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Upholding the San Francisco Promise: The Roadmap to a Constitutionalized United Nations

Authors: Shahr-Yar Mahmoud Sharei

The submission proposes using the Review process in Article 109, Chapter XVIII of the UN Charter, particularly its Paragraph 3. When the United Nations was formed in San Francisco in 1945, there was a great deal of opposition to the democratic deficit of the Security Council and its veto. As a compromise, the permanent five members of the UN Security Council agreed to a clause that allowed for Charter Review, ten years after the UN came into force. This “San Francisco Promise” was activated in 1955, but was later breached and abandoned. The review conference endowed in the Charter, and legally still valid, could pave the way for a process of writing a constitution for the UN, allowing it to reinvent itself to better face current and future global challenges. Thus help transform the UN into a global governance fulfilling the objectives set out in the UN Charter’s preamble.

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The submission proposes using the Review process in Article 109, Chapter XVIII of the UN Charter, particularly its Paragraph 3. When the United Nations was formed in San Francisco in 1945, there was a great deal of opposition to the democratic deficit of the Security Council and its veto. As a compromise, the permanent five members of the UN Security Council agreed to a clause that allowed for Charter Review, ten years after the UN came into force. This “San Francisco Promise” was activated in 1955, but was later breached and abandoned. The review conference endowed in the Charter, and legally still valid, could pave the way for a process of writing a constitution for the UN, allowing it to reinvent itself to better face current and future global challenges. Thus help transform the UN into a global governance fulfilling the objectives set out in the UN Charter’s preamble.

1. Abstract

Upholding the San Francisco Promise: The Roadmap for a Constitutionalised United Nations

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 proposal recognises 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 problems without borders.

We and our research team, before entering into the discussion on the design and its abstract, would like to put forward that our solution is actually a process where global governance institutional designs and their international rule of law can be developed and improved, based on the global challenges we face and the solutions required. Further, our proposed process is in fact a (re)discovery of a powerful methodology that already exists, has legal force, has universal application and universal coverage, but needs triggering.

In context of the Competition we considered the following:

Despite our strong belief in supra-national models, such as the European Union, where the interests of the community and its citizens are served, while applying the principles of subsidiarity and proportionality so is the independence and sovereignty of states and their multilevel governance is also preserved. However we are not proposing a specific supra-national model.

With over 25 countries in the world, representing 40% of the world's population, living in a federal system of government.[1] It is recognised that the citizens of those countries have a better than average global standard of living, widely enjoy stability and sustainability, and are invariably democratic. However, despite our strong belief in the applicability of the national federal models to “good” global governance, through their higher degree of political and economic integration and better suited to handle global challenges, we are not proposing any specific world federal model. As to its ideal design specifications, what its main branches should be, where the separation of powers would lie, or how the sovereignty-sharing, and law-making powers of both its citizens and the states should be structured and guaranteed.

On the fundamental topic of democracy in the context of global democracy, and global citizens right to representation in global law-making and administration, again, our process, does not profess or give a specific design. As to whether there should be a global parliament directly elected, or indirect representation through a parliamentary assembly, and whether the voting should be based on a one-person-one-vote, only, or factors such as regional presentations, or some other type of weighted voting be applied.

However, our proposed solution, is instead, a process that can potentially accommodate any of the above models. That process, already existing, if triggered and allowed to operate, gradually incubates and develops global governance models that are collaborative in nature, with tremendous member states' resources and knowledge base at its disposal. And can incubate the suitable supra-national models mentioned above, or a combination one, or a new one, suit for purpose. With the appropriate, laws, regulations, decision-making paths, and including the needed legal review and

control mechanisms. Further, the process being dynamic and with periodic reviews and revisions would create the potentials on not only handling current global challenges, but also adaptable to adjust and enhance itself to face future global challenges, currently unknown to us.

What our solution process lacks in design specifics, it makes up for with its ease of activation and implementation, the fact that it is already embraced in the UN Charter, that its outcome is legally binding on all, and the fact that, that process has already partially started with effective legal force.

