, but shared by some of the conservatives in the US, see Nathan Tabor, *The Beast on the East River, the UN Threat to America's Sovereignty and Security*. Endorsed by Senator Jesse Helms, this book, on its cover, states that it is about the UN's “ruthless attempt to control US education, law, gun ownership, taxation and reproductive rights” (Tabor 2006).

⁶²³ Although even a temporary suspension of the UN's operation would, from day one, most likely negatively impact hundreds of millions of lives. However, when it comes to the maintenance of “peace and security”, with the exception of some of the areas where peacekeeping missions are deployed, a world without the UN, probably in the short term, would not have that much of an adverse effect. With the UN side-lined, and the Council dysfunctional and incapable of dealing with many armed conflicts—and, on the other hand, mutual deterrence and the balance of destructive power inherent in the MAD doctrine, and all the different military alliances in place—a world without the UN would probably not be that different.

⁶²⁴ (Megret 2011): 1868-1869.

themselves to the Charter, regardless of the extent of any changes, and therefore this would serve as the reaffirmation of the UN's constitutive instrument.

With review and revision being desirable, but considering the failures of UN reform attempts in the past (mostly under the shadow of the veto), the principal question then becomes how to facilitate the member states and the P5 to come together in one forum to in effect renegotiate the Charter.

However, before exploring the feasibility of conducting a Charter review and revision process, which in effect would lead to the Charter's renegotiation and possibly the constitutionalisation of the UN—and before examining some of the legal strategies that may initiate such a process—I will first briefly expand on some of the constitutional ideals and principles highlighted in Chapter 1 which should be normatively applied to the UN system.

9.2. Constitutionalisation of the Charter and International Law: Concepts

Constitutionalisation was defined, in short, as the *supreme* legal order, with the necessary structures and *primary* and *secondary* rules to achieve its constitutional ideals, and was further characterised as a cognitive process with gradations and degrees.⁶²⁵

UN constitutionalisation, even if feasible, is unlikely to happen in *one* Charter review conference which may turn into a constitutional convention. The UN constitutionalisation process most likely would take an evolutionary dialectical path, and, moreover, as a construct, must have a set of ideals it sets out to accomplish, and must have at least an implicit beginning or “constitutional moment”.

⁶²⁵ This section draws on the introduction of concepts, terms and definitions, as well as references, given in Chapter 1.

Furthermore, it is recognised that, at any UN constitutional conference, the forum itself would ultimately decide on the features and the degree of constitutionalism it may adopt.

However, based on the experiences of working domestic constitutions, particularly those of the federal systems or the supranational regional models, I have attempted to identify the grand constitutional features and ideals required in any UN constitutionalisation attempt.

These are presented below.

Democracy (or *Demoi-cracy*)

In view of globalisation's "de-constitutionalisation" effect on fundamental rights and domestic constitutional processes,⁶²⁶ as well as the demonstrated legislative and judicial decisions of the SC and some other international law regimes that directly affect individuals and non-state actors, it becomes apparent that removing the democratic deficit in international law and governance must be the primary objective of a constitutionalised UN. This will require a paradigm shift from "sovereignty of states" to "sovereignty of peoples". In other words, a shift from the Westphalian concept of states' rights to individuals' rights, similar to all democracies, and towards the recognition of global citizens as the subjects and objects of law.⁶²⁷

This was exactly the European path taken in transforming the European Economic Community into the EU. The treaties establishing the Community were essentially concluded by sovereign states. This was helped by the constitutional jurisprudence of the landmark *Van Gend en Loos* decision, which recognised peoples as well as states as subjects of Community

⁶²⁶ See Chapter 1, Section 1.4. See also *The War of Law: How New International Law Undermines Democratic Sovereignty*, in (Kyl, Feith and Fonte 2013).

⁶²⁷ (Peters, Membership in the Global Constitutional Community 2011): 155, 158.

law, and represented a turning point that resulted in the law having “direct effect” on natural persons in the EU.⁶²⁸

Similarly, as with the EU legal order and its competences and the states’ concept of shared sovereignty, UN member states have also, in cases of Chapter VII decisions, limited their sovereign rights and submitted to the SC’s competences. And, similar to the EU Treaty, the

⁶²⁸ The European Court of Justice in its 1963 ruling stated:

*[T]his Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is **confirmed by the preamble to the Treaty which refers not only to governments but to peoples**. ...The Community constitutes a new legal order of international law for the benefits of which the states have limited their sovereign right, albeit within limited fields, and the subjects of which comprise not only Member States, but also their nationals. **Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.** [Emphasis added.]*

(Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) Case 26/62 1963): Sect. *B-On the substance of the Case*, at 12.

In *Van Gend en Loos*, the Court recognised and further framed the (r)evolution that had started to occur in traditional international law in two substantive respects: first, that EU law had formed a new sovereign legal order; and, secondly, that, through the application of the direct effect doctrine, EU citizens had now been granted new direct supranational rights. See (Chalmers, Davies and Monti 2010): 15-16, 268-271; and also (Weiler, Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy 2014): 94-103.

In fact, there was a precedent to *Van Gend en Loos* in traditional international law in terms of the recognition of individual rights and the direct effect doctrine. This was the advisory opinion issued in 1928 by the Permanent Court of International Justice (PCIJ) in a case involving individual claims by citizens of the Free City of Danzig against the state of Poland. In *Jurisdiction of the Courts of Danzig*, Advisory Opinion, the Court, while acknowledging that there was “a well-established principle of international law that an international agreement as such has no direct effects”, further recognised that “the situation may be different if such be the intention of the Parties.” (*Jurisdiction of the Courts of Danzig* 1928): 17. For online access, see http://www.icj-cij.org/pcij/serie/B/B_15/01_Compotence_des_tribunaux_de_Danzig_Avis_consultatif.pdf.

The PCIJ opinion further added that (*ibid*: 17-18):

[T]he very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.

Although there is some disagreement as to the exact interpretation of the opinion, nevertheless, most legal scholars, including Judge Schwebel and Sir Hersch Lauterpacht, concur that the *Danzig* opinion was the departure point for the exclusivity of states in having rights in international law, and the beginning of the expansion of international rights to encompass individuals (international human rights). (Schwebel 1994): 154,155.

It is noteworthy that the Court’s opinion forthrightly refers to the creation of “obligations” for domestic courts to enforce individuals’ international rights created as a result of an international agreement or treaty. (*Jurisdiction of the Courts of Danzig* 1928): 18.

UN Charter recognises “we the peoples” in its preamble.⁶²⁹ In the EU context, with a *Van Gend en loos* type of interpretation by the highest European court, this was one of the main factors in confirming rights “not only to governments but [also] to the peoples”.⁶³⁰ In fact, the UN Charter implicitly grants rights to global citizens, not only in its preamble but also in the other parts of the Charter, including in Chapters IX and X, relating to ECOSOC.⁶³¹

Therefore, what empowers people in a democratic framework is not just being objects of law but also being able to make laws, directly or through representation, and ultimately being able to elect or dispose of their governments. In fact, Joseph Weiler points out that “democracy is not about states, but about the exercise of public power”. Weiler further reminds us that, in essence, “the two primordial features of any functional democracy” are the principles of “accountability” and “representation”.⁶³²

The UN constitutionalisation goal of global democracy should in effect be the paradigm shift from international law of sovereign states to sovereign global peoples: the “humanisation” of international law.⁶³³ This empowerment of the world’s citizens should dilute the states’ monopoly on international norm generation, as well as mitigate powerful states’ arbitrary application of the rule of law, by giving global peoples material and direct access to international law-making.

⁶²⁹ (Charter of the United Nations 1945-2015): Preamble.

⁶³⁰ See n 628 above.

⁶³¹ For references to some of the mostly implied human, social and economic rights in the Charter, see the “fundamental and human rights” section of this chapter.

⁶³² (Weiler, *Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy* 2014): 100; and Phillippe Schmitter and Karl Lynn, *What Democracy Is ... and Is Not*, in *ibid*: n 16.

⁶³³ (Peters, *Membership in the Global Constitutional Community* 2011): 155-157.

That said, the injection of democracy into international law, and making global citizens the law-makers, does not imply that states will disappear anytime soon. Rather, it is that the governance of the UN, and international law, will be shouldered jointly, as a responsibility of both states and peoples, similar to the EU-type supranational or federal models of governments.

With this “global democracy” discourse, a more descriptive term to use in our UN constitutionalisation model here is the notion of “demoi-cracy”. This is in recognition of the plurality of the global demos, and the dual character of the global community—that is, in the global democracy being proposed, the demoi-cracy of “both states (peoples) and individuals, in a common supranational polity”, would jointly govern the world.⁶³⁴

Parliamentary Representation

With *representation* and *accountability* being the main pillars of *demos*’ power, these pillars would still hold in the global and multitude form of demoi-cracy. In domestic governance models, these two principles have been grounded in the creation of parliaments and the election of governments.

Similarly, in the global context, the establishment of a global parliament is the substantive component of global constitutionalisation. In other words, for global citizens to be represented by electing a global government freely, and holding that government responsible,

⁶³⁴ On *demoi-cracy* mostly in the EU context, see (Cheneval, Lavenex and Schimmelfennig 2014): 1-18; For Cheneval et al:

In a ‘demoi-cracy’, separate states-peoples enter into a political arrangement and jointly exercise political authority. Its proper domain is a polity of democratic states with hierarchical, majoritarian features of policy-making, especially in value-laden redistributive and coercive policy areas, but without a unified political community (demos). Ibid: 1.

See also (Nicolaidis, The New Constitution as European ‘demoi cracy’? 2004).

and being able to change it when it is not performing, is ultimately when the requirements of global representation and accountability are fulfilled.⁶³⁵

In the US—the main creator of the UN—the idea of a world union and a representative world government was popular and had significant public backing as well as politicians drive during the 1940s.⁶³⁶ The creation of the UN, during 1941 to 1945, in fact took a short dialectic path, from the State Department’s first designs, where there were proposals for minimal world government, to suggestions of an exclusively collective security pact between states, to the re-injection of some social, economic, and human rights ideals at Dumbarton Oaks, which were reinforced in San Francisco. These economic and social concepts, coupled with governance concepts of majority decision-making and shared sovereignty, eroded the states’ absolute sovereignty and resulted in the quasi-world governmental organisation created at the end of the San Francisco Conference.⁶³⁷

⁶³⁵ According to Weiler’s analysis of the EU’s democratic deficit—which is partially countered by the constitutional jurisprudential activism of the ECJ—the non-existence of a fully formed government, with an elected executive branch and a parliament with sufficient powers to do its job, and which can be ‘thrown out’ if not performing, is exactly the core cause of the democratic deficit and the “dark side” of the Union, thereby causing Weiler to rethink the necessity for a European state. (Weiler, Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy 2014):100-103.

⁶³⁶ During the decade 1940 to 1950, popular books promoting political integration and world union, such as Clarence Streit’s *Union Now*, Emery Reaves’ *Anatomy of Peace* and Wendell Wilkie’s *One World*, were best sellers, with the latter work selling two million copies. The American NGO the *United World Federalist* had over 100,000 members and was fully supported by scientists such as Albert Einstein, artists and musicians, such as the composer Oscar Hammerstein, and scholars and philosophers, such as Bertrand Russell.

At the political level, 22 US states had adopted legislative resolutions or proclamations expressing their willingness to be part of a world federal government, including the state of California. In Congress, there were a number of draft resolutions and hearings on UN Charter review and reform, including the House Concurrent Resolutions, HCR-59, 1948, and HCR-64, 1949. While the text of HCR-64 was asking the US Administration to reform the UN, its stated objective was to turn the organisation into a “world federation”. This unsuccessful resolution had nearly 110 congressional supporters, including John F. Kennedy. The most detailed accounts on the above are in the two-volume series by Joseph Baratta, *The Politics of World Federation* (Baratta, *The Politics of World Federation: From World Federalism to Global Governance* 2004). See also (Baratta, *The Politics of World Federation: United Nations, UN Reform, Atomic Control* 2004). See also (Weiss, *Thinking about Global Governance: Why People and Ideas Matter* 2011): 66-86; and also (witner 2013); and (Cabrera 2011): 3-6.

⁶³⁷ See Chapter 8, Section 8.2.2.

In that period, the last significant formal political drives to turn the UN into a representative union and create a UN parliament, before the movement was frozen by the Cold War, were, in the UK, a proposal by Foreign Secretary, Ernest Bevin to the House of Commons in November 1945,⁶³⁸ and, in the US, the House Concurrent Resolution HCR-64 of 1949 (Senate equivalent, Res. SCR-56), which attracted 111 Congressional signatories, including the future Presidents John F. Kennedy and Gerald Ford.⁶³⁹

In academia, the last significant attempt to propose the constitutionalisation of international law and the establishment of a world parliament, in the 1940s and 1950s, was the University of Chicago project involving a prominent group of scholars in the *Committee to Frame a World Constitution*, and Grenville Clark and Louis Sohn's work on establishing a UN parliament by means of Charter revisions in *World Peace Through World Law*.⁶⁴⁰

More recently, Richard Falk and Andrew Strauss have argued for a global parliament and, more specifically, have examined four models: 1) as an advisory body to the UN—created by civil society and eminent persons; 2) as a parliamentary assembly and advisory body to the UN—created under Article 22, as a subsidiary of the Assembly; 3) as a separate and

⁶³⁸ On the recommendation to the House of Commons by the UK Foreign Secretary, Ernest Bevin, of the feasibility of “creating a world assembly elected directly from the people of the world”, see (Childers 2011): 32.

⁶³⁹ On the related US Congressional Resolutions, see (Baratta, *The Politics of World Federation: From World Federalism to Global Governance* 2004): 357-358, 461-462, 578. See also (Baratta, *The Politics of World Federation: United Nations, UN Reform, Atomic Control* 2004): 3-4; and (Center for Legislative Archives (USA)-Committee on Foreign Relations 1947-1968). See also a more extensive list of draft resolutions before the Senate on United Nations, including SCR-56, in the Digital Collections of the University of Wisconsin: (University of Wisconsin Digital Collection 1950).

⁶⁴⁰ On the University of Chicago efforts, between 1945 and 1950, see (Weiss, *Thinking about Global Governance: Why People and Ideas Matter* 2011): 66-86. On Harvard University Law Professor, Louis Sohn, and former legal advisor to President Roosevelt, Grenville Clark, and their comprehensive UN reform proposals, including turning the GA into a parliament and the SC into an executive council, see their 1958 book *World Peace through World Law* (Grenville and Sohn 1958). For more recent efforts and a proposal for a *Constitution for the Federation of Earth*, see (Martin, 2010).

competent binding organ of the UN—created with revisions and amendments to the Charter; and 4) as a separate treaty with formal links to the UN.⁶⁴¹

Although there have been no significant political proposals sponsored by states in favour of a global parliament, individual politicians have joined civil society in establishing the *Campaign for a UN Parliamentary Assembly* (UNPA). Since the start of the campaign in 2007, it has attracted the support of former UN Secretary-General, Boutros Boutros-Ghali and been endorsed by over 700 current and 600 former global parliamentarians.⁶⁴²

There are currently close to 40 parliamentary assemblies acting as advisory bodies to international functional and regional organisations. One such entity, the European Parliamentary Assembly, which was initially an advisory-only body of the EEC, took the transformational path of becoming the European Parliament in 1979.⁶⁴³ Since then, the MEPs have been elected by direct universal suffrage. The legislative role of the Parliament, very limited at first, has significantly increased over the last 30 years.⁶⁴⁴

⁶⁴¹ (Strauss and Andrew 2007): 347-359, esp. 357. See also (Falk and Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty* 2000); (Falk, *What Comes After Westphalia: The Democratic Challenge* 2007); and (Falk and Strauss, *Give citizens a voice* 2008).

⁶⁴² (Peters, *Dual Democracy* 2011): 324-325. See also UNPA's website for the latest parliamentarians' support: <http://en.unpacampaign.org/index.php>, accessed 26 November 2014.

⁶⁴³ (Levi, *Introduction* 2014): Vii and 7-24.

