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.\textsuperscript{602}

At the end of the chapter, a concluding abstract of the thesis is presented.

\subsection*{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).\textsuperscript{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;\textsuperscript{604} and the recommendations of the 2005 World Summit, in which the world’s

\begin{flushleft}
\textsuperscript{602} For UNCIO references, see Chapter 5, especially section 5.5.
\textsuperscript{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 10\textsuperscript{th} anniversary of the UN, in 1955, and at the 10\textsuperscript{th} session of the GA (when Article 109(3)) was invoked are covered in Part II of the thesis, particularly Chapters 5 and 7.
\textsuperscript{604} (High-level Panel on Global Sustainability 2012).
\end{flushleft}
leaders called for the “early reform” of the Council. Will these initiatives lead to any concrete results?\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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:

\begin{quote}
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.
\end{quote}

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.

\textsuperscript{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.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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, \textit{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 \textit{Daily News}: http://www.dailynewsegypt.com/2014/09/19/shourky-attend-un-meetings-nuclear-weapons-eradication-right-veto/. Both \textit{accessed 2 November 2014}.

\textsuperscript{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. 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.

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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).\(^\text{611}\)

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.\(^\text{612}\)

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](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 any 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

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”.  

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.

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.

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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. 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”.

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.

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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](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.\footnote{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.  

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.

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

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623 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).

624 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.

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.


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”.

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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, 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.

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

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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:

[This 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.]

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_Competence_des_tribunaux_de_Danzig_Avis_consultatif.pdf . The PCIJ opinion further added that (ibid: 17-18):

[The 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. 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”. 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.

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”.

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. 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.

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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.
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
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 (wittner 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

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\(^{638}\) 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).

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.


645 Granted that any type of concrete attempt to parliamentalize 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.\textsuperscript{646}

\textit{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.\textsuperscript{647}

The Charter, on the other hand, in Article 94, provides a possible means of enforcing ICJ decisions through Council actions:\textsuperscript{648}

1. \textit{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. \textit{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

\textsuperscript{646} (Statute of International Court of Justice 1945): Art. 59.

\textsuperscript{647} For an expanded view of Article 59, with ICJ decisions in practice affecting third states, see (Brown, Article 59 2012): 1416-1446.

\textsuperscript{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-
scale war crimes, and since it enjoys only limited jurisdiction, this has meant very few cases have so far been tried.\footnote{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: \url{http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx}; and: \url{http://www.iccnow.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: \url{http://www.theguardian.com/world/2014/nov/06/israel-raid-gaza-flotilla-turkey-icc}. All accessed 29 November 2014.} (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.\footnote{(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.} 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.
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.®® 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.

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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. The other material component needed in the global legal order is judicial review. 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.

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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](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/](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](http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx) and [http://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions](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.\textsuperscript{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”.

\textsuperscript{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

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 Simmons’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:

> 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 law).

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668 See: [http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx](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](http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx); and [http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx](http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx).

law). 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” 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 minimal—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:

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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](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,

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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 parliamentarian 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.”

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.”

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.

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 (Krich 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.\textsuperscript{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.\textsuperscript{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.\footnote{The legislative history is set out in Chapters 4 and 5.}

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.\footnote{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.} 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.\footnote{For the list of states forming a bloc under Australia’s leadership who subsequently allowed the adoption of the formula, while registering their protest vote 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. 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.

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](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](http://research.un.org/en/docs/sc/quick). Both accessed 29 January 2015.


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. 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.

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/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.

687 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.

688 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.

689 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. 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.

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.”

“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.


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.\footnote{For an account of the historical political sensitivity of the P5 to the majority of states’ wishes on Charter decisions, see Section 9.4.}

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.

\textbf{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 \textit{advisory opinion}.\footnote{(Statute of International Court of Justice 1945): Chapter IV.} Charter Article 96 has two paragraphs.\footnote{(Charter of the United Nations 1945-2015): Article 96.} 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.\footnote{For the latest revision (2010) of the authorised list of entities that can request the Court’s advisory opinions, see: \url{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.  

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”.  

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”.  

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

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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].

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.\textsuperscript{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”.\textsuperscript{702}

\footnotesize{\textsuperscript{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: \textit{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.}

\footnotesize{\textsuperscript{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.\textsuperscript{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 (\textit{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.\textsuperscript{704}

\textsuperscript{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.

\textsuperscript{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”.

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

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 form 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.

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

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\( ^{706} \) The exact advisory question submitted by the WHO was:

\[
\text{In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?}
\]

(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:

\[
[T]he request for an advisory opinion submitted by the WHO did not relate to a question arising 'within the scope of [their] activities' of that organization.
\]


\( ^{707} \) 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

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.\textsuperscript{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.\textsuperscript{715}

\textsuperscript{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.

\textsuperscript{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;\(^7\) 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.\(^7\) 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...
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

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.\textsuperscript{720}

\textit{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.\textsuperscript{721}

\textit{Third}, the adoption of the proposed resolution should be based on a simple \textit{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.

\textit{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

\textsuperscript{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.

\textsuperscript{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 -
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{727}

\textsuperscript{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.

\textsuperscript{726} (Sharei, Creation of a Global Parliament and the Fear of Veto 2014): 10-12.

\textsuperscript{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

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:
- 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)
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 proposal\(^\text{732}\) 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

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\(^{732}\) See n 608 above.
expand the Council membership to 24 states? 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? 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? 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.

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.

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733 See n 605 above.
734 See n 606 above.
735 (McDonald and Stewart 2010): 38-39.
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.\(^\text{737}\) 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.\(^\text{738}\) Human rights, since the inception of the UN in San Francisco,
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. 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.

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.

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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

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.\textsuperscript{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”.\textsuperscript{746} Although it is difficult to link a specific conference or treaty with the Communities’ transformation into the European Union and its constitutionalisation,\textsuperscript{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.\textsuperscript{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”,\textsuperscript{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

\textsuperscript{745} For extensive coverage of the US’s constitutional evolution, see Bruce Ackerman’s two-volume series, \textit{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.

\textsuperscript{746} (Castiglione 2004): 86.

\textsuperscript{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 \textit{Van Gend en Loos} case, as it is on transformational treaties.

\textsuperscript{748} (Schutze 2014): 35-38. See also (Maas, Creating European Citizens 2007): 45-46.

\textsuperscript{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”.

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.

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

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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 \emph{two-thirds} of virtually all the states in the world.\(^{756}\)

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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 \emph{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.\textsuperscript{757}

As to the other two permanents 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

\textsuperscript{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: \url{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{758} (Chomsky 2004)

\textsuperscript{759} See n 745 above. See also: \url{http://www.archives.gov/education/lessons/constitution-day/ratification.html}, accessed 16 February 2015.
9.6. Conclusion

Governance is what governments do. 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 law, 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.

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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”. His prediction: it will happen within one to two hundred years.

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. 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 order 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.

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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:

In the Parliament of man, the Federation of the World.

Till the war-drums throbbed no longer, and the battle-flags were furled

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.

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Knowing that the UN being delivered was “no enchanted palace”, 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.

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 hegemons becoming the single empire. 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.

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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 “world’s government”, and the “Goliath”, see, (Mandelbaum 2006), esp. xvi.