The solution is the Review process, in Article 109, Chapter XVIII of the UN Charter, particularly its Paragraph 3. When the United Nations was formed in San Francisco in 1945, there was a great deal of opposition to the democratic deficit of the Security Council and its veto. As a compromise, the P5 agreed to a clause that allowed for Charter Review, ten years after the UN came into force. This “San Francisco Promise” was indeed activated in 1955, but never came to fruition – the Committee that was established to organize the review was never disbanded, but stopped meeting after 1967, and there has been no further progress on this matter since. The P5, determined to remain entrenched in their positions of power, have quashed all subsequent substantive attempts to reform the UN, by threatening use of the veto.

The proposal, then demonstrates a legal strategy of how to reactivate Article 109(3), neglected by researchers and politicians, to uphold this promise. Our analysis will show that the P5 veto is not the invincible roadblock that is so often feared (Table 2), and therefore action must be taken.

It will be argued that, if such a review conference is convened now, it would have the potential to trigger a “constitutional moment” leading to UN constitutionalisation, and thus help transform the UN, by ultimately fulfil the objectives set out in the Charter’s preamble—including guaranteeing and the protecting the fundamental rights of “we the peoples”. Such a democratic and empowered UN can then face the current and future global challenges.

Avslutningsvis, med våra begränsade svenskakunskaper, vi tacka Global Challenges Foundation grundare och anställda för deras arbete kring att främja forskning och studier om hanteringen av de globala problem som kräver globala lösningar. Oavsett vem som får motta priserna kommer de verkliga vinnarna att vara oss världsmedborgare, då den bästa lösningen eller rekommenderade processen kommer att bereda väg för en mer fredlig och hållbar värld.

[1] <http://www.forumfed.org/countries/>

2. Description of the model

Upholding the San Francisco Promise: The Roadmap for a Constitutionalised United Nations

If such a [review] 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.

-Article 109(3) of the UN Charter

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The GCF proposal being submitted here is a neglected UN Charter review process, (re)discovered by our researches, and therefore not a specific model or a solution. This description part covers the background of why the process is needed. The legislative history of how it was created and its legal spirit. The description also covers the legal strategies to reactivate it, and what happens if a UN review conference is held now and why it might lead to a “constitutional moment”.

1.1 Governing the World: Government, Governance or Anarchy

David Kennedy, in his article on “The Mystery of Global Governance”, reflects on “how little we in fact know about how we are governed”.^[1] Many scholars would say that there is no effective global order and the state of the world is merely 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 cardinal principle in this order being states as sovereign equals.^[3]

Koskenniemi and his UN commission report produced in 2006 tell us that we have a fragmented international law, with consequential conflicts in norms and jurisdictions. This hints at a dysfunctional global governance.[4] Arguably, international law is not “real” law, as it is not based on democracy, and lacks sufficient transparency, accountability, legitimacy, adjudication, and enforcement powers.[5]

Therefore 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.[6]

It is suggested, then, that “global governance” is not about how such governance is working to solve the world’s problems, but how it is not working, and is, at best, reduced to administering and managing their negative effects.

1.2 Constitutions, Constitutionalism and Global Governance Constitutionalisation: The Terms of Reference

Can we constitutionalise global governance? What do we mean by international (global) law and UN constitutionalisation?

Global governance can be defined in a number of ways, all of which are attempts to encapsulate the fragmented, overlapping, and complex systems of international laws, regulations, organisations, and customs.

Economics Nobel Laureate Stiglitz characterises the current shortcomings of global governance as follows:

“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**” [7]

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? International law constitutionalisation might be the answer. This could transform global governance—whatever that is—into *good governance*.

To provide a basic understanding of these derivatives of the constitutional terms in the global context, we 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.*

To clarify, international or UN constitutionalisation is not a prescription of a centralized 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, such as the EU or federal models, granting them in exchange collective global rights.

As in any constitutional project, the global constitution should be constructing the normative and axiological values prescribed by constitutionalism for the global citizens, fundamental amongst them, the protection of universal human rights.[8]

1.3 International Law Constitutionalisation and the Role of the United Nations

A constitutionalised international law would most likely remedy some of the fuzzy or unenforceable concepts in the current international legal regime – by codifying the supreme and compelling norms in the constitution, concepts such as *jus cogens* and customary international law would become obsolete. A constitutionalised international law could also address the current opacity of a global governance seemingly guided by an invisible hand.