⁶⁴⁴ (Chalmers, Davies and Monti 2010): 81-88.

According to the official EU websites, the EU Parliament has 751 members representing 500 million citizens. The EU's foundation and functioning is based on two principal treaties, the *Treaty on European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU). The latest review and revision to these two treaties is commonly referred to as the Lisbon Treaty, which has been in force since 2009. Article 13 of the TEU designates the seven main institutions of the EU, among them the three main law-making bodies of the European Parliament, the Council of the EU (formerly the Council of Ministers), and the European Commission. The other four EU institutions have no direct law-making competency, including the European Council (consisting of heads of state or government), which, according to Article 15 of the TEU, is charged with providing "impetus" and setting priorities for the EU, and "shall not exercise any legislative functions".

Therefore, of the three EU institutions which are jointly responsible for making most EU law, the Commission can only initiate legislation, and the EU Parliament (EP) and the Council of the EU must both jointly adopt the final text before it becomes law. The vast majority of the EU's legislation is of the "ordinary" type, which requires this "co-decision" procedure of both the EP's and the Council's concurrence on an equal footing. There are some exceptions, referred to as the "special" legislative procedures (such as taxation), that require only the

The UN system, however, has never had a parliamentary assembly in any capacity and, by virtue of its 1945 design, lacks its own parliament. Therefore, any attempt at UN constitutionalisation, in its initial stages, should include some type of popular representation with some degree of decision-making and binding effect.⁶⁴⁵

Council's decision to be adopted. However, in all the special cases, the EP must be consulted and in some instances the favourable opinion of the Parliament is obligatory.

The Lisbon Treaty, in addition to reinforcing the equal footing of the EU Parliament and the Council; strengthening the co-decision process; and further expanding the types and scope of the legislative powers of the EP, has also significantly increased the indirect law-making powers of the parliament, including by requiring the EP's consent to be given to the appointment of the European Commission members and to the election of the President of the Commission, as well as giving it the right to propose changes to the treaty, and to give consent on most types of international treaties and agreements.

In terms of the democratisation of the EU supranational government, in tandem with the Lisbon Treaty, and effective from 2012, was the introduction of the concept of direct democracy through the European Citizens' Initiative (ECI). This empowers EU citizens, based on the main criterion of collecting a minimum of one million signatures from citizens of at least a quarter of the EU member states, to appeal to the European Commission (as well as the EP) to propose legislation on matters that fall within the EU's legislative competence. Noteworthy, for the analysis of the legal means of holding the UN Charter Review, later in this chapter, the European Citizens' Initiative, although not in the scope of this thesis, might be a viable initiative, that if successful could potentially give a direct peoples voice in addition to the will of the EU states in requesting the Review.

The references for all the material in this footnote, in addition to (Chalmers, Davies and Monti 2010) cited above, are from the following official EU sources: the *Consolidated Version of the Treaty on European Union*: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN>; the description of the EU institutions and their functions, including the EP: *EUR-Lex*, http://eur-lex.europa.eu/summary/glossary/eu_institutions.html; and the European Citizens' Initiative: <http://ec.europa.eu/citizens-initiative/public/welcome> .

⁶⁴⁵ Granted that any type of concrete attempt to parliamentarize the UN will face many questions and challenges, both in theory and practice, two material questions are: How to qualify a majority decision at the parliament? And: What to do with the non-democratic member states?

As to how to account for states with large populations (such as China and India, with populations of over one billion each) and the states with smaller populations (there are even 13 micro states with populations of less than 100,000 each, such as the Seychelles and Nauru), in determining a balanced voting method, the experience and the schemes used in political integration and unions of states can be consulted. In addition to the voting formulas being used in practice, in regional and federal models, there are scholarly and NGO proposals on possible future voting methods in a democratised UN. For an example of an elaborate population size classification and weighted voting scheme, see (Schwartzberg 2013): Chapters 2 and 3.

For another weighted-voting method that takes the three factors of population, states, and the economic size of the states or their contribution to the UN budget into consideration—the “binding triad” scheme—see (in French) (Dehaussy 2005): 2226-2228.

As to the question of the member states' degree of internal democracy, and its possible adverse effect on freedom of elections should they participate in the global democracy, based on the objective of universality, virtually present in the current UN membership, no willing state should be excluded. The assumption here is that

Judicial Order, Review, and Independence

The judicial branch of the UN, the ICJ, has two major flaws as regards its ability to adjudicate contentious cases. First is the defect that ICJ jurisdiction is not compulsory. Secondly, without adoption in the Council and P5 concurrence, ICJ decisions cannot be enforced.

The ICJ Statute has no explicit enforcement provisions. Article 59 of the Statute further limits the binding judgment of the Court to the parties involved and only to that particular case:⁶⁴⁶

The decision of the Court has no binding force except between the parties and in respect of that particular case.

A strict interpretation of Article 59 implies that the Court's judgment cannot be used as a precedent and case-law, and cannot affect or bind third states under similar circumstances.⁶⁴⁷

The Charter, on the other hand, in Article 94, provides a possible means of enforcing ICJ decisions through Council actions:⁶⁴⁸

- 1. Each member of the United Nations undertakes to comply with the decisions of the International Court in any case to which it is a party.*
- 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.*

Therefore, according to Article 94, compliance with, and enforcement of, ICJ judgments is not automatic and is not initiated by the Court. Further, according to paragraph 2 of the

popular elections for a UN parliament would be with the authorisation and the collaboration of the host state, but financed, managed, and conducted by the UN, and therefore independent of the host state's influence.

⁶⁴⁶ (Statute of International Court of Justice 1945): Art. 59.

⁶⁴⁷ For an expanded view of Article 59, with ICJ decisions in practice affecting third states, see (Brown, Article 59 2012): 1416-1446.

⁶⁴⁸ (Charter of the United Nations 1945-2015): Article 94.

Article, enforcement of an ICJ judgment is wholly dependent on the Council, “which may, if it deems necessary” take action and “decide upon measures”, which in effect renders enforcement of ICJ judgments political acts, and subject to the veto of the permanent members.⁶⁴⁹

At San Francisco, just as they were aware of the shortcomings of the SC, the lesser powers were also aware of the flaws of the proposed international court, since nearly 20 states had submitted formal amendments for substantive changes to its statute. However, as part of the “package deal” of rule by the P5, the resolution regarding the defects in the UN’s judicial organ was, as with opposition to the Yalta formula, put off to revisions at a future Charter review.⁶⁵⁰

Despite its limited jurisdiction, the Court, in its first half-life, enjoyed prominence, and presided over a number of significant contentious cases, as well as providing advisory opinions. This was partly attributable to Article 36 (paragraphs 2 and 3) of the ICJ Statute. These provisions give the states the option of voluntarily accepting the Court’s jurisdiction. This option can further be qualified as unconditional or limited, based on reciprocity or exceptions.

⁶⁴⁹ See also (Tanzi 1995): 571-572. The binding effect of Article 59 was apparently a step backwards from the League of Nations and the Permanent Court of International Justice (PCIJ), where compliance proceedings could have been automatically launched after a PCIJ judgment. (Llamzon 2008): 822, esp. n 38.

⁶⁵⁰ The founding *travaux* reflect the fact that most of the states at San Francisco in the majority anti-veto camp were also in favour of the compulsory jurisdiction of the ICJ. Nearly 20 states, including Australia, Cuba, Ecuador, Iran, the Netherlands, Paraguay, the Philippines and Venezuela, had submitted, at the opening of the Conference, their formal amendment proposals to the DO document (DO- Chapter VII) with the intention of making the Court’s jurisdiction compulsory. Many other states at the Conference’s proceedings and commissions, such as Brazil, Belgium, Czechoslovakia, Greece, Mexico and Turkey, had also expressed views along the same lines. Moreover, there were proposals on the independence of the ICJ from the SC on enforcement measures, and even on the ICJ’s oversight role with respect to Council decisions. The source for the above is found in various UNCIO volumes. As a quick reference and index of the formal proposals to revise the sponsoring governments’ plan for the ICJ, see (UNCIO - Volume III: Dumbarton Oaks Proposals, Comments and Proposed Amendments 1945): 669-672.

The optional clause was well received in the earlier years of the ICJ's operation, and a large number of member states who had confidence in the jurisprudence of the UN made unilateral declarations and accepted the Court's jurisdiction. They included all the P5, with the exception of the USSR.⁶⁵¹

However, in the second half of the ICJ's existence, a number of situations and cases undermined the popularity and utility of the Court. This marginalisation of the Court can primarily be attributed to the Council and the role of the P5 in challenging the jurisdiction of the ICJ and its independence. That is to say, not only was the ICJ's jurisdiction optional, but, in contentious cases, the Council showed that, by adopting a SC resolution, it could take over jurisdiction and stay "seized" of a situation, and in effect undermine and interrupt the Court's proceedings and judgment. This was illustrated in the *Lockerbie* case, *Libya v. United States*, 1992, and the *Bosnia application* to the ICJ, in 1993.⁶⁵²

The international rule of law and UN jurisprudence were further discredited in the *Nicaragua v. USA* case (started in 1984 and concluded in 1986), in which the Court ruled against the US, including on the issue of the US having mined Nicaraguan harbours. However, when Nicaragua requested Council enforcement of the ICJ's judgment, it was blocked by the US, rendering the ruling without effect. The US also, in 1985, while the case was still in progress,

⁶⁵¹ (Crawford and Grant, *International Court of Justice* 2008): 195-196. Later, all of the P5, except the UK, opted out of the optional protocol. The notion of it being "optional" to be ruled by the law seems—in a rule of law sense—something of an oxymoron.

⁶⁵² In the *Lockerbie* case, the SC, by adopting Res. 748 (1992), mandated that the Council had *seized* the matter. This decision was directed, not only, as usual, to all the member states, but also to "all international organizations", in effect requesting the ICJ to refrain from exercising jurisdiction. (Chesterman, Franck and Malone 2008): 101-105. This challenge to the ICJ's jurisdiction by Council intervention occurred again in Bosnia and Herzegovina's application to the Court concerning genocide, against Serbia and Montenegro. *Ibid*: 105-108.

withdrew from the optional clause, leaving the UK as the only permanent member still accepting the compulsory jurisdiction of the Court.⁶⁵³

With this indeterminacy of the Court's jurisdiction, coupled with indeterminacy in the execution of its judgments, the Court's popularity and the relative handling of contentious cases has declined in recent decades.⁶⁵⁴

The UN's current judicial system, despite the existence of the ICJ, is missing a critical element: individuals and non-state actors as subjects of law. It was mentioned earlier that any constitutional project for the UN must first and foremost be concerned about democratisation. This democratisation would also mean that, in addition to states, people would be the subjects and objects of law and justice.

With the exception of the ad hoc courts mentioned in Chapter 2 that have been created by the SC, there are no permanent human rights or criminal courts as part of the UN system.

Multilaterally, there are two regional human rights courts— in Europe, the European Court of Human Rights (the ECtHR), and, in Latin America, the Inter-American Court of Human Rights (IACHR)—and the one permanent International Criminal Court (ICC). The ICC was intended to be universal, but with some of the most populous states opting out—such as China, India and the US—its jurisdiction covers less than half of the world's population.

Furthermore, with the ICC prosecuting only crimes against humanity, genocide, and *large-*

⁶⁵³ See (Posner, *The Perils of Global Legalism* 2009): 147-148; and, (Crawford and Grant, *International Court of Justice* 2008): 196.

⁶⁵⁴ *Ibid*: 195-196; and (Posner, *The Perils of Global Legalism* 2009): 137-149. See also (Schwartzberg 2013): 132-135. In fact, other than in issuing advisory opinions, the Court has become more of an elaborate arbitration panel for *willing* parties. The ICJ's credibility is again being put to the test as regards to how it will handle the complex Marshall Islands cases recently brought before the Court against the nine nuclear-weapons states, particularly in relation to India, Pakistan and the UK, which these latter states recognise the compulsory jurisdiction of the Court (albeit. with some reservations). See: <http://www.theguardian.com/world/2014/apr/24/marshall-islands-sues-nine-nuclear-powers-failure-disarm>; and also Section 9.3.1.

scale war crimes, and since it enjoys only limited jurisdiction, this has meant very few cases have so far been tried.⁶⁵⁵ (On the ICC’s complementarity principle, and it being the court of last resort, see Chapter 2, Section 2.3.1.)

Hans Kelsen published his classic work on accountability in international crimes, *Peace through Law*, in 1944, before the founding of the UN and the Nuremberg trials. Kelsen argued that the ultimate deterrence in respect of international crimes is when individuals who have committed such crimes are held responsible and tried, as opposed to states being viewed as the primary actors.⁶⁵⁶ This thesis holds true even more so today, with globalisation and the ease of physical and virtual mobility. Many international crimes—such as terrorism, illicit drugs trafficking, human trafficking, international financial and banking crimes, as well as environmental and cyber-crimes—are in fact committed by individuals, multinational corporations and other non-state actors, operating in multiple states, where no single state can be pinpointed as being responsible.

The current state-centric international law is, on the whole, not well equipped to deal with the above international crimes, as well as the yet-emerging ones—all of which are primarily committed by individuals and non-state actors.

⁶⁵⁵ As of 2014, after 12 years of operation, the ICC had accepted only 21 cases in nine situations, with only one conviction, in 2012, of Thomas Lubanga Dyilo. See: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx; and: http://www.iccnw.org/documents/HRW_2012_DRC_Lubanga_QA.pdf. With regard to the ICC being only concerned with large-scale war crimes, in a relatively recent case the ICC ruled out launching an investigation into an Israeli raid on a Turkish flotilla in which 10 activists were killed. The ICC’s chief prosecutor announced that, despite there existing a “reasonable basis to believe that war crimes were committed”, the situation was not of “sufficient gravity” to justify prosecution by the Court. See: <http://www.theguardian.com/world/2014/nov/06/israel-raid-gaza-flotilla-turkey-icc> .

All accessed 29 November 2014.

⁶⁵⁶ (Kelsen, *Peace Through Law* 1944 (reprint 2008)), especially Part II. For more on Kelsen and *individuals* as subjects of international law, see (Zolo 1998): 306-324.

In the pursuit of global human rights and criminal adjudication, and the attainment of the principle of direct effect, however, the likelihood of an advisory opinion of the ICJ triggering a *Van Gend en Loos*-type moment, similar to the EU experience, seems both unlikely and impractical. Therefore, the normative proposition of this chapter remains that universal criminal and human rights adjudication, in conjunction with, and as a complement to, domestic jurisprudence and court systems, would, inherently, need to be incorporated into any UN constitutionalisation project.

Charter and constitutional interpretations and, more generally, *judicial review* is another important area that any Charter review would have to address. Amendments to the Charter can be introduced to identify the ICJ or a newly created court as the ultimate broker on the UN's constitutional questions, allowing the court to define its functions, competency, and jurisdiction, as well as ensuring the independence of the court.

The existing Charter, premeditatedly, does not permit the ICJ or any other organ to be the final authority for interpreting the Charter. The San Francisco *travaux* indicate that any of the principal organs of the UN, such as the GA, and including the ICJ, can interpret the Charter. However, such an interpretation will have no binding effect, unless it is “generally acceptable” in other words attracts unanimous support (currently, 193 states need to be in favour), thereby enabling it to be formally adopted into the Charter.⁶⁵⁷ This latter stipulation for formal amendment again bears the fingerprints of P5 supremacy, with the permanent members' required concurrence allowing them to reject any unwanted Charter interpretation.

⁶⁵⁷ (Sohn 1995): 171-176. In practice, the ICJ, especially in its earlier years, has performed some degree of Charter interpretation, as can be seen in the *Corfu* case, 1949, and the *Certain Expenses Advisory Opinion* of 1962. It seems that this judgment and opinion, respectively, were “generally acceptable” and therefore not contested by the P5. Ibid. See also (Schachter 1994): 7-8.

