

UNITED NATIONS SECURITY COUNCIL REFORM: CAN ARTICLE 109 OF THE UN CHARTER COME TO THE RESCUE?

*Presented to: the Council Members and the Board of Directors of:
Democratic World Federalists,
World Alliance to Transform the UN (WATUN),
and the World Federalist Movement*

*By: Shahriar Mahmoud Sharei
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Introduction

“In this age of guided missiles, constitutional amendment is pretty cumbersome artillery.”¹; This quotation is the opening statement of a legal journal article in 1958 regarding the UN Charter, three years after a Conference on UN Charter Review was scheduled. The review was put in the 1955 agenda of the General Assembly, as promised by the founders of the United Nations in San Francisco,² waiting to transform the UN—and particularly the Security Council (SC)—into a more democratic world body. After remaining in the General Assembly (GA) agenda for twelve consecutive years, the subject mysteriously disappeared from the GA tasks. Is this disappearance permanent? Can Article 109(3) be revived? Can it come to the rescue, breaking the current Security Council reform stalemate?

In this article, the desirability for Security Council reform and current status of its latest proposals will be examined. Then, Article 108 of the Charter will be reviewed, with its

1. Egon Schwelb, “Charter Review and Charter Amendment: Recent Developments,” *International Comparative Law Quarterly* 7 (1958): 303.

2. “Articles 108 and 109” (United Nations Treaty Collection). http://untreaty.un.org/cod/repertory/art108-109/english/rep_supp1_vol2-art108-109_e.pdf

requirements of two-thirds GA majority vote and SC concurrence,³ as the means for amending the UN Charter, and predictions that it will likely fail in achieving the 2004 UN High-Level Panel recommendations on the enlargement of the SC⁴ as well as any other substantive attempts at reforming the Security Council.

Next, the seemingly more cumbersome alternative of Article 109 will be explored, calling for a General Conference to review the Charter (Charter Review Conference). I will argue that since Article 109 Paragraph (3) facilitated the convocation of the Conference through a special simple majority provisions in its trigger year of 1955 but never completed its mission nor was officially tabled; therefore, it can be revived. I will argue that the best route to achieve this revival is through the General Assembly with the backing of International Court of Justice (ICJ), an Advisory Opinion of Article 109(3), covering the 1955 events and validity of the General Assembly (GA) and Security Council (SC) resolutions for setting a date and place for convening the Conference. Based on previous UN Amendments voting history of the SC Permanent Five (P5) veto-privileged members of the SC, I will argue that despite some initial opposition from P5, once the Conference convenes, any UN reforms or Security Council reforms resolved and passed by the two-thirds majority of member States at the Review Conference will also pass the Security Council with a likelihood of no veto being cast.

3. "Article 108" in *Charter of the United Nations* (June 26, 1945). <http://www.un.org/en/documents/charter/chapter18.shtml>

4. Yehuda Blum, "Proposals for UN Security Council Reform," *The American Journal of International Law* 99 (2005): 632–649.

UN Security Council Reform: Is It Needed?

In the early 1940s in the midst of World War II, the framers of the UN Charter had to abandon the ideals of a world government or a world parliament⁵ to build an international organization more limited in function and less democratic in representation of its world constituents. The new international organization, later called the United Nations, was designed to maintain world peace and promote international economic and social cooperation. It was put together in relatively short time—mostly in the last two years of World War II—and primarily catering and having the consent of the main five victors of the war: the United States, United Kingdom, Soviet Union, China, and France. The creation of the Security Council, the concept of veto, and allocation of the five permanent seats (P5) for these countries at the SC was driven by those five victors.