How might this be achieved? Recent history tells us that, unless there is a major global calamity, such as another world 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. Such a scenario is neither foreseeable nor desirable. It is therefore preferable to take the core components of an already-existing agency and gradually make a constitutional transformation.

Although the WTO is arguably the most legally sophisticated and effective IO, even with considerable transformation, as a trade organization it is not equipped to address international criminal law or armed conflicts. In contrast, the UN already possesses some features of quasi-world government in its charter and how it operates. It is an excellent candidate due to its supranationality, legal supremacy, and universality. The principal features of constitutionalisation include: democracy, protection of fundamental rights, separation of powers, and the due process of law.

The UN being the primary source of international law,[9] its constitutionalisation therefore by and large encompasses international law.

1.4 The San Francisco Anti-Veto Rebellion

Towards the end of World War II, the United Nations, by design was intended to be at the apex of international law and the legal order to govern the world. At the San Francisco United Nations Conference on International Organization (UNCIO), the Dumbarton Oaks (DO) proposal was termed the proposal for a “general” IO, which would not only keep international “peace and security”, but would also be concerned with social and economic affairs of the world. The UN was essentially the work of the Big-3 (USA, UK, and USSR) at the time, and mostly the design of the United States. Therefore, at San Francisco, none of the invited states, other than China, had any participation or any say in the proposed UN Charter. At the Conference, upon a closer examination of the Dumbarton Oaks proposal and its Yalta formula, particularly the “veto”, it became apparent to nations that the liberal majority procedure was only for insignificant matters. Opposition to the veto was voiced collectively by many of the weaker states, first sparked 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:[10]

The veto ... if retained and exercised, [will] be destructive not only to the main purposes of the International Organization but to the Organization itself.

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, remarked:[11]

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.

Ecuador's Minister of Foreign Affairs, Camilo Enriquez, in his objection to the veto, said:[12]

[W]e 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.

Eelco van Kleffens, Foreign Minister of The Netherlands, described the veto as a “quasi-judicial” organ that mixes the jury, the judge and the executioner.[13] These remarks encouraged small nations to begin formally submitting amendments and proposals to the SC structure to correct the democratic deficit of the Council.

By the second week of the Conference over 20 states submitted formal amendment requests to revise the Security Council section of the Dumbarton Oaks proposal. By the third week of the Conference, 33 of the 50 states participating at the Conference (representing a 73% majority not counting the P5), had either written or oral communications, going on record objecting to the proposed Security Council. (See Table 1 supplementary document).

With the Conference coming to a standstill, the United States declared, on behalf of the permanent five, that the SC proposal and its structure was not subject to negotiations, that the delegates could take those provisions of the Charter as they were or “go home”. This *realpolitik* was further exacerbated due to the fact that not only were “enemy states” not invited to the Conference, but also a large number of states in San Francisco were under the political, military, or economic influence of the Big-3 at the time (Table 1). On 13 June 1945, near the close of the Conference, the opposition was quelled and the SC structure and its voting procedure, as proposed by

DO and essentially the same as today, was adopted. As a historical record, and by recommendation of Australia, a large block of abstention votes was cast to show the silent opposition, while allowing the Security Council to be formed.

1.5 The San Francisco Promise: The Great Compromise and the Statutory Antidote to the Yalta Formula

In parallel, the anti-veto opposition was working to neutralise these undemocratic and extraordinary powers of the P5 at some future date, after the UN's formation. An option preferred by the majority of the anti-veto opposition was to allow for a future date for review of the Charter, reforming or replacing the structure or the voting procedures at the SC.

Breaking the deadlock, a compromise was achieved: 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 neutralized. More concretely, a promise was made to hold such a review by 1955, and added as paragraph 3 of Article 109 in Chapter XVIII of the UN Charter.

This great compromise was a statutory promise was expressed unequivocally by India's chief delegate, Mr. Ramaswami Mudaliar, stating what was shared by many of the opposition:[14]

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 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.