In summary, any constitutionalisation of the UN's jurisprudence must ensure that individuals and non-state actors, as well as states, are subjects and objects of law. The global judiciary must be ensured its independence, and should be endowed with compulsory jurisdiction and the means to enforce its decisions independent of the SC.⁶⁵⁸ The other material component needed in the global legal order is judicial review.⁶⁵⁹ The judicial organ entrusted with this function, in addition to being independent, must have the power to determine the limits of other organs' competencies, and would also be the final authority in the matter of interpreting constitutional questions.

Protection of Fundamental and Human Rights

A global legal order in which individuals are subjects and objects of international law should require and result in the constitutionalisation of basic human rights as fundamental rights.⁶⁶⁰

⁶⁵⁸ Apart from the enforcement of decisions, another way in which the ICJ is dependent on the Council is in the election of its judges. Historically, five of the 15 judges—one each—have been selected by the P5. The permanent members also have a disproportionate advantage when it comes to the selection of the other 10 judges. For details of the Court's election procedures, see the ICJ's website: <http://www.icj-cij.org/court/index.php?p1=1>; accessed 11 July 2016. See also (Akande 2014).

⁶⁵⁹ Jose Alvarez, during the 1990s, when the rule of law and international law seemed to be flourishing at the global level, and when there was P5 unanimity in respect of most critical Council decisions, believed, perhaps over-optimistically, that a critical moment had arrived for the World Court to establish itself as the judicial review body for the UN. Alvarez argued for the Council's cooperation, particularly that of the "P1" (the US), in promoting and helping the ICJ "to evolve its own powers" to encompass judicial review. (Alvarez, *Judging the Security Council* 1996): 1-39; especially 38-39. However, Alexander Orakhelashvili, a decade later, was more pessimistic about such an outcome, warning that continuation of (de)legitimate Council decisions, without judicial review, could lead to the Council being "paralyzed": both in terms of disagreement in reaching decisions, and in making decisions and adopting resolutions that would risk "non-compliance" at either the state or regional level. (Orakhelashvili 2007): 143-195; especially 194-195. Perhaps *Kadi III* functions as a model of a regional court (where there is one, such as the EU) starting to perform some level of review of Council decisions. See: <http://www.ejiltalk.org/kadi-showdown/>.

⁶⁶⁰ Fundamental rights and human rights in this thesis are mostly used interchangeably. However, the distinction between the two, particularly in this section, is based on the presumption that *fundamental rights* are a subset of the generally recognised International Bill of Human Rights (the UDHR plus the ICCPR and the ICESCR), which enjoy a degree of constitutional protection and cannot be taken away except by conformance with the due process of law. In this context, the notion is similar to the usage of fundamental rights in the Indian constitution, or the bill of rights and the "unalienable rights" in the US Constitution, or, since the coming into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union in EU law. See: <http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>; and <http://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions>. Both accessed 1 December 2014. See also (Palombella 2006).

The UN, in its seven decades of operation, has carried out extensive and monumental work in defining—and encouraging the world to come to some common understanding of—our global human rights. Its Universal Declaration of Human Rights of 1948, along with the International Covenant on *Civil and Political Rights* (ICCPR) and *the International Covenant on Economic, Social and Cultural Rights* (ICESCR) (both in force as of 1976) have become a global core of rights, and are together known as the International Bill of Human Rights.⁶⁶¹

The second UN general conference on human rights, held in Vienna in 1993 (the Vienna Conference), further consolidated previous human rights efforts and prompted future work and instruments on more specific rights, such as the rights of women, children and indigenous peoples. In addition, the Conference’s outcome document confirmed that such rights have three important features: they are *interdependent, interrelated* and *indivisible*.⁶⁶²

All these UN human rights achievements originate from the UN Charter. Its incorporation of certain fundamental rights and economic and social objectives—albeit in a somewhat discursive form—can in turn be explained by the advocacy of certain Latin American states at the 1945 Conference for their inclusion, as well as to the support provided by the US, with both political and civil society in the country at the time championing such rights.⁶⁶³

⁶⁶¹ (Steiner, Alston and Goodman 2007): 133.

⁶⁶² (Lam 2008): 527-535. See also (UN Office of the High Commissioner for Human Rights 2014): Vienna Declaration PDF.

⁶⁶³ At UNCIO, several Latin American states, including Mexico and Panama, were calling for a robust bill of rights to be incorporated in the Charter. Other states, such as Australia and Peru, were more concerned about economic rights. (UNCIO - Volume I: General 1945): 559-562, 682-685; and (UNCIO - Volume III: Dumbarton Oaks Proposals, Comments and Proposed Amendments 1945): 176,178. The American propensity for human rights at the time was partly owing to President Roosevelt and his promotion of the *Four Freedoms*: freedom of speech, freedom of religion, freedom from want, and freedom from fear. Further, Roosevelt and many of the US drafters of the Charter were, at the time, particularly conscious of human rights violations being one of the causes of wars.

For the first time at San Francisco, civil society was formally invited by the State Department to participate in an international conference of this type. At the time, the US government was seeking popular support for its UN

The relatively short text of the Charter (fewer than 10,000 words) mentions “human rights” or “fundamental freedoms” *twelve* times; gender equality *five* times; the right to education *eight* times; health *four* times; and freedom from fear of war and armaments, or disarmament also *four* times.⁶⁶⁴

Chapters IX and X of the Charter were dedicated to achieving the above human rights goals. The Economic and Social Council (ECOSOC) was created, albeit without the enforcement might and the legislative powers of the Security Council. ECOSOC decisions, according to Article 67, and in a similar fashion to those of the GA, are majoritarian based—a significant departure from states’ consent and no veto—which that meant decisions could be made and made faster.

Further, ECOSOC, in order to deliver on the human rights and economic promises of the Charter articulated in Article 55, was empowered, in Articles 56 to 59, to create subsidiaries and enter into treaties, and in effect create affiliate organs and “specialised agencies”.

project, which it intended as the “instrument of the people”. Nearly two million copies of the DO proposal were published and distributed to the US public. The media and civil society were highly engaged, participating in side activities relating to the new organisation both before and during the Conference. Although the participating NGOs at the Conference were practically all from the US and were pre-selected (the excluded NGOs continued to be highly active outside of the Conference), in all, 43 NGOs and 160 observers, from a range of organisations, were able to attend some of the meetings as observers, and received regular briefings from the US delegation.

The activism of the NGOs is attributed to some of the references to human rights that were to be added to the Charter, particularly on the subject of education, “equality of [the] sexes”, and fundamental rights. (Schlesinger 2003): 31, 122-125. As an example of productive activism at the Conference, the NGOs championing women’s rights were instrumental in getting the issue of women’s equality on the agenda for the Charter, notwithstanding the fact of a completely male-dominated Conference, and one where 20 of the 50 states in attendance did not allow their female populations to vote at the time. See Torild Skard, *Getting Our History Right: How Were The Equal Rights Of Women And Men Included In The Charter Of The United Nations?* (Skard 2008): 37-51. NGO activism inside and outside of the Conference also resulted in the inclusion of Article 71 of the Charter—establishing a formal consultative role for the NGOs—which was another first, recognising civil society’s role in international law and treaties.

⁶⁶⁴ The data counts were extracted directly from the Charter.

Moreover, in accordance with Articles 57 and 58, ECOSOC was intended, in effect, to administer and govern all the UN affiliated organs created in the future. Despite that intention, most of the critical UN affiliates created, such as the IMF, the World Bank and the IAEA, are outside of ECOSOC and the GA's management and control.⁶⁶⁵

The current collection of human rights treaties has had mixed results in the past 70 years in achieving the “universal” objectives of the UDHR and the International Bill of Human Rights, with citizens of many states, particularly those located in Africa, the Middle East and Asia, experiencing systemic violations of their political, civil and social rights.

It is true that, in general, the ratification of HR treaties has led to some degree of implementation in regional and domestic laws, and therefore has furthered the development of human rights.⁶⁶⁶ And there are non-judicial and dialogical approaches that can lead to improved human rights practices.⁶⁶⁷ However, by and large, in the absence of the necessary

⁶⁶⁵ (Childers 2011): 23-24, 221; and (P. Kennedy 2006): 113-116.

⁶⁶⁶ For the argument, accompanied by empirical evidence, that ratification of international human rights treaties leads to better HR practices and compliance, see Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, (Simmons 2009). For Eric Posner's critique of Simmons' work, arguing that her statistical regression analysis findings show correlations, but not necessarily causation (“Human Rights compliance”), see (Posner, Some Skeptical Comments on Beth Simmon's Mobilizing for Human Rights Symposium 2012): 819-831.

⁶⁶⁷ Human rights scholars seem to have used the “dialogical approach” in three different contexts. The first is as a philosophical approach, in which cultural differences are recognised, and cross-cultural mediation and dialogs are encouraged to come up with human rights agreements based on “unforced consensus”. See, for example, the work of Jeffrey Flynn, in *Reframing the Intercultural Dialogue on Human Rights*, in which he proposes a “dialogical framework”, suggesting more of a moral rather than a legal perspective to be used in developing HR norms, which he suggests could also lead to “global civic solidarity”. (Flynn 2014): esp. 79, 101, and 104-105.

The second usage of “dialogical approach” has been in the context of the dialog between the judiciary and the legislative bodies of states in order to promote human rights in a more democratic way—by, presumably, shifting some of the constitutional and judicial responsibility for the interpretation and promotion of HR to parliaments, where people, through their representatives, can have a more participatory role and also hold their governments to account. See (Hunt, Hooper and Yowell 2015): esp. 447-468.

The third usage of “dialogical approach” in human rights is mostly in the context of federal states, particularly the US, and the HR dialog and interaction at the different layers of multilevel-government. Catherine Powell, in her article on “dialogic federalism”, gives the example of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, which the US signed in 1980, but has, after more than three decades, still chosen not to ratify. In contrast, the municipality of San Francisco, in dialog with the federal layer, and

global, legislative, adjudicative and enforcement powers, the goals of ECOSOC and the UN in the areas of political, social and economic rights have proven difficult to achieve and have been sidelined in the discursive global governance and human rights regimes. On the promotion and protection of human rights, the UN and ECOSOC have, through the issuing of proclamations, the generation of soft law, and the practice of “naming and shaming”—mostly directed at states rather than individuals, and with no adjudication—been as effective as such measures have allowed them to be, and therefore the UN’s stated human rights objectives remain largely unfulfilled.

According to the Office of the UN High Commissioner for Human Rights (OHCHR), the UN ideals for global human rights are unequivocal:⁶⁶⁸

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Not only are these rights equal and non-discriminatory, as well as universal, they are also inalienable (that is, they can only be limited or taken away according to *due process* of

taking the treaty as its model, has, since 2001, incorporated most of the “principles of CEDAW” into local binding law. (Powell 2001): 245-295.

⁶⁶⁸ See: <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>. Note that, in addition to the OHCHR, which is part of the Secretary-General’s Office mentioned above, there is the Human Rights Council, which is also part of the UN System.

The OHCHR primarily supports the work of the UN human rights mechanisms, “including the treaty bodies established to monitor State Parties’ compliance with the core international human rights treaties and the Special Procedures of the Human Rights Council”. In fact, the International Covenant on Civil and Political Rights (ICCPR) has its own Human Rights Committee at OHCHR. See: <http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx>; and <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> .

The main UN body concerning human rights promotion and thematic HR issues is the Human Rights Council (HRC), which is a subsidiary of the GA. The HRC is made up of 47 member states elected by the GA. The Human Rights Council replaced the former UN Commission on Human Rights (UNCHR) in 2006. See: <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>. For the 2015 version of the organisational chart of the UN System, see: http://www.un.org/en/aboutun/structure/pdfs/UN_System_Chart_30June2015.pdf.

law).⁶⁶⁹ With the International Bill of Human Rights' ideals and objectives set, what does it take for the UN to protect and enforce these *fundamental rights*?

With “life, liberty, and pursuit of happiness”⁶⁷⁰ being the ultimate goals of many human rights regimes, the international law constitutionalisation of the UN would have to ensure the promotion and protection of *rights* by grounded means of legislation and adjudication as outlined earlier in the parliamentary and jurisprudence sections of the constitutional project.

As a supranational organisation, the role of the UN in the promotion and protection of human rights would be the necessary minimal⁶⁷¹—the goal being to promote and ensure the fulfilment of that common set of human rights that are global fundamental rights and non-derogable, leaving the added rights and values, and later additions to these, to the regional organisations and the member states.

International Rule of Law, Due Process, and Multilevel Constitutionalism

The rule of law was the core promise of the legal order of the UN, as much in 1945, as it is today.

However, a formal definition of the global *rule of law* was never formulated, and was for the first time presented in the Secretary-General's report to the SC in August 2004, a definition which has been embraced by the UN ever since:⁶⁷²

⁶⁶⁹ Ibid.

⁶⁷⁰ The phrase, commonly employed in the context of the US's founding human rights principles, was first used in the US Declaration of Independence: http://www.archives.gov/exhibits/charters/declaration_transcript.html

⁶⁷¹ Kai Moller, however, argues that the moral structures of human rights are such that, whether domestic constitutional rights or international, human rights are in fact identical, with thin distinction between the *minimalist* and *maximalist* HR fundamentals. (Moller 2014): 373-403.

⁶⁷² (Report of the Secretary General: The rule of law and transitional justice in conflict and post-conflict societies 2004): S/2004/616; paragraph 6; [emphasis added]. This definition of the rule of law has, ever since,

The “rule of law” is a concept at the very heart of the Organization’s mission.

It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

In the global governance setting, however, the rule of law (ROL) has been elusive, and more easily invoked than defined. Therefore, a global consensus on, and definition of, the rule of law and its institutionalisation will be of immense utility in the constitutional project.

The stated “mission” of the UN on ROL already has many of the material objectives of the constitutionalisation project. The stated democratic and judicial principles, such as *equality, fairness, participation* (representation) and *human rights*, coupled with the rule of law structural characteristics of *supremacy of law, legal certainty, and separation of powers* and *independence*, as well as the good governance stated objectives of *transparency* and *accountability*—and the fact that all these principles and concepts are inclusive of both “states” and non-states (“all persons, institutions and entities, public and private”) —cover most if not all of the constitutional grounds and grand principles.

To ensure the workings of the ROL, the constitutional requirement of the principle of *due process*, similar to that in domestic models, is paramount. This is mostly to protect the different organs from overstepping their competencies, and more importantly to protect individuals from the government, or, in our case, the UN—the global government institution.

been used in various GA declarations, and SC open debates and Presidential Reports, as well as referenced in formal resolutions. See (Cross-Cutting Report on the Rule of Law 2011): 7-10.

Therefore, a constitutionalised UN must provide both for *substantive due process*, such as protection of global human rights, as it may apply to multiple and across institutional organs, and *procedural due process*. This latter due process, for example, includes an individual's right to notice, counsel, and fair trial.

In Montesquieu's terms, the UN constitutional project, with the mission of global rule of law and democracy, would require *separation of powers*, monitored with *legal review*, which would utilise the *due process* of law when invoked to apply the necessary oversight of the *checks and balances* of the different *branches* of the UN.⁶⁷³ This fundamental governmental architecture and processes, complemented by the other constitutional concepts covered earlier, should provide for all the essentials of a working democratic government—similar to the many functioning state democracies now.

One substantive question, not directly addressed, remains: how should a supranational UN interact with state governments and regional governments?

The proposition of multilevel constitutionalism and multilevel government considerations for a constitutionalised UN is, again, not a major political or legal invention. It is rather a reinvention and fine-tuning of our experience with the political and legal developments of the nearly 25 existing federal unions and states, two of the oldest being Switzerland and the US, and the most populous one being India, in fact, 40 per cent of the world's population today is represented by a federal system of government.⁶⁷⁴ In addition to these federal states,

⁶⁷³ The separation of powers mentioned here does not have to be in the strict Montesquieu terms of *tripartite*, common in many of the republican presidential systems, but could also be of the *bipartite* type, where the parliament in effect elects the executive branch, common in many of the parliamentary systems.

⁶⁷⁴ (Forum of Federations-The Global Network on Federalism and Devolved Governance 2014).

multilevel constitutionalism ideas can be drawn from the not-so-federal, but still multi-government, supranational European Union, consisting of 28 states.