Regardless of the type of UN reforms and particularly Security Council reforms, the need for the change after sixty-five years is essential for the following four main reasons:

1. *A more democratic Security Council* in terms of representation of regions and peoples of the world.
2. *The promise of 1945, at the time of signing of the UN Charter in San Francisco.*

Many smaller powers in San Francisco were opposed to the veto status for the permanent five members at the Security Council. In persuading these countries to sign, the U.S. representatives—the main driving force in framing the UN—offered the compromise of a facilitated Charter review General Conference, as

5. Bruno Simma, ed, *Charter of the United Nations: A Commentary*. (Oxford: Oxford University Press, 1994):22.

Article 109(3),⁶ where a facilitated mechanism for significant revisions to the Charter and the Security Council, at a set date after ten years were offered.⁷

3. *Accommodate changes in the international geopolitical landscape.* Japan, Germany, and emerging countries such as India and Brazil—after considerable economic and population changes—are certainly overtaking the United Kingdom, France, and even Russia as super powers, with India being a nuclear weapons state yet not part of P5.⁸
4. *Security Council as an unplanned world legislator.* This less understood power of the SC needs further explanation.

In recent years, a potent capability in Security Council has been revealed: acting as a world parliament, which are quasi-legislative powers. Since the end of the Cold War and breakup of the Soviet Union, there is less use of vetoes and more cooperation between the P5 in carrying decisions in the Security Council.⁹ This may have led to a more effective SC in its functions; however, it has also resulted in a role that has gone beyond the intention of leaders and lawyers who framed the Security Council.

There are at least two such quasi-legislative Security Council resolutions issued in the last decade. First, the adoption of Resolution 1373 in September 2001, immediately after the 9/11 terrorist attack on the United States; This Resolution, deciding for all the countries in the world, “decides that all States shall”, further instruction them on how to handle individual persons and citizens of their countries to “prohibit their nationals or any persons and entities

6. “Article 109(3)”, *Charter of the United Nations* (June 26, 1945). <http://www.un.org/en/documents/charter/chapter18.shtml>

7. Shirley Scott. “Australia and New Zealand Law and History E-Journal, The Failure of the UN to Hold a Charter Review Conference in the 1950s: The Future in the Past?” (2005) http://www.anzlhsejournal.auckland.ac.nz/pdfs_2005/Scott.pdf

8. Blum, “Proposals,” 638–639.

9. Simma, *A Commentary*, 22.

within their territories” and orders them to modify their domestic penal codes and domestic laws that “such terrorist acts are established as serious criminal offences in domestic laws and regulations”.¹⁰

The second such mandate is Security Council Resolution 1540, adopted in April 2004, which decided with binding effect that all member States:

Shall adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer, or use nuclear, chemical, or biological weapons or their means of delivery in particular for terrorist purposes.¹¹

Both these resolutions, encompass directly the individual citizens, in addition to the sovereign states and have a ripple effect on the domestic laws of all UN member states. In fact, both resolutions imply their automatic invocation or transformation into national laws—thus for all countries outside of the Security Council, legislation without representation.

Hans Blix, former Swedish Foreign Minister and former head of International Atomic Energy Agency (IAEA), headed the independent Commission on Weapons of Mass Destruction. On its final Commission report in 2006, the Commission criticizes the Security Council for its broad powers:

Indeed to “legislate” for the world: Member states are obliged under Article 25 of the Charter to accept and carry out the decisions of the Security Council. There is no right of reservation or opting out. . . . This broad authority also raises some questions. It makes the Council legislator, judge, and enforcer.¹²

UN Security Reform Attempts and Status

10. “SC Resolution 1373,” United Nations Press Release (September 23, 2001). <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.

11. Hans Blix, *Weapons of Mass Destruction Commission*. Final Report, “Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms.” (Stockholm: EO Grafisca Stockholm, 2006), 182.