1.6 The UN Constitutional Question and the Activation of Article 103

Ten years after the completion of the UN Charter, a forum for ideas on the constitution of the UN took place at the 10th session of the Assembly, 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.^[15] By December of that year and after initial "constitutional" meetings held by the GA, the invocation of Article 109 Paragraph 3 and holding of the "general" review conference was put to a vote, and adopted by the General Assembly as Res. 992(X) and subsequently received the Security Council concurrence as SC Res. S/3504.

1.7 Article 109 Paragraph 3—Obsolete or neglected?

Due to both the heightened tensions during the Cold War and the especially complex legal history of this amendment, there has been very little scholarship regarding the current status of Article 109(3). One of the few sources available is Georg Witschel,

who has declared the paragraph to be “obsolete” and a “classic example of a ‘UN burial.’” His primary reasoning for this is that when the Security Council was expanded to 15 members, there was a corresponding amendment to change the number of votes needed for the adoption of Article 109 paragraph 1, but not paragraph 3. [16]

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 paragraph did not require any consequential adjustment because of the subsequent SC expansion amendment.

Secondly, and more importantly, Witschel fails 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”. [17]

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.

The Arrangements Committee was created in 1955 to fulfil the terms of Article 109(3), tasked with fixing the date and venue for the Charter review conference. The Committee was active for twelve years, but by 1967, it was still not able to find an *auspicious* time to convene a Review conference. [18] Therefore, with Resolution

2285 (XXII), it was decided that the Committee would be kept “in being,” but with no deadline of when to report next on its findings, and the Committee became dormant.

[19]

Our research shows that to date, from 1955 to 2016, no follow-up GA resolutions or formal memorandums have been issued with the effect of killing or repealing the Committee.

1.9 Constitutionalisation of the UN and International Law

The Elusive UN Reform

In the last 50 years, member states’ UN reform efforts have been mostly ineffective, fragmented, and 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.

With the UN Reform deadlocked can the member states take the bolder step of Charter review? Perhaps in the direction of its constitutionalisation?

Constitutionalisation involves shifting from a sovereignty of states to a sovereignty of peoples, granting global rights to global citizens. This is not to imply that states would disappear, but simply that global governance will be shouldered jointly between states

and peoples, as seen in supranational or federal governments. Such an arrangement would require parliaments and elections to ensure representation and accountability, as is the case in domestic governments.

Recognition of individuals as subjects as well as objects of international law would also empower the international law system by creating mechanisms to prosecute serious international crimes committed by non-state actors that currently go unpunished under the state-centric model. A constitutionalised UN would be better equipped to focus on protection and promotion of human rights, as those would be the rights of all global citizens and recognized as such in law.

The process of constitutionalisation would be based on rule of law and provide mechanisms for due process, create accommodations for vertical and horizontal inter-governmental relationships, and implement systems of proportionality and subsidiarity. Charter review would allow for these structural changes to be put in place in an effective and democratic manner. The question, then, is only how to get there.

2.0 Convening the Review: The Legal Strategies to Effectuate Article 109(3)

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?

There are three legal strategies to fully implement paragraph 3. The first two draw on cases at the ICJ, while the third is triggering it by an Assembly decision.

I. ICJ Contentious Cases: One or More States vs. the Permanent Five

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.” 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.

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. 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.

The contentious case could be brought by a coalition of founding member states who opposed the veto at the 1945 conference. That is who the San Francisco Promise was made to; therefore they have a strong case for arguing that the clause has been breached.

II. ICJ Advisory Opinions: Application by One or More UN Organs or Agencies

The ICJ Statute allows UN organs or specialised agencies (but not states) to ask the Court for an advisory opinion.[20] 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. The usefulness of this legal strategy is that it widens the scope to non-state actors and to a wide array of current topics.