Neil Walker explains “multilevel constitutionalism” within the legal academic discourse as “a label, or at least an initial point of reference”, which maintains “that constitutional ideas, institutions, norms and practices could apply in settings beyond the states.”⁶⁷⁵

Further, Michel Rosenfeld, while discarding the notion that “global constitutionalism” is a mere utopia, and believing that nation-state liberal constitutionalism is dialectic in nature, argues that the “differences between national and transnational constitutionalism are of degree rather than of kind.”⁶⁷⁶

To summarise, a constitutionalised UN in a multi-level government setting must have a supranational architecture accommodating vertical and horizontal legal inter-governmental relationships, migrating and incorporating federal or EU-type grand principles of subsidiarity (to ensure that powers are exercised as close to the citizen as possible), and proportionality (regulating and limiting the exercise of powers proportional with the aim pursued), with the subjects being states as well as citizens with direct effect.⁶⁷⁷

⁶⁷⁵ (Walker, *Multilevel Constitutionalism: Looking Beyond the German Debate* 2009): 1 (n 1) and 10-11. Here, “multilevel constitutionalism” is understood in its *global constitutionalism* context: that is, integration and interlink at the different layers of government while withholding subsidiarity, with the result that rules and norms are applicable such that no political or judicial actors can claim non-compliance based on legal grounds. (Krisch 2010): 242. This is in contrast to “constitutional pluralism”, which assumes hierarchy of norms (mostly on rights, and mostly based on *jus cogens* or *opinio juris*). But legitimisation and enforcement of those norms is left to the sovereign states, and typically no “final authority” exists to resolve jurisdictional conflicts or enforce compliance. For a debate, conducted by Nico Krisch and Alec Stone, on *constitutional pluralism* and whether, in that setting, the claim to hierarchy of norms suggests dichotomy (“oxymoron”), see (Stone Sweet 2013): 49-500; and (Krisch 2013):501-506.

⁶⁷⁶ (Rosenfeld 2014): 177, 199.

⁶⁷⁷ On the EU *subsidiarity* and *proportionality* principles, see n 24 above. See also (Chalmers, Davies and Monti 2010): 361-369; and, respectively: <http://eur-lex.europa.eu/summary/glossary/subsidiarity.html>; and http://www.europedia.moussis.eu/books/Book_2/2/3/2/?all=1.

Lastly, a “thick” constitution, as noted in Chapter 1, requires secondary rules. In other words, a constitutionalised UN as a global autonomous legal order containing superior legal norms must also have rules of change in order to be able to adapt to the future constitutional challenges of a dynamic world.⁶⁷⁸

A successful UN constitutionalisation project, in terms of its effect, as well as its paradigm shift from states to peoples, perhaps may be considered a global governance and international law revolution. However, conceptually, and as far as the legal structure is concerned, the model is not new or untested. In fact, global constitutionalism seems to be just the next stage in the extension of states’ constitutions and legal orders, and in essence the transformation and evolution of the existing fragmented, unitary, or federal and multilateral regional states’ political and legal systems into a global union.⁶⁷⁹ And, by applying the principles of subsidiarity and proportionality, the independence of its member states will be protected.

With regard to judicial matters, in a constitutionalised UN setting, perhaps the ICC principle of complementarity can also be migrated. This principle may be particularly useful in prosecuting international crimes, where the states, first and foremost, have the responsibility and right to prosecute international crimes, and the role of the UN’s judiciary organ is regulated. The UN courts, or the ICC (in case of the ICC being incorporated into the UN system), can only exercise jurisdiction where national legal systems fail to do so. For a summary of the complementarity principle of the ICC, see: https://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/complementarity.pdf#search=principle%20of%20complementarity .

For *migration* and *translation* of some of the domestic and existing constitutional concepts to a supranational realm, see (Ulfstein, Empowerment and Constitutional Control 2010); and (Walker, Multilevel Constitutionalism: Looking Beyond the German Debate 2009): 10. Any migration of constitutional “templates” from the unitary domestic models, or from the federal and supranational models, would most likely not be direct, and some degree of adaptation would be required. See also Walker’s more extended discussion, in Sujit Choudhry (Sujit 2006): 316-344.

⁶⁷⁸ See Chapter 1, Section 1.3 on “terms of reference” and the related footnotes. See also (Reinold and Zurn 2014): 236-273.

⁶⁷⁹ Some of the potential barriers mentioned when debating the practicality of multi-state unions include diversity of languages, religions, cultures and size (physical and economic). However, some older federations, such as Switzerland and Canada, and certain newer ones, such as India and South Africa—as well as the supranational EU—provide functioning examples of how two or more of these barriers have been solved simultaneously. The real barrier, historically, has been political rather than language, religion, culture, or size. See also (Kelsen, Peace Through Law 1944 (reprint 2008)): 9-13. Historically, in terms of the number of independent political units on earth, there are anthropological estimates that, 3,000 years ago, there were approximately 600,000, with the number now under 200. (Wendt, Why a World State is Inevitable 2003): 503 (n 37).

9.3. Convening the Review: the Legal Strategies to Effectuate Article 109(3)

With the need for UN constitutionalisation, but with the path of gradual Charter changes and UN reform at a standstill, and perhaps no more than a pipe dream, is it feasible to uphold the founders' compromise and the *San Francisco promise* of in effect putting everything on the table and holding the review conference?

In strictly legal terms, unless the review conference is held, or unless, in a repealing or reversing resolution of the Assembly, it is proclaimed undesirable, Article 109(3) is not obsolete, but has been only partially implemented and has continuing legal force. How then can the partially implemented article be given legal effect to complete its operation?

My research points to three legal strategies to fully implement paragraph 3. The first two draw on cases at the ICJ, while the third is inspired by an Assembly decision. The highlights of the three options are:

I. ICJ Contentious Cases: One or More States vs. the Permanent Five

The ICJ was not intended to have jurisdiction over contentious cases by member states against the UN organisation or its organs. Nor was the ICJ designated to act as a constitutional court in order to interpret the Charter on its application or its breach.⁶⁸⁰

With regard to the breach of Article 109(3), the above ICJ jurisdictional options are closed. However, there may be a backdoor way in which the states responsible for blocking the Review—namely the P5—can be challenged.

⁶⁸⁰ See above: n 657; and (Sohn 1995): 171-175.

It may be recalled that the San Francisco anti-veto rebellion was all about opposition to the apartheid-like and unequal status of the P5. And that it was the P5 who, in order to protect their privileged status, offered as a concession the Charter review process. Furthermore, according to the legislative history, all the permanent members, with the exception of the Soviet Union, expressed their willingness to abide by the majority decision at the future review conference, even if this meant limiting or abolishing the veto.⁶⁸¹

Accordingly, in respect of this option, one or more states may institute contentious proceedings against the P5, holding them responsible for the dysfunctional SC and the breach of responsibilities entrusted to its permanent members by the Charter to effectively maintain international peace and security.⁶⁸² The applicant states can then establish a linkage to Article 109(3) as the statutory means to renegotiate this power-responsibility matrix in the Charter and the Court to order full P5 cooperation in conducting the review.

In fact, to link the case to the Charter's legislative history, the applicants could be one or more of the founding "Under-Influence States" listed in Table 2 in Chapter 8. Or, regardless of the existence of duress, the applicants could come from the large block of anti-veto states that, by casting a large number of abstentions in a crucial committee vote, allowed the Yalta formula to be adopted, while at the same time registering their protest vote and bargaining for Article 109, and particularly its paragraph 3.⁶⁸³

⁶⁸¹ The legislative history is set out in Chapters 4 and 5.

⁶⁸² In fact, the main thrust of the P5's justification at San Francisco for their special privileges was just this—that the effective maintenance of peace and security was a paramount responsibility for the permanent members, and that they would have to dedicate substantial financial and human resources to this mission, most likely through the creation of a standing UN armed force, and were therefore deserving of their enhanced powers. On this point, see statements made by the P5 in support of the Yalta formula in Chapter 4.

⁶⁸³ For the list of states forming a bloc under Australia's leadership who subsequently allowed the adoption of the formula, while registering their protest by abstaining, see the description of the activities of Committees III/1 and I/2 in Chapter 5, esp. Sec. 5.7.

Alternatively, and in addition, an applicant could be a non-founding member state that can link an armed conflict situation to a particular Council decision or inaction which has caused harm and injury to that state. This is particularly relevant in the more recent R2P-type situations and what the group of S5 was unsuccessfully pursuing.

Therefore, regardless of the variations mentioned, the applicant states could request renegotiation of the Charter-granted SC competency-responsibility matrix and that of its main actors, the P5.

A similar ICJ case which could function as a crucial precedent for our hypothetical scenario is the *Republic of Marshall Islands (RMI) v. the Nuclear Weapons States*, currently in progress. At the time of writing, the RMI has filed applications, and proceedings have been instituted but the Court has not yet decided on its jurisdiction over the cases.⁶⁸⁴ Similar to our hypothetical case, this case involves multiple applications against the nine nuclear-armed states, among them the P5, which are state parties to the Treaty on the Non-proliferation of Nuclear Weapons (NPT). The RMI has alleged that each of the P5 states has essentially breached its obligations under Article VI of the NPT. The cases involve multiple applications and requests to the Court, and are complex.⁶⁸⁵

Note that other states can file suit as complainants, either initially separately or by joining at a later stage as interventions. It should also be noted that, in the case of P5 members that have opted out of the compulsory jurisdiction of the ICJ, the possibility still exists that some of them may have existing bilateral agreements on “reciprocal effect” of the ICJ’s jurisdiction. In such a situation, a complainant state with a “reciprocal” agreement with a P5 member can drag the target P5 into the Court case. For a summary of the Court’s workings, see: <http://www.icj-cij.org/court/index.php?p1=1&p2=6>. For a complete veto list, including a P5 veto involving one of the founding members in a conflict situation, see: <http://research.un.org/en/docs/sc/quick>. Both accessed 29 January 2015.

⁶⁸⁴ (ICJ Annual Report 2014-2015): 41-43.

⁶⁸⁵ Of the nine nuclear-weapons states (NWS), six (the US, Russia, China, France, Israel and North Korea-KPDR) do not recognise the compulsory jurisdiction of the ICJ. Four are not state parties to the NPT (India, Pakistan, Israel and North Korea). Only three have made optional declarations accepting the compulsory jurisdiction of the Court—India, Pakistan and the UK—and, of these three, only the UK is both a state party to the NPT and, by means of an ICJ declaration (with some reservations), also subject to the compulsory

Of the nine nuclear weapons states, only India, Pakistan and the UK have made declarations accepting the Court’s compulsory jurisdiction. All the three mentioned declarations, however, contain reservations, with Pakistan’s declaration having the fewest restrictions.⁶⁸⁶ The RMI’s legal strategy towards the P5 seems to have been to formally file application and “institute proceedings” against the UK separately, while at the same time requesting and applying against the other four permanent members, using the *forum prorogatum* provision allowed by the Court, which would enable the voluntary acceptance of the Court’s jurisdiction by the US, Russia, China and France. However, so far, there has been no positive response from any of these P5 states, and the Court has not published those applications on its website.⁶⁸⁷

jurisdiction of the Court. Therefore, the RMI application that targets the UK—*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*—is the only one of the P5-members cases so far accepted by the Court. In addition to the UK, RMI has filed two separate applications against India and Pakistan, as the other two NWS under the compulsory jurisdiction of the Court. See the ICJ’s website: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=miuk&case=160&k=ef>; and <http://www.icj-cij.org/docket/files/160/18342.pdf>. See also (ICJ Annual Report 2014-2015): 41-43.

The Marshall Islands, in the initial application filing of 25 April 2014, pursuant to Article 38, Paragraph 5 of the Rules of Court, had asked the Court to notify the other four permanent members, plus Israel and North Korea, of the application and to request their consent to the Court’s jurisdiction. Unless those states explicitly give their consent, their names will not be entered in the formal General List, and in effect the case will be dismissed for those states. See the associated ICJ Press Release: <http://www.icj-cij.org/presscom/files/0/18300.pdf>. It is noteworthy that, in the applications against the four NWS non-state parties to the NPT, RMI is basing its claim on customary international law (CIL). It is arguing, *inter alia*, that the NPT, being almost universally accepted (by 190 states), and having been in force since 1970, means—especially in view Court’s advisory opinion in *Legality of the Threat or Use of Nuclear Weapons (1996)*—that the provisions of Article VI of the treaty have in effect become CIL and therefore binding on *all* states.

⁶⁸⁶ See the separate Declarations for India, Pakistan and the UK at: <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>. Examining these Declarations, it seems that not only the UK’s but also India’s Declaration has significant reservations, making it more difficult for RMI lawyers, in their respective cases, to establish the Court’s jurisdiction.

It should also be noted that the “condition of reciprocity” is typically required and is part of the text of declarations submitted by states when consenting to the compulsory jurisdiction of the ICJ. The submission date of the RMI declaration to the Court is 24 April 2013: exactly a year before its multiple-application submissions of 24 April 2014. This cannot be a coincidence, and must have been deliberate on the part of RMI’s lawyers to satisfy another of the conditions contained in most declarations (such as the UK’s) that at least “twelve months prior to the filing” the applicant state must have submitted its own declaration to satisfy the “condition of reciprocity”. See the declaration of RMI, as well as, for example, those of the UK and India. *Ibid*.

⁶⁸⁷ For the latest on the RMI’s three contentious cases, see: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3>. The possibility of a state in effect instantly accepting the Court’s jurisdiction in regard to a case brought against it is referred to as *forum prorogatum*. This is described in the

However, in refusing to accept the Court’s jurisdiction, the UK, on 15 June 2015, referring to Article 79, paragraph 1, of the Rules of Court, raised certain preliminary objections regarding the RMI application concerning the jurisdiction of the Court and the admissibility of the application.⁶⁸⁸ The Court’s 2014–2015 annual report states that, “in accordance with paragraph 5 of the same article, the proceedings on the merits have therefore been suspended.” The Court then gave the RMI four months in which to respond to the preliminary objections raised by the UK.⁶⁸⁹

The RMI’s claim against the UK will, no doubt, face many challenges. Professor Nick Grief, a member of the legal team currently representing the RMI at the ICJ, points out that there are significant exceptions in the UK’s optional clause declarations. In particular, Professor Greif highlights the limitation contained in the declaration that the ICJ’s compulsory jurisdiction in respect of the UK is only applicable to “all disputes arising after 1 January 1984”.⁶⁹⁰

“Basis of the Court’s Jurisdiction” section of the Court’s website as follows: “If a State has not recognised the jurisdiction of the Court at the time when an application instituting proceedings is filed against it, that State has the possibility of accepting such jurisdiction”. See: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2>.

⁶⁸⁸ For the ICJ’s Rules of Court, see: <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&>.

⁶⁸⁹ (ICJ Annual Report 2014-2015): paragraphs 218-223.

⁶⁹⁰ The exceptions contained in the UK’s optional declaration were raised by Professor Grief at the time this thesis was being defended, and are noted as part of the revisions, considerations and requests. For the latest text of the UK’s declaration, revised on 31 December 2014 (notably, the revision date is after the RMI submission against the UK earlier that same year!), see: <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=GB>. However, for the purposes of the legal strategy proposed in this section, perhaps another exception, specified in Article 1(ii), can introduce a new variation of the contentious-case scenario—that is, the possible applicability of contentious cases outside of the ICJ forum, to other international tribunals and courts in regional or multi-lateral agreements.

The UK declaration also excludes:

(ii) any dispute with the government of any other country which is or has been a Member of the Commonwealth ...

This suggests that the UK expects the Commonwealth countries to use a different forum for their legal disputes with the UK. As recounted in the legislative history section of this thesis (Chapters 4 and 5), at the San Francisco Conference, a number of British Commonwealth states were opposed to the Council’s proposed structure and the Yalta formula, and only consented to them on the basis of the perceived temporary nature of the formula and the Article 109(3) compromise to review the Charter at a later time. Notable among these anti-veto states were the Commonwealth members Australia, India and New Zealand. Therefore, it seems one of those original state parties, or in fact any other willing Commonwealth member, can be the complainant in a

As at the end of December 2015, the Court had not established its jurisdiction over any of the three RMI applications that it has acknowledged so far.