12. Blix, *Weapons of Mass Destruction*, 182.

The United Nations has long history of attempts for change in the representation, composition, and voting procedures of the Security Council. These attempts for Security Council reforms date back to the 1945 San Francisco conference, the time of finalization of the Charter, where countries such as Australia were adamantly against the veto power.¹³

The compromise and hope for reform in San Francisco, was concentrated on the General Conference for review of the Charter and as part of Article 109. It was scheduled to occur in 1955. That hope was kept real for twelve years, from 1955 to 1967, where it was part of the agenda of the General Assembly. In 1969, after the hopes for a Charter Review Conference had faded, per Columbia's initiative, the Ad Hoc Committee on the Charter of the UN was established.¹⁴ After a few years of work, in 1995, the Committee's name was changed to Special Committee on the Charter of the UN and on the Strengthening of the Role of the Organization (Charter Committee), with its membership expanded to include all member states of the UN. It became an Open-Ended Working Group.¹⁵

In 1963, the one and only amendment related to SC was passed for expansion of the Security Council by four members, from eleven to fifteen, with no new permanent or veto enabled members.¹⁶ In the 1990s, there was renewed interest; both Japan and Germany requested to become permanent members. The latest efforts for UN and Security Council reforms were part of *High-Level Panel on Threats, Challenges, and Change*, with a section on SC enlargement. Secretary General Kofi Annan circulated the Panel Report in 2004. Under this plan, there were

13. Schwelb, "Charter Review," 310.

14. Simma, *A Commentary*, 1185.

15. Bruno Simma and others. *The Charter of the United Nations: A Commentary*. 2nd ed. Vol. II. (Oxford University Press, 2002).

16. "Introduction", *The Charter of the United Nations* (June 26, 1945).

two proposals, both seeking to increase the number of members of the SC based on geographic regions or permanent seats. However, neither proposal took away veto rights from the existing P5 or granted new veto rights to any new member.¹⁷ As of this date no further progress has been made on these proposals.

The UN Charter, throughout its sixty-five-year history, has amended the structure of the powerful Security Council only once, when it increased its non-permanent members by four. Just increasing the size of the non-permanent members, without eliminating or at least diluting the veto privileges of the P5, does not indicate qualitative improvement; this only amendment to the council going to force in 1965, is considered low impact.¹⁸

Given that the 2004 UN High-level Panel recommendations for SC reforms have not passed after six years, I will examine the two main avenues in implementing UN Charter amendments as the means to achieving SC Reform.

UN Security Council Reform by Means of Article 108

The UN founders provided for two avenues for Charter revisions under Chapter XVIII: Article 108 Amendments procedures and Article 109, through a General Conference to review the present Charter. Article 108 states:

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.¹⁹

17. Blum, "Proposals," 632–649.

18. Pat Orvis. "United Nations Reform and Article 109," *Foreign Policy Association* (January 2004): 3.

19. "Article 108," *Charter of the United Nations* (June 26, 1945), <http://www.un.org/en/documents/charter/chapter18.shtml>

Article 108 has the constitutionally reasonable criteria of two-thirds of the UN member states voting for and ratifying a proposed amendment. In addition, “all the permanent members of the Security Council” must also ratify before the amendment goes into force. This unanimous concurrence of the P5 is the biggest challenge to adopting any amendment to the UN Charter, particularly if the interest of a P5 member is threatened or the P5 member’s privileged veto rights are diluted or revoked.

These rigid requirements have made any substantive amendment almost impossible. In fact, throughout the United Nation’s sixty-five-year history, the Charter has been amended only three times and only once related to the Security Council: In 1963, an amendment to Article 23, going into force in 1965, increased its numbers from eleven to fifteen but without any permanent member additions or modifications to the veto rights. There were two other amendments: one concerning membership enlargement in the Economic and Social Council (ECOSOC) and the second, in 1965, actually correcting Article 109(1) as to the proportionality of the required SC votes in passage of an amendment using Article 109, because of SC enlargement in the earlier 1963 amendment.

As to the fate of the current 2004 UN High-Level Panel recommendations for SC enlargement, the United States has linked the progress in SC reforms to an overall package of United Nations reforms.²⁰ One P5 member can kill a Charter amendment by use of veto; therefore, even a threat of use of a veto by one or more P5 member is often enough to discourage an amendment by its GA supporters, stopped from being taken up for a General Assembly vote, and never come to actual vote in the Security Council. Therefore, after six years and under the

20. Blum, “Proposals,” 647.

option of Article 108, the current SC High-level Panel recommendations on SC Reforms, does not seem to have a chance for passage.