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 regarding the legality of nuclear weapons. The Court was 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.[21]

That was not the end of the case, however. This initiative on the part of some audacious individuals at WHO, with the backing of a few dedicated NGOs, [22] prompted significant public debate, and subsequently states’ interest in the issue, finally culminating in the GA taking up essentially the same question with the Court. This time, the ICJ could not deny its jurisdiction, and issued its opinion on 8 July 1996. [23]

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”. According to the Court’s registrar, 35 states submitted written statements and 24 States made oral submissions. In addition, a “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.[24]

Therefore, based on that precedent, a number of global challenges such as climate change, extreme poverty, and conflict-related migration can be linked by the

corresponding UN organisations such as UNEP, UNHCR, ECOSOC, or UNDP to non-performance of the UN as founded, and therefore, charter review.

III. General Assembly Decision: Reactivate the “Arrangements Committee”

The most direct way of convening the review would be by a GA decision. A 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.[25]

The GA’s adoption of the proposed resolution should be very likely: almost every year, UN reform-type resolutions are adopted, corresponding committees created, or their mandates renewed—all adopted with at least a *simple majority*. [26]

The above three separate legal strategies are most effective as a three-pronged action. The primary reason being to create synergy and encourage not only the member states, but also the global public and NGOs to become engaged and put pressure on the politicians and states’ foreign offices and their UN representatives to take the review seriously, and, unlike in 1955, to bring it to a conclusion, and to stay accountable. One further initiative that could be added to help give momentum is the “European Citizens’ Initiative”, which would further encourage EU as a block to ask for the Review.

2.1 Convening the Review: Is the Veto Invincible?

The fear of the veto still shadows any Charter revision. Historically, however, the two-step process of adoption then subsequent ratification on amendments, with the time

window of approximately two years in between, has demonstrated unexpected conformity to the majority's wishes in the P5's voting behavior.

In the history of the UN, there have been three amendments that altered the composition of major UN bodies. In *all* three cases, two or more of the P5 formally cast their opposition, but ultimately, their earlier veto was overruled and the amendment was in fact ratified. (Table 2).

In 1963, amendments were introduced to expand the composition of both the SC and ECOSOC, for which the USSR and France cast "no" votes. In 1971 ECOSOC membership was expanded again, which was opposed by the UK and France. 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 allowed the Charter to be changed.

Consequently, it appears that the veto may not be invincible after all. Once the issue had left the UN and New York and returned to national capitals and governments, the veto was in effect overruled by the citizens and national legislatures.[27] For the P5 executive branches, the veto option might be legally available, but not politically. 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.

In the context of Charter review, a question may arise that what if a P5 and especially the USA as the most powerful of them decides to veto the outcome of a Charter review, by in effect staying outside of the UN? The answer can be found in the argumentation section of our proposal.

2.2 Convening the Review: Towards a Constitutional Moment?

If the conference is convened, 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.

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; it has also been partly because the stakeholder states could not agree among themselves.

Such a standstill on the question of Council reforms at the Review cannot just be set aside, since it impacts many other institutional reforms. 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”.

This moment would be reached when at least the two-thirds majority of the states at the review would come to three fundamental realisations:

That 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 [28]

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; that the states, in their collective approach to the *global*

commons and peace and security, are compelled to *share limited sovereignty* mutually with other states as well as the global citizens.

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.

For example, in the case of the US, it is generally agreed that America's constitutional moment occurred in 1787, eleven years after the American Revolution and independence. This is when the original 13 sovereign states, in order to solve their interstate problems, met in Philadelphia to review and to amend the Articles of Confederation. 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 Convention of the United States of America, producing a full-fledged Constitution which incorporated an unprecedented and significant Bill of Rights [29]. Of the 25 federal states in the world, covering 40% of the world's population, such as India, Brazil, South Africa, Germany, and Switzerland, there are many examples of constitutional moments[30].

In the case of supranational regional states, the EU can be cited. Although it is difficult to link a specific conference or treaty with the Communities' transformation into the European Union and its constitutionalisation [31], the Maastricht Treaty of 1992 is generally associated with the "constitutional moment" for Europe, when the European Parliament was granted more powers, and the people of the Union granted a rights-based European citizenship [32].

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 comes to a stalemate and it acknowledges the earlier mentioned three realisations, the conference will reach its transformational moment—towards a democratised and constitutionalised UN. Only then will the required institutional structure and components start to fall into place at the Conference.