To return to our scenario of ICJ contentious cases against the P5, the applicant state(s) would have to argue for “breach” of the review obligation, rather than adopt the “it is still-in-force-but-not-implemented” argument. Particularly in the case of the UK, the breach would further need to be linked to a related UN event or GA resolution, so as to meet the UK declaration’s after-1984 criterion. Possibly, for example, the materialisation of the P5 intent and act of breach could be linked to when the Arrangements Committee—“kept in being”, but not actually meeting—finally “disappeared” from the roster of the GA’s active committees, in 1991.⁶⁹¹

In this hypothetical scenario of the contentious cases, assuming that the submission of the applications is admissible, but that the Court does not rule in favour of the applicant states, the pleadings and arguments during the proceedings and the trial would at least, in a legal fashion, publically reveal the political reality of whose interests the Council actually serves. This would further demonstrate why SC reforms are a no-go, and why the UN Charter has been essentially frozen since its inception.

The global public exposure of these facts during the trial, and the revelation that the unequal powers granted to the permanent members are disproportional to their effective responsibilities, would be of significant public informational value, making the need to redress the Charter’s birth-defect in order to democratise the UN particularly apparent,

Commonwealth-related tribunal or forum. This scenario may be particularly feasible in the cases of France and the UK (both EU and P5 Members) if it can be applied in the framework of the EU’s jurisprudence or parliament, however, this is a topic beyond the scope of this thesis.

⁶⁹¹ See Chapter 7, Section 7.9.

regardless of the outcome of the case. This in turn should make it difficult for the P5 to ignore their moral and political liability.⁶⁹²

However, rather than pursue contentious cases against the permanent members, a second option involving the ICJ—and one that might be considered a win-win situation for all states (including the P5), and is probably more plausible and practical—is that of requesting the Court’s advisory opinion.

II. ICJ Advisory Opinions: Application by One or More UN Organs or Agencies

Article 96 of the UN Charter, which is linked to Chapter IV (Articles 65 to 68) of the ICJ Statute, allows UN organs or specialised agencies (but not states) to ask the Court for an *advisory opinion*.⁶⁹³ Charter Article 96 has two paragraphs.⁶⁹⁴ Article 96(1) allows the Council and the GA to independently and directly request the Court’s advisory opinion. In contrast, under Article 96(2), the UN system’s other organs and some of the affiliated agencies can also request an advisory opinion from the Court, but only with the approval of the GA. However, based on GA-agency agreements or other arrangements, there is a GA pre-approved list of over 20 organs and agencies that can request the Court’s advisory opinions.⁶⁹⁵

⁶⁹² For an account of the historical political sensitivity of the P5 to the majority of states’ wishes on Charter decisions, see Section 9.4.

⁶⁹³ (Statute of International Court of Justice 1945): Chapter IV.

⁶⁹⁴ (Charter of the United Nations 1945-2015): Article 96.

⁶⁹⁵ For the latest revision (2010) of the authorised list of entities that can request the Court’s advisory opinions, see: http://www.icj-cij.org/presscom/en/kos_faq_en.pdf, accessed 29 January 2015. See also the ICJ annual report for each year. It should be noted that some of the organs on the list, such as ECOSOC, have associated subsidiaries and agencies. For the purposes of this study, and in respect of this legal option for the filing of advisory-opinion applications at the Court, the UN’s main organs and their eligible associated sub-organs or units are treated interchangeably.

The opinions are non-binding but carry significant moral and legal weight. Some of these advisory opinions have also had the flavour of Charter interpretation, and in effect have set legal frameworks and rules for the UN.

In the Court's more proactive earlier years, one of these landmark advisory opinions was the *Reparation* case (1949), in which the Court established that the UN Charter has, in effect, created a legal "international personality" that is independent of its member states.⁶⁹⁶ In the *Certain Expenses* case of 1962, the Court, while examining the member states' responsibility for expenses of peacekeeping operations, also in effect interpreted the Charter in terms of the scope of GA functions vis-a-vis the Council.⁶⁹⁷

The usefulness of this legal strategy is that it widens the scope to non-state actors and to a wide array of current topics. Any UN organ or affiliated agency that considers the accomplishment of its mission and objectives to have been jeopardised because of the UN's structural and Charter flaws could argue for a review and ask the Court for an advisory opinion on the legality of the suspended operation of Article 109(3).

One such application could be in the critical area of global governance of the environment. Considering the harm that climate change will inflict if no concrete global action is taken, and that governance in this area has been hindered by having to obtain the consensus of every single state—whether populous or small, whether economically developed or poor, or a major

⁶⁹⁶ (ICJ, *Reparation for Injuries Suffered in the Service of the United Nations* 1949): Report 174. See also (Ulfstein, *Institutions and Competencies* 2011): 71. That supranational organisations (states) are in fact sovereign themselves, with legal powers independent of their member states, has also been confirmed in the case of EU law, by the European Court of Justice (ECJ). (Chalmers, Davies and Monti 2010): 186-188, especially at 186, *Costa* case.

⁶⁹⁷ In *Certain Expenses*, the Court's advisory opinion of Charter significance was that the maintenance of peace and security did not fall exclusively within the domain of the Council, and that the GA, without being *ultra vires*, could also engage in peace and security activities, as long as those activities did not require "action", such as the GA interventions for peace keeping operations, at the time, in the Suez and Congo situations. (ICJ, *Certain Expenses of the United Nations* 1962): at 61. See also (Duke 1963): 304-306.

carbon emitter or not—agreeing on the terms a treaty and then further committing to enforce them is of paramount importance.⁶⁹⁸

Further, the Secretary-General, recognising the gravity of the problem, and inspired by the World Summit on Climate Change of 2009, appointed a High-level Panel on Global Sustainability, asking the participants to be “bold and think ‘out of the box’”, and to formulate an “integrated” approach to provide for the interrelated goals of “economic growth, social equality and environmental sustainability”. The panel released its report in 2012, which cited three main pillars for promoting sustainable development, two of which were “empowering people” and “**strengthening institutional governance**”.⁶⁹⁹

The High-level Panel’s proposals included two significant institutional recommendations: “to revitalise and **reform the international institutional framework**” and to consider the creation of a “global sustainable development council”.⁷⁰⁰

Based on the Panel’s finding, the two candidate agencies of the UN Environment Programme (UNEP) and the World Meteorological Organisation (WMO) could individually or collectively request an advisory opinion from the ICJ. The application would have to be framed in terms of one or more legal questions arising within the scope of their activities (hence the advice). And in this case the two agencies could link the Panel’s findings on the needed institutional reforms to their inabilities to achieve their objectives in combating the

⁶⁹⁸ The main treaty effort in the environmental area, the United Nations Framework Convention on Climate Change (UNFCCC), was initiated at the Earth Summit of 1992, and is supported by the research and reports of the Intergovernmental Panel on Climate Change (IPCC). Although there have been proposals for majority voting, UNFCCC’s substantive decisions are still based on consensus. See: <http://unfccc.int/resource/docs/cop2/02.pdf>, accessed 30 January 2015. The two main UN agencies dealing with climate change are, the UN Environmental Programme (UNEP), and the World Meteorological Organisation (WMO), which have jointly set up the Nobel laureate Intergovernmental Panel on Climate Change (IPCC), which acts as a resource in conducting research and reports on the topic.

⁶⁹⁹ (High-level Panel on Global Sustainability 2012): 1-2 [emphasis added].

⁷⁰⁰ Ibid: 8-9.

adverse effects of climate change. In other words, they could link the global governance shortcomings regarding the environment to the institutional and structural changes needed. In particular, at the UN level, they could seek the advice of the Court on the legality of the review as the forum where substantive institutional changes can occur.⁷⁰¹

Another area where such a link could be established is in the area of human rights. For example, the Human Rights Council (HRC) could argue at the Court that the reason for the relative ineffectiveness of the HR regime is that it needs to shift from governance to governing of international human rights, and that it needs to be equipped with legitimate legislation and a court system to promote and protect global human rights and its covenants.

In fact, concerned about the state of global human rights, and based on a GA resolution and a HRC-commissioned consultation on the “Promotion of a **Democratic and Equitable International Order**”, the Independent Expert who was commissioned along the same “democratic” lines recommended the need for a UN parliamentary assembly. That recommendation, as part of the HRC’s efforts, was presented by the Secretary-General to the Assembly (A/68/284) in 2013. This report, among others, highlighted the need for a “World Parliamentary Assembly” and a “World Court of Human Rights”.⁷⁰²

⁷⁰¹ The High-level Panel, which consisted of various eminent persons, and was co-chaired by the presidents of Finland and South Africa, attributed in its report great significance to “strengthening institutional governance”. To that end, and as it had been instructed, it did indeed think “out-of-the box”. The report’s conclusion reads as follows:

To achieve sustainable development, we need to build an effective framework of institutions and decision-making processes at the local, national, regional and global levels. We must overcome the legacy of fragmented institutions established around single-issue “silos”; deficits of both leadership and political space; lack of flexibility in adapting to new kinds of challenges and crises; and a frequent failure to anticipate and plan for both challenges and opportunities — all of which undermine both policymaking and delivery on the ground. [Emphasis added];

Ibid: 8.

⁷⁰² (Zayas 2013): 24. See also the two related GA resolutions (General Assembly Documentation Center 1946-2015): A/RES/67/175, 28 March 2013, and A/68/284, 7 August 2013 [emphasis added].

Related to human rights and security is the situation of refugees. In a similar manner, the two-time Nobel laureate UN Refugee Agency (UNHCR), overburdened with 50 million Iraqi, Syrian, Somalian, Ukrainian and other refugees worldwide, could request an advisory opinion on Charter revisions to give R2P and the *Responsibility-not-to-veto* legal definitions and applications.⁷⁰³

Questions on advisory opinions could also be raised by the Food and Agriculture Organisation (FAO) on world hunger and food security, by the World Health Organisation (*WHO*) on combating pandemics, and, perhaps, by the UN Development Programme (UNDP), in relation to its objectives of addressing global poverty and reducing the adverse effects of severe economic fluctuations and meltdowns. The list of potential organs able to raise the advisory-opinion questions could include other UN agencies involved in many other functional areas, such as nuclear disarmament, drug trafficking, human trafficking, global financial issues, terrorism, and other global perils.⁷⁰⁴

For the press release, see: http://www.un.org/press/en/2013/131028_Democracy.doc.htm, accessed 30 January 2015.

⁷⁰³ The Office of the UN High Commissioner for Refugees (UNHCR) is part of the UN Development Group (UNDG). Established in 1997, the UNDG “unites” the 32 UN funds, programmes, agencies, departments and offices that play a role in development. See: http://www.undg.org/docs/10350/UNDGFactSheet_August2009.pdf. For statistics on the number of refugees in a dozen countries reaching 50 million, the highest figure since World War II, see: <http://www.unhcr.org/53a155bc6.html>. Both accessed 3 February 2015.

⁷⁰⁴ The topic of nuclear disarmament is one functional area that clearly illustrates that the existing UN and its related agencies are incapable of delivering their objective (in this case, nuclear disarmament) without radical changes towards a revamped world order and what is currently perceived as collective security.

Ironically, the GA’s *first* resolution, five months after Hiroshima, in January of 1946, called for “the elimination from national armaments of atomic weapons.” In fact, the GA adopts a resolution to this effect almost every year. However, while a number of UN sub-organs and agencies are dedicated to the elimination of the dreaded nuclear weapons, after almost 70 years, there still exist thousands of such weapons, which, if not quantitatively, then certainly qualitatively, have been upgraded and are becoming more destructive.

Nuclear weapons, in the eyes of their possessors, are indispensable, serving two main functions for nuclear weapons states (NWS). First, they are believed to act as a deterrent, in line with the mutually-assured-destruction (MAD) doctrine. In fact, some attribute the emergence in the 1950s of the MAD doctrine as the underlying reason—and not the SC—for prevention of a third world war. Secondly, they give an NWS a “first strike” option: that is, state holders of nuclear arsenals that have relatively weaker conventional forces in

In addition to the narrowly defined specialised agencies, there are general units and standing commissions that can request advisory opinions, such as the International Law Commission (ILC), and the Rule of Law Unit (ROL). The relatively recent establishment of the ROL at the Secretariat level represented a major advance in defining the rule of law, as mentioned earlier. Proclaiming that the rule of law applies not only to states, but also to “persons” and “institutions”, ROL recommends measures to be taken to “ensure adherence to the principles of ... equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.⁷⁰⁵

There is legal precedent for the type of strategy being recommended in this option. In 1993, the WHO requested an advisory opinion from the ICJ, in a submission that linked world health to the means and weapons of war, and particularly the use of nuclear weapons. Considering the catastrophic direct and collateral damage that such weapons can wreak, and hence the grave threat to health they pose, the WHO essentially asked the question of whether such weapons are legal. The Court, having examined the WHO’s “application” (request), was

comparison with their perceived adversaries regard nuclear weapons as indispensable in their defence postures, in the likelihood of a large-scale conventional arms conflict. (Sharei, *The Treaty on Non Proliferation of Nuclear Weapons (NPT) Regime, and the Legality of Nuclear Weapons: Is there the "good faith" in a Legal Regime for Nuclear Disarmament?* 2010): especially 11, 19-20, 24-25, and 77.

Both the MAD and first-strike doctrines, in relation to disarmament, imply a catch-22 situation. Nuclear disarmament and “general” conventional arms disarmament (both objectives in Article VI of the NPT) become two sides of the same coin—one cannot be achieved without the other. Needless to say that the institutional requirements for providing collective security based on the abolition of war and states without armaments will be principally different from the existing security governance where states can maintain armaments and conduct “legal” wars. In fact, Albert Einstein, after the deployment of nuclear weapons, in 1945, recognised the institutional deficiency in coping with the world security requirements in the post-nuclear era, and called for the “creation of world government” to fill the gap and be accountable for elimination of nuclear weapons. (Isaacson 2007): 487-489.

⁷⁰⁵Above: n 672. See also: http://www.unrol.org/article.aspx?article_id=3, accessed 1 February 2015.

reluctant to take on the matter and, in 1996, formally cited “the Court’s lack of jurisdiction” as the reason for its refusal to accede to the WHO’s request.⁷⁰⁶

That was not the end of the case, however. This low-cost initiative (in terms of time and material) on the part of some audacious individuals at WHO, with the backing of a few dedicated NGOs,⁷⁰⁷ actually prompted significant public debate, and subsequently states’ interest, in the issue, and finally culminated in the GA taking up essentially the same question with the Court. This time, the ICJ had to respond to its main constituency, and to one of the principal organs of the UN, the GA. The Court issued its opinion on 8 July 1996.⁷⁰⁸

The path, the dynamics, and the findings of the WHO Application, culminating in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, appears highly valuable and encouraging in terms of this legal strategy option. According to the Court’s registrar, 35 states submitted written statements and 24 States made oral submissions. In addition, a

⁷⁰⁶ The exact advisory question submitted by the WHO was:

In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?

(World Health Organization: Request for Advisory Opinion 1993). The WHO, based on a 1946 agreement with the GA, is authorised to request advisory opinions, and had earlier, in 1980, successfully submitted another advisory question. Ibid. See also (WHO 1993): 1-7. The Court, in its opinion on the GA version of essentially the same question on the legality of nuclear weapons, had just made a short reference to the previous WHO case and had simply stated that the Court lacked jurisdiction. (*Legality of the Threat or Use of Nuclear Weapons* 1996): paragraph 14. However, in a more detailed report, the ICJ had clarified that the WHO lacked competence to ask this type of question, and that the main reason for refusing the request was:

[T]he request for an advisory opinion submitted by the WHO did not relate to a question arising ‘within the scope of [the] activities’ of that organization.

See: <http://www.icj-cij.org/docket/files/93/7406.pdf>: paragraph 27.