In the UN transformation path from a United Nations to a “Union of Nations”, and the path to democratisation, a peoples’ assembly (global parliament) needs to be established. Perhaps the dysfunctional Security 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”. In addition, such a parliament could feature a security committee as a subsidiary, rather than a powerful and separate Council.

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. 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. [33]

That said, it would be hard to imagine that, at the first review of the Charter, there will be a major constitutional turn and union of states, similar to that experienced by the US. However, once the transformational awareness is reached, most likely at the review, the foundations are laid and 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 to adopt a UN Parliamentary Assembly, as the Independent Expert and some NGO observers have recommended.[34] 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. [35]

The path to global governance constitutionalisation is gradual and long, but it seems “we the peoples” have been endowed by the legacy of article 109 to trigger that process.

2.3 Conclusion

The world order we have today was never meant to be frozen into its current shape. As we have shown, review was part of the compromise that allowed the United Nations to be created in the first place. Rather than rebuilding the world order from scratch, it is vastly preferable to utilize the tools that are already in place; rather than envisioning a rigid system that may not be right for the future, success is far more likely with a process that allows for a multitude of possibilities. Article 109 (3) is simply a means to bypass the legal and procedural roadblocks that have held up necessary reforms for the last 70 years. We have shown that the process already exists to bring about meaningful reform; now it must be activated. Once that occurs and a charter review is convened, a constitutionalized system of global governance that recognizes the rights of global citizens can take shape – whatever that precise shape might be.

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 the 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.

[1] (Kennedy 2009)

[2] (Verbeek 2011) also (Wendt, 1992).

[3] (Kelsen, 1949)

[4] (Koskenniemi, 2006). also (Pauwelyn, 2003) and (Andenas and Bjorge 2015)

[5] (Hart, 1994). also (Payandeh, 2011), (Liste 2011).(Posner, 2009) and (Mansell and Openshaw, 2013)

[6] (Alvarez, 2005). also (Vagts 2001).

[7] (Stiglitz 2003)

[8] (Tsagourias 2007) : also Walker

[9] (Joyner 2010)

[10] (UN Doc)

[11] (Hurd 2007)

[12] (UN Doc 1946-2000):

[13] (UN Doc 1945)

[14](UN Doc 1945)

[15] (ODS 1993-2012): A/2919

[16](Witschel 2012) and (Simma, Mosler, et al. 2002)

[17] (UN Doc 1965) ; also (UN Docs 1946-2000): A/5974.

[18] (UN Doc 1966-1969)

[19] (UN Doc 1967)

[20] (UN Doc 1945)

[21] (UN Doc 1993) also (UN Doc 1996)

[22] (Green, 2010)

[23] (UN Doc 1996).

[24] (Lindblom 2006) also (Weeramantry 1996)

[25](UN Doc).

[26] (UN Doc 2014).

[27] (Sharei 2014)

[28] (UN Doc 2013)

[29] (Ackerman 2000). also (Baratta, 2004):(Perez 1996): 399-403.

[30] (Forum of Federations 2014).

[31] (Weiler,1991)

[32](Schutze 2014) (Maas, 2007)

[34] (Zayas 2013) (UN Doc 1946-2015)

[35] Ibid.

3. Motivation

Assessment Criteria

Upholding the San Francisco Promise: The Roadmap for a Constitutionalised United Nations

Core Values

With the title of the solution and focus on Constitutionalisation of the United Nations. It seems the core values for all the global citizens through the promotion and protection of their fundamental rights would be the ultimate objective and so is the core of this solution.

The 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. However, there is no enforcements of these rights and there is no international human rights court.

The mission of the constitutionalisation of the UN would be to in fact turn these HR declarations and the associated new ones that have been defined or yet not defined (such as the right to clean environment and climate) into binding and enforceable laws. Ultimately constitutionalisation, in the global context, involves shifting from sovereignty of states only to global citizens as well, granting global rights to global citizens.

Decision-Making Capacity

The San Francisco promise and the legislative history of Art. 109 (3) was ultimately about the limitation and elimination of the veto and democratisation of the UN. Based on a democratic UN, there will not be any possibility of a P5 or any one nation's veto. The international law will be based on some sort of majority (or qualified) decision-making with no consensus rule that typically bugs down the treaty process and no possibility of one state, such as the US case in Paris Accords, just walking out and shouldering their commitments.

Effectiveness

The UN System, with its associated organs and agencies, is already the authority on dealing with multitude of global challenges. Agencies, such as UNEP, WHO, UNDP, UNHCR, ITU, are by and large sophisticated, what they may be lacking in effectiveness, is that these organs cannot mandate binding regulations or adopt global laws. With the constitutionalised UN and some of the most fundamental rights being the political and representation rights, the process solution will most likely create some sort of world parliament or assembly as part of the constitutional process. This would give the current and future UN agencies and organs, more effective resources, enforcement, and therefore governance in their related fields.

Resources and financing

In a constitutionalised UN with an associated parliament or assembly, an EU type of member state financing can be devised. The transformed UN can never again depend on one or two, member states as large contributors.

Trust and Insight

The proposed process leading to a constitutionalised UN would provide for maximum transparency exercised similar to the good national models. With representation of global citizens, separation of powers, rule of law and judicial independence, and due process of being cardinal in a constitutionalised governance. The trust and insight into governance should be at its peak.

Flexibility

The San Francisco promise and Article 109 of the Charter are premised on the fact that periodic reviews are needed and based on experiences gained and the current challenges faced to fine tune the governance model. Article 109 (3) and removal of the veto, and the fear of its use, would facilitate that mutation and adaptation process.

Protection Against the Abuse of Power

A revised constitutional charter would most likely and gradually have all the features of good governance to prevent concentration and abuse of power. For example, legal review processes, court systems with universal jurisdiction (whether ICJ, ICC, or new courts), always designed with separation of powers and judicial independence.

Accountability

A transformed and democratic UN, the main officers would have the power, as well as the associated responsibility and accountability, similar to the domestic. No more political appointments but merit based elections of the Secretary General and of the executive officers of the UN. This could be the first step, eventually the UN parliament or assembly can elect the main officers and in case of non-performance dispose of them. In addition judicial review can also hold officers accountable.

Miscellaneous notes on the GCF proposal submitted

A caveat on the proposed process solution, what if a super power P5 decides not to join the transformed UN?

Since meeting global challenges requires global cooperation, what if, in the process of the constitutionalisation of the UN a P5 decides to leave the UN? Based on our researchers' analysis, this scenario is unlikely, and if it occurs will not last long. For the sake of limited word count, this issue is examined here.

As to the P5, France, Russia, and the UK have a questionable status as the top five super states in terms of population or size of their economy. With the P5's overall poor performance in keeping the world free of armed conflicts during the past 70 years, those states would more likely follow the majority decision at the review conference, triggered by Article 109 (3).

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, similar to the 1920s

and 1930s US isolationism. Therefore, the US too 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 the US not being part of a UN "world community" would be very short-lived. During the 1787 Constitutional Convention, 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. Shortly thereafter, however, recognising the synergy and the moral and material power of the union, New York rejoined its ex-Confederation members in a constitutionalised United States of America. Therefore, in the event of the US not ratifying the review's proposals, and opting to stay out of a new UN, it is likely that they would similarly rejoin its fellow UN members after a short period of isolation.

Notes on citation

Again, based on limited word count allowed, the documents provided were supplied with only footnotes and not the end notes and bibliography. The end notes and the complete citation version of the documents will be gladly provided upon request.