⁷⁰⁷ The Director General of WHO at the time was Hiroshi Nakajima of Japan; and one of the lead NGOs championing the case and also functioning as a legal aid on the suit was the International Association of Lawyers Against Nuclear Arms. See (Green, *Security Without Nuclear Deterrence* 2010): 191.

⁷⁰⁸ (*Legality of the Threat or Use of Nuclear Weapons* 1996).

“multitude” of NGOs and, by the Court archivist’s count, over three million global citizens endorsed and submitted *Declarations of Public Conscience* to the Court.⁷⁰⁹

According to the dissenting opinion of Judge Weeramantry, this level of state and non-state actors’ participation was “unparalleled in the annals of this Court”. And although the public appeals could not be considered formal submissions, Judge Weeramantry’s opinion notes that “they evidence a groundswell of global public opinion which is not without legal relevance”.⁷¹⁰

Later in his dissenting opinion, Judge Weeramantry explains this “legal relevance” in a section entitled *Impact of the United Nations Charter and Human Rights on "Considerations of Humanity" and "Dictates of Public Conscience"*.⁷¹¹ Here, he explains how the Martens Clause had, over the years—with the addition of the UN Charter, and the various human rights conventions and covenants—actually transformed humanitarian standards, so that “the public conscious of the global community has now been ‘sensitized to considerations of humanity’ and ‘dictates of public conscience’”, thereby transforming international humanitarian law.⁷¹² Elsewhere in his dissenting opinion, Judge Weeramantry, in considering law recognised by “civilized nations”, concedes that, after all, “the law of the United Nations proceeds from the will of the peoples of the United Nations.”⁷¹³

⁷⁰⁹ (Lindblom 2006): 220-222. See also (Dissenting Opinion of Judge WEERAMANTRY 1996): 438; for electronic access: <http://www.icj-cij.org/docket/files/95/7521.pdf>.

⁷¹⁰ (Dissenting Opinion of Judge WEERAMANTRY 1996): 490.

⁷¹¹ Ibid: 490-491.

⁷¹² Ibid: 490-491. Judge Weeramantry, in building the case for an expanded international humanitarian law, referred to the Charter’s Preamble, and to Articles 1, 55, 62, and 76, in addition to citing important human rights conventions, such as the UDHR, ICCPR, ICESCR, and the Convention Against Torture. Ibid: 441-442, 490-491.

⁷¹³ Ibid: 530.

Therefore, it appears that the *Legality of the Threat or Use of Nuclear Weapons* is a successful precedent for our hypothetical legal option to follow. With the involvement and partnership of the global public, NGOs, and willing states, it should be possible to request an advisory opinion concerning Charter review, which might result in the positive findings of the Court.⁷¹⁴

It is noteworthy that, in making use of this legal strategy, all the previously mentioned potential cases would be based on institutional questions that directly impact the structure and the competencies of their respective functional organisations (or their parent in the UN hierarchy), and therefore, compared with the WHO case, the institutional question and the related advisory opinion should carry a higher relevancy.

Moreover, the organs' argument before the Court is reinforced by the fact that most of the mentioned UN subsystems' policy and strategy reports in the new millennium in their adopted recommendations refer to a degree on institutional strengthening and capacity building. In addition to the ones mentioned earlier, the UN Millennium Declaration of 2000, endorsed by the world leaders at the *Millennium Summit*, encompassed detailed wish lists of institutional goals in its "Human rights, democracy and good governance" section, as well as the more focused "Strengthening the United Nations" section, implying substantial institutional reforms.⁷¹⁵

⁷¹⁴ For the role of the World Court Project and the International Association of Lawyers Against Nuclear Arms (together with the help of some other NGOs) in coordinating the request, and the immense impact they had from the beginning of the case until the advisory opinion was issued by the Court, see (Lindblom 2006): 220-222; and (Burroughs 1997): especially, ix-xi, and 9-14.

⁷¹⁵ The Millennium Declaration by world leaders was adopted as a GA resolution on 18 September 2000. (General Assembly Documentation Center 1946-2015): A/RES/55/2, esp. Sec. V and VIII.

The strategy with such Court cases, even if there were only one or two, is not only to attain the desired outcome: where the Court finds one of the organs requesting an advisory opinion to be competent (or if the WHO route, then perhaps the parent organ) and *intra vires*, and issues the Opinion that Article 109(3) should be fulfilled. It is just as much geared to provoking policy and structural debate within the UN system internally, and to generating global public debate and interest externally.

III. General Assembly Decision: Reactivate the “Arrangements Committee”

The most direct way of convening the review would be by a GA decision. This could be done in two ways: 1) by reactivating the Committee on Arrangements for a Conference for the Purpose of Reviewing the Charter, also known as the Arrangements Committee;⁷¹⁶ or 2) adopting a GA resolution reactivating the review with the time and venue already specified as part of the resolution.

In the first alternative, although procedurally the reactivation of the Committee can be requested by the Secretary-General, it may more reliably be requested by member states.⁷¹⁷ Therefore, one or more member states, based on Resolution 2285 (XXII) of 1967 (the last resolution on the topic), may request the Arrangements Committee to be reactivated.

However, requesting the reactivation of the Committee’s work at states’ request and without the backing of a GA resolution may be problematic. The possible indeterminacy is owing to

⁷¹⁶ The Arrangements Committee was set up by the first GA resolution of 1955, Res. 992 (X). For the Committee’s activities and the last resolution on the topic, Res. 2285 (XXII) of 1967, see Chapter 7, Section 7.9.

⁷¹⁷ According to Rule 13(g) of the GA Rules of Procedures, the SG can request any item, such as the review, to be put in the *provisional* agenda of the Assembly. (UNGA: Rules of procedure and comments 2015), and possibly add the Arrangements name back in the list of the GA active committees. However, this requires a bold Secretary General to be the initiator, who would have to go against the P5’s wishes. Given the fact that, in the election and the re-election of the SG, it is indeed the P5 rather than the Assembly who are the kingmakers, the SG taking this initiative seems doubtful. Assuming the review is held, the fair election of an SG based on merits, which was a concern at San Francisco, would probably resurface as one of the critical Charter revision topics. See also n 265 above.

how the *last rendezvous*'s re-enactment criteria are interpreted. In the *travaux* of the resolution, where it was decided to keep the Committee "in being", the terms of reference for its reactivation were based on any single state's request. However, when the chairman of the Committee was specifically asked the question, it was vaguely stated that it would be up to the Secretary-General, who "would consult the Members and would convene the Committee if it was found desirable to do so".⁷¹⁸

With that contradiction in terms, and the fact that almost half a century has elapsed since the *last rendezvous*, it seems that option (2) below will be more effective.

In this second alternative, a GA resolution in reaffirmation of the 1955 to 1967 efforts to convene the Charter review, based on the adoption of Article 109 Paragraph 3, and in consideration of the need to follow up and fulfil that effort, would be submitted, with the actual time and venue of the review conference unequivocally specified in its text.⁷¹⁹

To ensure that the Article 109(3) implementation is completed, and the review is held, there are *four* key considerations regarding the proposed resolution.

First, it must be ensured that the review conference is not confused with the current ongoing UN and Council reform efforts: that is, the review is not intentionally or coincidentally derailed into multiple non-productive and non-substantive existing efforts. To that end, the resolution should be *unequivocal* and make clear that the objective is, as specified in Article

⁷¹⁸ (UNRIC 1946-2000): A/6865, paragraph 4. See also (Yearbook of the United Nations 1967): 290; and Chapter 7, Section 7.9.

⁷¹⁹ The list of relevant resolutions referenced in the proposed resolution should at least include the *first* and the *last* GA resolutions mentioned, as well as the SC concurring Res. 110 (1955), Doc. S/3504. See n 716 above; and Chapter 7.

109, the “general” type conference “for the purpose of reviewing the present Charter” and with the same intent, despite any other parallel UN reform efforts that might be ongoing.⁷²⁰

Second, the resolution must contain the exact date and time and venue of the Conference. The start date of the review should not be open-ended and preferably should have a conclusion date.⁷²¹

Third, the adoption of the proposed resolution should be based on a simple *majority* decision and not a two-thirds majority. The P5 and some of their allies or states under their influence may try to impose a two-thirds vote for adoption of the resolution, arguing that the review conference request is a new proposal, based on paragraph 1 of Article 109, therefore requiring a two-thirds vote of the GA to be adopted.

The counter-argument, however, could be that this is not a new proposal but in fact a reaffirmation of paragraph 3 of Article 109, which facilitated a simple majority to decide what was already adopted in 1955—and, indeed, that the purpose of the resolution is to redress the breach of Article 109(3) and complete its suspended operation.

Fourth, the sponsors of the resolution should seriously resist obtaining any type of formal concurrence from, or procedural involvement by, the Council. According to Chapter XVIII, conducting Charter reviews and proposing amendments is the GA’s concern, and, with the

⁷²⁰ For a discussion of the “Open-ended” working groups and “Special” committees on UN reform and the Charter that may cause confusion in purpose or suggest redundancy, see Section 9.1.1.

⁷²¹ In fact, as the UNCIO legislative history shows, the venue had already been decided at the 1945 Conference. The delegates were so confident that the review would occur in 10 years that, at the closing plenary, a Turkish proposal of holding the review conference in San Francisco again was approved by a show of hands. (UNCIO - Volume VI: Commission I, General Provisions 1945): 251.

exception of a majority concurrence at the Council (veto not applicable) on initiating a review, the Council has no other intervention rights.

In fact, the review conference, once convened, is independent of both of the two main UN organs, and its decisions and whatever “alterations” it adopts require neither the Assembly’s nor the SC’s concurrence, and in effect would be directly submitted for ratifications.

Therefore, based on SC Resolution 110 of 1955, the Council has already given its concurrence for conducting the review under Article 109(3), and is not required to do so again. This avoidance of any legal and procedural entanglement with the Council at this stage is for the obvious reason that the privileged P5, which historically have resisted the Review, are the main stakeholders who would most likely oppose any Charter renegotiation.⁷²²

The GA’s adoption of the proposed resolution, based on consideration of the above four points, should be more likely: the reason being that almost every year there are UN reform-type resolutions that are being adopted and corresponding committees being created or their mandates renewed—all adopted with at least a *simple majority*.⁷²³ In terms of ease of adoption, the proposed reactivation resolution should not be any different. In fact, the proposed resolution would be just a wider and more concrete alternative to the existing ones, which could also serve to channel the previous and the existing reform efforts into the Charter-endowed path.

⁷²² The strategy of avoiding any P5 concurrence or votes at the Council at the review stage is based on the fact that the P5 at the Council, even in cases where they are prevented from exercising their veto—as a voting bloc—always have disproportionate leverage. In the GA, the five account for just 3 per cent of the votes, whereas, at the Council, they enjoy 5 out of 15 or, as a bloc, 33.3% of the votes.

⁷²³ For an example of a related committee, which has had its mandate renewed every year by means of GA resolutions, based on *simple majority*, see (Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization 2014). The *Special Committee on the Charter* has been meeting every year for almost 40 years and traces its origins to Res. 992(X).

As a closing remark, the three separate legal strategies being proposed in this section are not mutually exclusive and in fact are most effective as a three-pronged action. In other words, all three options of a contentious case at the ICJ, one or more advisory opinion requests to the Court, and the reinforcing Assembly resolution should all be employed, with the first two options at the Court being initiated preferably before the recommended submission of the convocation resolution at the GA.

The ICJ cases, in addition to their own merits, would establish the legal need and the backdrop for the review.

Furthermore, the importance of the Court referrals, particularly the request for advisory opinions, is that the abstract UN reform topics get translated into functional and current global issues. The possibilities of the different UN organs and specialised agencies translating the types of institutional deficiencies mentioned under the second strategy into advisory questions, each through their own lens, are in practice many, provided that—to stay *intra vires*—the topics at hand are linked to the UN’s own discourse on the principles of “ROL” and the fundamentals of “good governance”, posed as constitutional and institutional requirements, and therefore questioning the legality of a frozen Charter.⁷²⁴

The primary reason for this three-pronged strategy is to encourage not only the member states, but also the global public and the NGOs to become engaged, to create synergy and to act as a means of putting pressure and the spotlight on the politicians and states’ foreign

⁷²⁴ For examples of the UN’s own discourse on institutional requirements and reforms covering powerful concepts, see the reports of the Rule of Law Unit, the HRC *High-level Panel*, and the *World Summit*, ns 672, 701-702, and 715 above.

offices and their UN representatives to take the review seriously, and, unlike in 1955, to bring it to a conclusion, and to stay accountable.

9.4. Convening the Review: Who's Afraid of the Veto?

When it comes to Charter revisions and amendments, the mighty SC is essentially excluded from the process. In Chapter XVIII, the amendments section of the Charter—whether revisions are decided in an ordinary session of the Assembly, as in Article 108, or adopted in a “general conference” dedicated to reviewing the Charter, as in Article 109—it is, in the end, the *two-thirds* majority of the member states that adopt the revisions and send them for the member states’ governments to ratify. No approval of the Council is required and the veto privilege does not apply. In other words, even an explicit P5 *no* vote on a Charter revision during its adoption, on its own merits, cannot stop the adoption of the amendment.

However, according to Charter rules, the dreaded veto comes into play at a much later stage, when the adopted revisions are sent to national governments for ratification. This is when a P5, by refusing to ratify, can defeat any adopted revision.

This superiority of the P5, even with respect to the Charter’s constitutional future and the veto's applicability to the adoption of the Charter amendments, has led many politicians and policy and legal analysts to conclude that the Charter is immutable and therefore frozen (see Section 9.1.1). Historically, however, this two-step process, with first the adoption and then subsequently the ratification of Charter revisions, with the time window of approximately two years in between, has demonstrated unexpected flexibility in the P5’s voting behavior. In regard to the Review, the key question is, is the veto invincible? Or can citizens and their elected representatives overturn a negative vote of a permanent member?

In the history of the UN there have been effectively three amendments which may be considered moderate steps in the direction of the democratisation of the organisation. In *all* three cases, two or more of the P5 formally cast their opposition.⁷²⁵

My empirical observation has further revealed that, despite the P5's initial opposition, all three amendments were ratified within a period of two years. This finding seems to be possible because of the two-phase process of adoption and then later ratification of amendments envisioned in Articles 108 and 109, and the typical two-year period in between. In all the three cases, either because of the P5 governments' reassessment of their vote, or because of a shift of ratification decision-making, according to their national constitutional processes, from their executive to their legislative branches, their earlier veto was overruled and the amendment was in fact been ratified.

Consequently, it appears that the veto, in cases where it counts the most—those of Charter revisions—may not be invincible after all. Once the issue had left the environs of the UN building in New York and returned to the national capitals and governments, the veto was in effect overruled by the citizens and the national legislatures of the P5 states that had wielded it in the first place.⁷²⁶ And this significant but often neglected outcome in fact happened on all three occasions on which the UN underwent structural changes through Charter amendments.⁷²⁷

⁷²⁵ There was actually a fourth amendment, a technical one, to correct another amendment's consequential negligence relating to Article 109, which is of no significance on its own, but of legal significance in this thesis. See Chapter 7, Sections 7.7 and 7.8.

⁷²⁶ (Sharei, *Creation of a Global Parliament and the Fear of Veto* 2014): 10-12.

⁷²⁷ The GA-adopted Charter-amendment resolutions corresponding to the expansion of the SC and ECOSOC were, respectively, Res. 1991(A) and Res. 1991(B) of 17 December 1963. The second ECOSOC expansion amendment was Res. 2847, adopted on 20 December 1971. For the P5 voting record on the resolutions, see, respectively, (*Yearbook of the United Nations* 1963): 87-88; and (*Yearbook of the United Nations* 1971): 469. See also Chapter 7, Section 7.7.

The first of these amendment resolutions expanded the SC's composition from 11 to 15 members in 1963. Practically all the P5 were against it. The USSR and France cast a no vote, while the US and the UK abstained. The second case related to enlarged representation at the Economic and Social Council (ECOSOC), also in 1963, and encountered similar P5 opposition. In the third and the last case, in 1971, the amendment resolution increased the membership of ECOSOC from 27 to 54 states. This time, the UK and France voted no and the USSR abstained. But in all three cases, at the deadline date of two years for country ratifications to be registered, all of the P5, regardless of their earlier veto or lack of concurrence, had ratified the amendments, and in effect allowed the Charter to be changed.⁷²⁸

The might of the P5 and their veto is notorious in many vital aspects of global governance, as *realism*. However, the fact has been widely neglected that, in cases where it counts the most—the UN Charter amendments and revisions, where the whole UN system and its functioning, including the use of the veto can be reformed—transferring the debate to the people and their national legislatures means that the veto can be challenged and in fact overruled.⁷²⁹

What then is the countermeasure in cases of one or more P5 members casting negative votes at the review conference? For the Charter reformists, it seems they should not be intimidated,

⁷²⁸ Ibid.

⁷²⁹ During my research, I scarcely came across any source on the analysis of the P5 voting pattern relating to the three Charter amendments or the significance of the topic—that of being able to overturn the negative vote of a permanent member. The only exception was an analysis by Edward Luck, arguing that, when it comes to Charter amendments, a “lonely veto” by a P5 member, because of its high political costs, would be unlikely. (Luck 2003): 9.

and, in the case of P5 opposition, should push the reform fight from the UN's forum to the P5's people, civil society, and the national parliaments, where historically those societal and political elements of the P5 have been more amenable to the democratisation of the UN. As for the P5 executive branches, which are their respective states' key decision-makers at the UN, should the review outcome result in two-thirds majority backing of the world's states, then the veto option might be legally available, but not politically. Hence, perhaps being fully aware of the consequences of such a situation, the P5 have, since the 1960s, consistently pursued the policy of avoiding a review.⁷³⁰

9.5. Convening the Review: Towards a *Constitutional Moment*?

In the legal strategies section on convening the review, the emphasis was on holding the Conference based on paragraph 3 of Article 109, rather than under the functionally equivalent paragraph 1, which also provides for a “general” review of the Charter.

There are two main reasons for opting for paragraph 3. The first is that it requires a simple rather than a two-thirds majority decision to hold the review conference, and it has already been invoked, so, technically, the review process has already begun. The second and equally important reason is that paragraph 3 is loaded with legislative history as to what its review should address, particularly when it comes to the SC's structure and the veto. In short, the spirit of Article 109(3) dictates that the present Council structure and its rules should have had a 10-year life-span, after which they were due for change or renewal, and that term has already expired.

⁷³⁰ Ultimately, the P5—under the spotlight of a review—cannot pursue a double standard of heralding democracy while suppressing it at the UN, and would have to give in to the wishes of the majority. See Chapter 7; and also n 617 above.

Moreover, with the UN being more than the sum of its parts and currently acting as *the* quasi-world government, and after 70 years of UN experience, if a Review were held now it would most likely extend beyond just Council voting considerations and lead to the intended “general” review and possible transformation.

In terms of scope, today’s UN is involved in the global governance of a wide spectrum of areas, other than peace and security, such as human rights, food, poverty and income gap, the economy and finance, the environment, international crimes, health, telecommunications, and other substantive as well as functional areas.

Considering the UN’s vast governance role, in the event of a review with legal ramifications, what would happen to the future of international law? With the UN and its organs being the direct originator of, and contributor to, the many sources of international law with extensive global coverage and applications, a review with a significant impact on UN law would in turn have a direct impact on international law.⁷³¹

⁷³¹ See Joyner, *The UN System as Source of Law* (Joyner 2010): 3-65.

For a summary of the UN’s own assessment of its wide role in international law-making and upholding, see: <http://www.un.org/en/sections/what-we-do/uphold-international-law/>. Some of the UN’s organs or other bodies that make, affect, or uphold international law are: the SC, GA, the ICJ and the ad hoc courts and tribunals; the GA’s Sixth Committee (Legal), the International Law Commission (ILC), and the many UN-affiliated multilateral bodies, such as the International Labour Organisation (ILO) and the World Health Organisation (WHO); the subsidiary organs of the UN, such as the UN Commission on International Trade Law (UNCITRAL) and the UN Office on Drugs and Crime (UNODC); and multilateral negotiating bodies, such as the Commission on Disarmament.

Some of the treaties which have been directly adopted by the GA are:

- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- International Covenant on Civil and Political Rights (ICCPR) (1966)
- International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)
- International Convention on the Elimination of All Forms of Racial Discrimination (1966)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- United Nations Convention on the Law of the Sea (UNCLOS) (1982)
- Convention on the Rights of the Child (1989)
- Comprehensive Nuclear-Test-Ban Treaty (NPT) (1996)
- International Convention for the Suppression of Terrorist Bombings (1997)
- International Convention for the Suppression of the Financing of Terrorism (1999)
- International Convention for the Suppression of Acts of Nuclear Terrorism (2005)
- Convention on the Rights of Persons with Disabilities (2006)

Therefore, assuming that the existing UN and Council reform efforts, including the substantial institutional changes required at the functional agencies, were channeled to the review, would the review also be receptive to fundamental legal questions and concepts revolutionary to international law, such as direct effect, representation, participation, accountability, and, in more general terms, democratisation? Or, in cognitive terms, would the review lead to the start of a UN constitutionalisation process?

If the conference is convened, it seems that the review process may first go through a frustrating period of trying to focus on solving some issues and not others, which may not be possible in the complex and highly-integrated, and interrelated, globalised world.

For example, on the subject of SC reform, assuming that an S5-type proposal⁷³² attracts sufficient support at the Conference, and the veto is weeded out or survives with limited applicability, the second major concern with the Council reform is expansion of its size in terms of the permanent or non-permanent membership. In that case, what should be decided about the existing contested proposals: would any of them get the two-thirds majority backing?

Should it be the High-level Panel's recommendation under two models that include a combination of new permanent and non-permanent members to be added, which would

- United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)

- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008)

In addition, the GA has initiated and adopted resolutions that, through the facilitation and contributions of the ILC, have led to the creation of other multilateral treaties. Examples include the draft code of the International Criminal Court (1994) (later the Rome Statute, ICC, 1998) and the draft Code of Crimes against Peace and Security of Mankind (1996). It also drafted the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on the Law of Treaties (VCLT) (1969), and the draft articles on the Responsibility of States for Internationally Wrongful Acts (2001). See also:

https://treaties.un.org/doc/source/events/2011/Press_kit/fact_sheet_5_english.pdf.

⁷³² See n 608 above.

expand the Council membership to 24 states?⁷³³ Or is it sufficient for the Council just to add the presumed four new super-powers—Germany, Japan, Brazil and India, as in the Group-4 proposal?⁷³⁴ Or, should it take the counter proposal of the Uniting for Consensus group, led by the Group-4 rivals, Italy, South Korea, Mexico and Pakistan, proposing a 25-member Council?⁷³⁵ Or should the Council be inclusive of blocs of nations, such as the Arab and the Moslem League, or regions, such as the EU and the African Union, with some type of formula as to how their member states should be represented?

In fact, one approach could be to include *all* the states in the above mentioned scenarios. This last option would likely ensure getting the necessary two-thirds majority vote. In this last scenario, however, we would end up with a Council that, with the possible exclusion of some of the micro-states, would generally resemble the GA. Is it advisable to have two assemblies, both representing the sovereign states?

The review conference, most likely at first, would find itself deadlocked on the questions of Council reform. In fact, the past failed attempts at reforming the Council cannot all be attributed to the P5's unwillingness and manipulation. The lack of a resolution has also been partly due to the fact that the stakeholder states could not agree among themselves.⁷³⁶

The problem with a standstill on the question of Council reforms at the review is that it cannot just be set aside, since it impacts many other institutional reforms and their regimes, which are interrelated with the Council.

⁷³³ See n 605 above.

⁷³⁴ See n 606 above.

⁷³⁵ (McDonald and Stewart 2010): 38-39.

⁷³⁶ Ibid: 11-18.

For example, nuclear disarmament—a vital concern of the Assembly—would continue to be unresolved. Armed conflicts would continue. The election of top UN officials would continue to be based on politics rather than merits. The international criminal law and adjudicative roles of the Council would continue. And, if the P5 act as a hegemonic body, targeted lists without due process of the law, as well as the precedent-setting undemocratic legislative acts of the Council would continue to be administered, affecting global citizens and non-state actors, universally. With the Council, regardless of its *vires*, in practice, being the adjudicator, the legislator, and the enforcer, all-in-one, the degree of its reform could involve major redesign and serious structural impact on the other areas of the UN system.

Another major topic on the review’s agenda would most likely be the institutional requirements of how to tackle global warming. The different substantive suggestions, such as strengthening environmental institutions, or recommendations for the creation of an environmental court, or streamlining the environmental agencies, perhaps under one umbrella upgraded to a main organ status to be called the environment or sustainable development “council”, would all be on the table at the review and subject to consideration.⁷³⁷ However, if the states insist on their absolute sovereign rights and try to confine climate-change decisions and impacts to their own borders, reaching agreements, similar to outside the review, will be deadlocked.

On the substantive human rights institutional and enforcement topics, most likely a similar scenario would develop.⁷³⁸ Human rights, since the inception of the UN in San Francisco,

⁷³⁷ See ns 699-700 above.

⁷³⁸ For the *problematique* of even a single state being able to stop global HR or environmental solutions, see (Mayerfeld 2011): 212-213.

have been recognised as not only fundamentally important in themselves, but also because their violation is recognised as a cause of war and conflict. The HR project touched on at San Francisco, partly due to lack of time, was deferred to when the UN became operational and to future reviews.⁷³⁹ Three years later, in 1948, the GA's adoption of the Universal Declaration of Human Rights (UDHR) was a monumental achievement that, up until the present, has essentially remained soft law, and in many regions of the world lacks adjudication.⁷⁴⁰ Therefore, at the review, by trying to tweak the current ineffective HR functional regime based on sovereign states' consensus, derogations and optional protocols, and also without a court system and enforcement, it would soon realised that, under a state-centric international law, the regime cannot be much improved on, and the reform efforts would soon be deadlocked.

⁷³⁹ (Ramcharan 2008): 442-443. See also n 663 above.

⁷⁴⁰ As was mentioned earlier in this chapter, in the section headed "Protection of Fundamental and Human Rights", there is no denying that the UDHR and its spin-offs, the ICCPR, and the ICESCR have, together, influenced customary international law, and have formed the core of what is referred to as the International Bill of Human Rights. (Steiner, Alston and Goodman 2007). It is also the case that significant international and regional treaties, such as the European Convention on Human Rights (ECHR), have also been inspired by, and have successfully given effect to, the UDHR principles. In fact, the ECHR Preamble, by first acknowledging the UDHR, sets as its mission to implement and "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration". (European Convention on Human Rights (ECHR) 1950-2010): *Preamble*. Further, Section II of the text of the Convention has led to the establishment of the European Court of Human Rights (ECtHR). *Ibid*: Sec. II.

Since 1998, the ECtHR has sat as a full-time court, to which individuals, as well as European Council member states, can apply directly, alleging violations of civil and political rights. In almost fifty years, the Court has delivered more than 10,000 judgments on European human rights violations. See: <http://www.echr.coe.int/pages/home.aspx?p=basictexts>; and http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf. However, in the "universal" context, and in the UN constitutionalisation context, without global legislation, or without a global human rights court or effective enforcement, then, as can be observed today, in many states and regions of the world there continues to be systemic violation of the UDHR norms and principles.

Perhaps after some months (if not years) of unsuccessful attempts to resolve substantive global governance questions in fragments and isolation, the conference might then reach a critical “constitutional moment”.

In defining the *constitutional moment* in the UN context for governing, I suggest the following three fundamental apexes as the trigger for radical departure from the past and for the transformation of the institutional framework of the organisation. This moment would be reached when at least the two-thirds majority of the states at the review would come to these three fundamental realisations:

- 1) that the fragmented global governance regime, in managing the increasingly complex and interrelated global challenges, has been mostly inadequate. Addressing these challenges requires coherent, holistic, collective and integrated approaches in governing—a transformation from governance to *government*—democratically, with the necessary representation, transparency and accountability;⁷⁴¹
- 2) that the peoples are objects and subjects of international law, and its ultimate legitimisers; therefore, the formal recognition and protection of a *rights-based* global citizen is necessary;
- 3) that the states, in their collective approach to the *global commons*⁷⁴² and peace and security, are compelled to *share limited sovereignty* mutually with other states as well as the global citizens.

⁷⁴¹ It seems that most of the main concepts in the *first* realisation have already been reached at the different areas within the UN system. In addition to some of the institutional assessments and reports along these lines mentioned earlier, the UN System Task Team on the Post-2015 UN Development Agenda, in its report in 2013, came to similar conclusions. Having recognised the shortcomings of the “**global governance regime**”, including poor representation and also the exclusion of many of the developing countries from some of the multilateral regimes, such as the Bretton Woods institutions and the G-20, the Task Team noted that:

In a more interdependent world, a more coherent, transparent and representative global governance regime will be critical to achieve sustainable development in all its dimensions – economic, social, and environmental. [Emphasis added.]

The ongoing *Task Team* is co-led by the Department of Economics and Social Affairs (UN-DESA) and UNDP, and has senior experts’ participation in over 60 UN systems’ subsidiaries and special agencies. (UN-DESA & UNDP 2013): 1-11, at 8.

⁷⁴² Here, I am subscribing to the broader definition of the *global commons*, where the concept is not only inclusive of the world’s shared resources and the common heritage of mankind, but is also inclusive of “science, education, information, and peace”. Ibid: 6.

In other words, they would reach the grand conclusion that Global Citizens are the rightful as well as rights-bearing agents of global and political social transformations, the only legitimate interlocutors of the global interests, and for that reason the best guarantors of a just and a democratic global society.⁷⁴³

This paradigm shift from states' absolute sovereignty to a multi-level governmental system of states and peoples in a federal or supranational model is not a new phenomenon and has had many historical precedents. In fact, most of the world's existing 25 federal states, in one way or another, have experienced this constitutional moment.⁷⁴⁴

For example, in the case of the US, it is generally agreed that America's constitutional moment occurred in 1787, 11 years after the American Revolution and independence. This is when the original 13 sovereign states, in order to solve their interstate problems (stemming from having a states congress but no people's congress, no judiciary, and no executive organs), met in Philadelphia, to review and to amend the Articles of Confederation. While at the convention, the member states went against the Confederation Treaty's amendment rules, changing their formal charter rules at the conference, and abandoned consensus decision-making. Consequently, at the Convention, the Articles of Confederation were essentially turned upside-down, from state-centric to popular sovereignty, and the focus became "we the people". Therefore, the Philadelphia conference transformed into the Constitutional

⁷⁴³ "Translating" Michael O'Neal's definition from its EU context. (O'Neal 2008): 49.

⁷⁴⁴ See n 674 above.

Convention of the United States of America, producing a full-fledged Constitution which incorporated an unprecedented and significant Bill of Rights.⁷⁴⁵

In the case of the non-federal but still supranational European Union model, some argue that “the European 'constitution' is a work in progress”, and that it has already had its “constitutional moment without a constitution”.⁷⁴⁶ Although it is difficult to link a specific conference or treaty with the Communities’ transformation into the European Union and its constitutionalisation,⁷⁴⁷ the Maastricht Treaty of 1992 is generally associated with the “constitutional moment” for Europe, when the European Parliament was granted more powers, and, more fundamentally, the people of the Union were recognised as multi-level citizens and granted a rights-based European citizenship.⁷⁴⁸

As for the review conference, and whether it would turn into a constitutional convention, on the basis of similar past experiences, the prospect seems to be high. After the review reaches stalemate, where “nothing is agreed upon unless everything is agreed upon”, perhaps “as a package rather than singly”,⁷⁴⁹ and it reaches the earlier mentioned three realisations, especially on the recognition of a rights-based global citizen, that is when the conference will reach its transformational moment—towards a democratised and constitutionalised UN. Only

⁷⁴⁵ For extensive coverage of the US’s constitutional evolution, see Bruce Ackerman’s two-volume series, *We the People*, particularly volume 2, which has a detailed account of the three “transformative moments” he associates with the formation of the US Constitution, especially the constitutional moment at the Philadelphia Convention. (Ackerman 2000). On changing the Confederation’s consensus rule, see *ibid*: 34. See also (Baratta, *The Politics of World Federation: United Nations, UN Reform, Atomic Control* 2004): 7, 16. On Article 109 parallelism with the US Constitutional Convention, see (Perez 1996): 399-403.