Table 1**The San Francisco Rebellion**

Member States support/opposition to the Security Council, and
Distribution of States as Independent or Under Influence of the Permanent Members

UNCIO, 11 February to 24 October 1945

State	P5 Dependency Status at UNCIO	Under Influence Category	Support for Security Council* <i>Dumbarton Oaks Proposal</i>
Argentina	I	–	N
Australia	I	–	N
Belarus	U	M, P	Y
Belgium	U	M, EX	N
Bolivia	I	–	N
Brazil	I	M	N
Canada	I	–	N
Chile	I	–	N
Republic of China	P5	–	Y
Colombia	I	–	N
Costa Rica	I	–	N
Cuba	I	M	N
Czechoslovakia	U	M, P	Y
Denmark	U	M, EX	N
Dominican Republic	I	–	Y
Ecuador	U	M	N
Egypt	U	M, P	N
El Salvador	I	–	N
Ethiopia	U	M, EX	N
France	P5	–	Y**
Greece	U	M, EX	N
Guatemala	I	–	N
Haiti	U	M, P	Y
Honduras	I	–	N
India	U	M, C	N
Iran	U	M, P	N
Iraq	U	M, P	Y
Lebanon	U	M, C	N
Liberia	U	M, P	Y
Luxembourg	U	M, EX	Y
Mexico	I	–	N

Netherlands	U	M, EX	N
New Zealand	I	–	N
Nicaragua	U	M, P	-
Norway	U	M, EX	N
Panama	U	M, P	N
Paraguay	I	–	N
Peru	U	M	N
Philippines	U	M, C	N
Poland	U	M, P	–
Saudi Arabia	U	M, P	Y
South Africa	U	C	Y
Syria	U	M, C	N
Turkey	I	–	N
Ukraine	U	M, P	Y
USSR	P5	–	Y
United Kingdom	P5	–	Y
United States	P5	–	Y
Uruguay	I	–	N
Venezuela	I	–	N
Yugoslavia	U	M	Y
Figures:			
33 No's / 50 states* = 66% against SC structure			
33 No's / 45 states (Excluding P-5) = 73% against SC structure			

* The Security Council structure, competency, and voting procedure, including veto, was what was drafted at Dumbarton Oaks and Yalta, and despite the opposition, was adopted and essentially remained unchanged by the end of the Conference.

* *Changed stance: France at the beginning of the Conference had opposed the SC structure

Criteria:

Member states partial or whole opposition and negative support for the SC determined by: (i.) submitting formal request to amendments the SC section of Dumbarton Oaks; (ii.) Recorded preliminary or committee meetings that they spoke against, or requested revisions.

Index:

Y = Yes, in favor of the proposed Security as was proposed by the P5 at the Conference.

N = No, against proposed SC; requesting changes to the voting procedure, its structure, composition, or competency.

I= Independent

U= Under Influence

C = Colonial

M = Military: significant P5 military presence (friendly or otherwise)

P = Puppet regime, or significant P5 political and economic influence

EX = Government in Exile during the War

50* = (State number excludes Poland due to missing participation from Conference)

Sources: Perhaps pioneering the legitimacy angle of research of the UN Charter, as to formation of the Security Council, 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 being the official 23-volume UNCIO documents published by UN-DPI. Second, the authored political history of each state immediately prior and during 1945. Available upon request.

Table 2

**Invincibility of the Permanent Five “Veto” and its Reversal
as Related to UN Charter Amendments, 1945-2012**

Permanent Five	<u>SC Expansion</u> <i>Res.1991 A(XVIII)</i> <i>October 1963</i>		<u>ECOSOC Expansion</u> <i>Res. 1991 B(XVIII)</i> <i>October 1963</i>		<u>ECOSOC Expansion II</u> <i>Res. 2847 GA</i> <i>December 1971</i>	
	At General Assembly	At Ratification	At General Assembly	At Ratification	At General Assembly	At Ratification
United Kingdom	Abstain	Y	Abstain	Y	Abstain	Y
United States	Abstain	Y	Abstain	Y	Y	Y
Soviet Union	N	Y	N	Y	Abstain	Y
France	N	Y	N	Y	N	Y
China	Y	Y	Abstain	Y	Did not participate	Y

In the history of the UN, there have only been three amendments. (There was a fourth which was a technical correction to a prior amendment). Of these three, all were opposed by one or all of the P5. However, this two-step process of adoption then subsequent ratification, related to Charter amendments, with the time window of approximately two years in between, has demonstrated remarkable reversal of P5 voting behavior.

Perhaps because of the domestic and international political liability, all the P5 in these cases, have demonstrated unexpected conformity to the two-thirds majority wish at the General Assembly.