⁷⁴⁶ (Castiglione 2004): 86.

⁷⁴⁷ For example, Weiler, without citing a specific date or event, argues that the first phase of EU constitutionalisation was completed in the 1970s. (Weiler, *The Transformation of Europe* 1991): 12. Weiler’s conclusion is as much based on the ECJ’s judicial constitutionalism, such as the *Van Gend en Loos* case, as it is on transformational treaties.

⁷⁴⁸ (Schutze 2014): 35-38. See also (Maas, *Creating European Citizens* 2007): 45-46.

⁷⁴⁹ On arriving at a package solution rather than a sum of singular ones as a technique in negotiations that have stalled, see (Nazarkin 2010): 241. For an application of this in a possible UN context, see (P. Kennedy 2006): 272.

then will the vision, the achievable goals, and the path become crystallised, and the required institutional structure and components, to a degree, start to fall into place at the Conference.

Towards constitutionalisation, some of the fundamental convergences at the review might be as follows.

With the recognition of the rights-based global citizen, the next step is representation. A chamber representing the states—the GA—is already in existence, but, on the path to democratisation, a peoples’ assembly (a parliament) needs to be established. Perhaps the dysfunctional Council, which has embarked on adjudicative and legislative roles before, can now be formally replaced by a democratic parliament, towards legitimate legislation of our “global commons”.⁷⁵⁰

The Secretariat and the operation of the UN must become independent of the P5’s financial and power politics, and the election of the Secretary-General and the senior officials should be merit-based and democratic, perhaps based on the resolve of both the states’ Assembly and the envisioned parliamentary assembly. Further, an empowered and independent ICJ and judiciary is vital and one of the main pillars of constitutionalism that must be grounded in any future Charter revision.⁷⁵¹

That said, it would be hard to imagine that, at the first review of the Charter of the UN, there will be a major constitutional turn, similar to that experienced by the US. However, once the transformational awareness is reached, most likely at the review, the foundations are laid and

⁷⁵⁰ See n 664 above.

⁷⁵¹ Specific Charter transformation proposals and policy recommendations are not in the scope of this thesis. However, the few principles and features highlighted above are in fact extracts from the *Constitutional* section of this chapter.

the initial steps taken, the complementary steps can be left to subsequent reviews and future dynamics of the constitutionalisation process.

For example, on the subject of democratic representation, the first step might be exactly what the Independent Expert and some NGO observers have recommended, and which is included in the Human Rights Council's study of "Promotion of a **Democratic and Equitable International Order**", which is on the Secretary-General's desk awaiting possible further action.⁷⁵²

This study recommends, without going into great detail, the establishment of a UN parliamentary assembly (UNPA).⁷⁵³ Such a parliamentary assembly would presumably be primarily an advisory and monitoring body, consisting of the sitting parliamentarians, with the capacity to review, recommend and monitor, particularly in relation to the substantive GA and Council decisions. The UNPA, while being a relatively quick, low cost, low controversy and easy to implement interim solution, should be of added value not only in its consultative role, but also, to some extent, in adding to the legitimisation of the UN and its decisions, as the top-layered global organisation.

The first review may also implement another of the HRC's expert recommendations, which is the establishment of a global human rights court, perhaps similar to the European Court of Human Rights.⁷⁵⁴

⁷⁵² (Zayas 2013): 24. See also the two related GA resolutions (General Assembly Documentation Center 1946-2015): A/RES/67/175, 28 March 2013, and A/68/284, 7 August 2013; [emphasis added].

⁷⁵³ Ibid.

⁷⁵⁴ Ibid.

In closing, the fundamental question becomes: how detrimental would it be to the UN's constitutionalisation, and what would be some of the possible consequences, if one or more of the P5 decide not to ratify the outcome of the review?

Let us recall that a permanent member's no vote cannot stop the adoption of the review's recommended changes. In fact, according to the Charter rules, the review conference is run independently of the GA and presumably can have its own rules of procedure. Its output does not require a GA resolution or its explicit adoption, or the concurrence of the SC.⁷⁵⁵

Based on historical precedents, it can be presumed that the global political liability for a P5 state is too high for it to go against the majority and oppose the ratification of Charter amendments, as this would mean opposing what has been adopted by at least *two-thirds* of virtually all the states in the world.⁷⁵⁶

⁷⁵⁵ According to Kelsen, the organisation of the "General Conference" and who presides over it does not fall under the auspices of either the GA or the Council. (Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* 1950): 822. (Schwelb, *Charter Review and Charter Amendment--Recent Developments* 1958): 322. See also (Simma, Mosler, et al. 2002): 1368. For differing views by member states during the 1950s on ratification procedures, see (Repertory of the United Nations Practices-Supplement-2 1955-1959), especially 553; and (Repertory of the United Nations Practices-Supplement-3, 1959-1966), especially 259.

With the charter being silent on how the review should conduct its business and on its apparent independence, the conference could be given the freedom to decide on its size and scope of work, and, in addition, be permitted some degree of leeway in defining and refining the details of the ratification procedures. For example, in the event of a queue of states waiting to be admitted to the UN, the conference could decide on the question of what constitutes the two-thirds ratifications. Is it two-thirds of member states at the time of adoption, or later, at the time of the last required ratification—at which time the number of member states might have changed? A more vital question that can be decided internally by the conference is how to treat P5 *acquiescence* at the ratification stage.

This is to anticipate the highly likely strategy of a P5 government that, while not intending to ratify the proposed changes, at the same time attempts to dodge the domestic and international public debate and pressure. Therefore, the P5 government would not take the typically required parliamentary action on ratification, or would slow its process by letting the conference's ratification deadline pass, in the hope of its inaction being interpreted as a veto and lack of "concurrence". However, the conference seems to have the competency to decide beforehand that, unless there is an explicit rejection by a P5 national government, that P5's acquiescence on the review's adopted amendments would also count as "concurrence". This would be consistent with the existing SC practice that a P5 abstention from a vote at the Council is interpreted as a concurrence.

⁷⁵⁶ See Section 9.4.

Three of the P5, France, Russia and the UK, have a questionable status as the top five super states in terms of population or size of the economy. Nor are they the exclusive members of a five-member nuclear-weapons club any longer. In addition, with the P5's overall poor performance in keeping the world free of armed conflicts during the past 70 years, those states cannot expect to hold on to their World War II legacy of unequal UN rights and would more likely follow the majority decision at the Conference.⁷⁵⁷

As to the other two permanent members, China and the US, based on the size of their populations or their economies, they may be classified as super-powers and could still vie for the Yalta formula over any other voting procedure at the review, and opt not to ratify the adopted Charter changes.

But in the global neighbourhood, what are their other options? China's livelihood and economy owes its success to globalisation and it therefore cannot afford the risk of staying outside of the global community.

As for the US, it is probably the only P5 member that is powerful enough and presumably independent enough from the rest of the world to opt to stay out of the UN. In that unlikely event, such a scenario should not last long, considering that today's world is much more globalised than that which existed during the US isolationism of the 1920s and 1930s. Then, most of the American continent and Latin America were not isolated from the US and were

⁷⁵⁷ In the case of France and the UK, these two states have additional foreign relations and UN obligations to their fellow member states at the EU. For example, Lisbon Treaty, Article 34 of TEU, provides that member states "shall coordinate their action in international organisations and at international conferences". Furthermore, the "Member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union". See: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN>, accessed 16 February 2015. For the possible constructive role of the EU in SC reforms, see (Finizio 2013): 307-308.

part of its sphere of influence, which is no longer true.⁷⁵⁸ But still, the isolationism of that period witnessed the “Great Depression” in the US. Therefore, the US, similar to China, but perhaps with higher tolerance, could not deny its global economic and other interdependencies and stay outside of the world community for too long.

In fact, judging by the US’s own constitutional history, it seems a scenario of a US without the UN would be very short-lived. During the 1787 transition of the Confederation to the federal union, the then super-power state of New York, having doubts about a United States of America, did not adopt the Philadelphia Convention’s proposals and was not one of the founding states that ratified the constitution at the time that the US was legally created. However, shortly thereafter, the state of New York, recognising the synergy and the moral and material power of the union, rejoined its ex-Confederation members in a constitutionalised United States of America.⁷⁵⁹

Therefore, in the unlikely event of the US not ratifying the review’s proposals, and opting to stay out of a new UN, it seems that, after a short period, and similar to the state of New York’s experience before it, the US would probably rejoin its fellow UN members.

⁷⁵⁸ (Chomsky 2004)

⁷⁵⁹ See n 745 above. See also:

<http://www.archives.gov/education/lessons/constitution-day/ratification.html>, accessed 16 February 2015.

9.6. Conclusion

Governance is what governments do.⁷⁶⁰ In fact, a state without a government is considered a failed state and the condition is called anarchy. In the global setting without a government, if global governance is functioning, it seems to be a “mystery”—but in many substantive areas it is not; it is in fact dysfunctional and anarchic.

Within the patchwork of fragmented global governance organisations, the closest institution resembling a quasi-world government is the United Nations, which with its shared sovereignty and supremacy clauses embedded in its Charter, has demonstrated that in addition to being the world’s broker of the legal use of coercion, in practice, it is also adjudicating and legislating universally.

However, this “general” and nearly all-encompassing world organisation, with large impact on creating and upholding international law⁷⁶¹, at the global scale, and the promoter of human rights and the “rule of law”, is deficient in democracy and legitimacy. In fact, its most powerful organ capable of devising and enforcing “hard” law is a World War II martial law legacy, designed to be administered by the Five Permanent Members.⁷⁶²

⁷⁶⁰ (Yunker 2014): 1-13.

⁷⁶¹ Here, international law impact, is considered more in its global context, not bi-lateral or regional treaties. For the current large UN impact, in, creation or origination, and upholding of global international law, see, above: n 731.

⁷⁶² The fact that the Council would have extraordinary powers and would be dominated by the P5, “the jury, the judge, and the executioner”, all-in-one, was mostly referenced in the legislative history chapters, Ch. 4 and 5; For examples, see views expressed by foreign ministers of Egypt and Netherlands, respectively at, Ch. 4: n 220 and Ch. 5: Sec. 5.2.

However, that war-time design and governance mentality still prevailing today, is perhaps best explained by Kishore Mahbubani, experienced personally by him while being the President of the Security Council from Singapore in 2002. Mahbubani, while explaining the non-democratic procedural means the P5 were employing, such as “implied vetoes” and “double vetoes”, and while they labelled the non-permanent members of the Council as “tourists”, that despite their differences, when it came to their P5 interests at the UN, they often acted in harmony. Mahbubani argues that keeping “institutions of global governance weak” is intentional, and that the “P5 has distorted the UN system to serve the interests of five countries often at the expense of the interest of the vast majority of the world’s population.” (Mahbubani 2013): 223-238.

Alexander Wendt, considered one of the living icons and theoreticians in the field of IR, has argued that a “world-state is inevitable”.⁷⁶³ His prediction: it will happen within one to two hundred years.⁷⁶⁴

The Americans in the early 1940s, with a little help from the rest of the world, attempted to create a quasi-world government partly modelled on the United States’ experience.⁷⁶⁵ With a chamber of states, a judiciary, and the underpinning institutional structures to provide for not only world peace and security but also for humanity in the areas of social, cultural, technological, and economical rights and needs.

The United Nations that was created was a much scaled-down version of that world union dream, and more of a world order⁷⁶⁶ regime to prevent conflicts and maintain peace—with one birth-defect. The major defect detected at the foundational time was in one of the principal organs, the Security Council.

⁷⁶³ (Wendt, *Why a World State is Inevitable* 2003): 491-542.

⁷⁶⁴ *Ibid*: 492.

⁷⁶⁵ The United States’ world government fever of the 1940s, both public and governmental, and the key role of President Roosevelt in promotion of his *Four Freedoms* and the formation of the ideals of the “United Nations” beyond a security pact were explained in Ch. 6 and 7. However, probably the second most important American political personality, often neglected, who played a leading role in the founding of the UN was Vice-President Harry Truman. Taking over from Roosevelt after his death, President Truman steered the last few months of the founding to its completion and ratification. At those times, Truman was influenced by Alfred Lord Tennyson’s poem, *Locksley Hall (the Parliament of Man)*, including the following verse:

*Till the war-drum throbbed no longer, and the battle-flags were furled
In the Parliament of man, the Federation of the World.*

Truman was known to carry the poem in his wallet and readily showed the verses during the years of the UN’s formation and at the San Francisco Conference. (Schlesinger 2003): 5-6; And, (P. Kennedy 2006): xii. See also, (Baratta, *The Politics of World Federation: From World Federalism to Global Governance* 2004): 485.

⁷⁶⁶ The Anti-veto *majority* at UNCIO were opting for more than a “world order” but “world justice”. See, Ch. 5, Sec. 5.6 and above: n 281.

Knowing that the UN being delivered was “no enchanted palace”,⁷⁶⁷ the visionary leaders sought remedy at the Conference. The great compromise reached was in ten years’ time, based on the “experiences” gained, to reform the organisation and particularly its Council.⁷⁶⁸

If Wendt is correct and if we are to have a world-state it might as well be a *constitutional* one. Not one modelled after an Orwellian blueprint or an end-game product of one of the global hegemonies becoming the single empire.⁷⁶⁹ The forum and the legal place to start, it seems, is what we were endowed in the Charter with the General Review to bootstrap the process of transforming the United Nations and consequently international law. Article 109(3) holds the intent and the spirit and it seems that its fulfillment would set the wheels of international law constitutionalisation in motion.

⁷⁶⁷ The words of Lord Halifax, acting chairman of the UK delegation at San Francisco. (Mazower 2008): 1.

⁷⁶⁸ The rich set of related UNCIO references were covered in the legislative history chapters, esp. the *Great Compromise*, Ch. 5, esp. Sec. 5.6.

⁷⁶⁹ As an argument that a kind of a liberal hegemon may be a good idea and in fact America is already acting as the “the world’s government”, and the “Goliath”, see, (Mandelbaum 2006), esp. xvi.

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Appendix 1 UN Charter Articles 108 and 109


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CHARTER OF THE UNITED NATIONS


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Introductory Note	<u>Article 108</u>
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Chapter I	Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.
Chapter II	
Chapter III	
Chapter IV	<u>Article 109</u>
Chapter V	
Chapter VI	1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference.
Chapter VII	2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.
Chapter VIII	3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.
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CHARTER OF THE UNITED NATIONS

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Introductory Note	<h3>INTRODUCTORY NOTE</h3> <p>The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter.</p>
Preamble	
Chapter I	
Chapter II	Amendments to Articles 23, 27 and 61 of the Charter were adopted by the General Assembly on 17 December 1963 and came into force on 31 August 1965. A further amendment to Article 61 was adopted by the General Assembly on 20 December 1971, and came into force on 24 September 1973. An amendment to Article 109, adopted by the General Assembly on 20 December 1965, came into force on 12 June 1968.
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Chapter V	The amendment to Article 23 enlarges the membership of the Security Council from eleven to fifteen. The amended Article 27 provides that decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members (formerly seven) and on all other matters by an affirmative vote of nine members (formerly seven), including the concurring votes of the five permanent members of the Security Council.
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Chapter X	
Chapter XI	The amendment to Article 109, which relates to the first paragraph of that Article, provides that a General Conference of Member States for the purpose of reviewing the Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members (formerly seven) of the Security Council. Paragraph 3 of Article 109, which deals with the consideration of a possible review conference during the tenth regular session of the General Assembly, has been retained in its original form in its reference to a "vote, of any seven members of the Security Council", the paragraph having been acted upon in 1955 by the General Assembly, at its tenth regular session, and by the Security Council.
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