UN Security Council Reform by Means of Article 109: Charter Review Conference

Article 109 and its History

Article 109 is the only article under Chapter XVIII and the second path to making changes and amendments to the Charter. Text of the article follows:

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference.
2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.
3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.²¹

The first paragraph, of the Article 109, although, calling for a “General Conference of the Members of the United Nations for the purpose of reviewing the present Charter” and its second paragraph of requiring ratification “of two thirds of the Members of the United Nations including all the permanent members of the Security Council” are in effect the same requirements as Article 108’s, assumed in a “conference” outside of the usual GA meetings and for the purpose

²¹ “Article 109,” *Charter of the United Nations*. <http://www.un.org/en/documents/charter/chapter18.shtml>

of a comprehensive “review” of the Charter for presumably major revisions to the Charter rather than just a few amendments. Since the revisions to the Charter coming to force under both Article 108 and Article 109 are the same, the significant facility in Article 109 is its third paragraph. The founders of the UN Charter and all the countries signing it expected a General Conference (Review Conference) to be held—if it was not already held earlier—at “the tenth annual session of the General Assembly.” Further, “the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.” In other words, the intention was not only to hold such a review conference but also the procedures to convene it were made significantly easier by requiring a simple majority of both General Assembly and the Security Council to concur (no use of veto), and it was to be placed automatically on “the agenda of that session of the General Assembly.”

Per UN historians, in 1945, the privileged position of the P5 to veto Charter amendments and revisions in Article 108 and in general under Chapter XVIII met with even stronger opposition than the P5’s right to veto in the Article 27(3) related to the Security Council resolutions. In effect, the right of veto in Articles 108 and 109 means that a single P5 country could derail any attempts for future changes to the UN system.²²

The compromise of 1945 in San Francisco was a UN Charter review in a maximum of ten years by means of Article 109(3), the General Conference to “review” and possibly revise the Charter.

In 1955 and after ten years, the convocation of the General Conference was put in the GA agenda list by the Secretary General and the General Assembly Resolution 992 (X). On December 16, 1955, with concurrence of the Security Council (nine in favor, one against, and

22. Simma, *A Commentary*, 1353.

one abstention), it was decided that a Preparatory Committee be established in consultation with the Secretary General to set a time and place for the General Conference and to report to the Twelfth Session of General Assembly two years later.²³

The Preparatory Committee was told that “time” implies “the consideration of propitious and auspicious conditions,” further emphasizing that the Committee is free to report even two years later that it is still not the appropriate time to hold the Review Conference.²⁴

Starting with 1957 and for the next several years, the Preparatory Committee was effectively inactive and did not report a set time and place for the Charter Review Conference. In 1967, after twelve years from the 1955 Article 109(3) invocation, without any official or procedural action to counteract the GA and SC resolutions of 1955, the Preparatory Committee and its task in the General Assembly agenda disappeared.

Per a group of UN legal experts and scholars:

This was a classic case of a UN ‘burial.’ On the one hand the proponents of a Charter revision obtained a decision in principle on the calling of the conference; on the other hand, the actual convocation was postponed *sine die*, as proved by future session of the Committee which in spite of repeated renewals of its mandate produced no result”.²⁵

Can Article 109(3) Be Revived?

Is Article 109 (3) obsolete fifty-five years after the 1955 events and thirty-three years after its last episode in 1967? Can a Review Conference be held under its auspices as a continuation of its initiation in 1955?

23. *UN Repertory*. http://untreaty.un.org/cod/repertory/art108-109/english/rep_supp1_vol2-art108-109_e.pdf

24. Schwelb, “Charter Review,” 310–311.

25. Simma, *A Commentary*, 1369.

Based on the fact that General Assembly did not debate, or put to vote the cancellation of the Review Conference, its desirability and intention is explicit in GA Resolution 992 (X),²⁶ and Security Council Resolution 110 (S/3504)²⁷ concurrence, those resolutions were never overturned in any subsequent resolutions and, without any time expiration, are still valid.

Furthermore, the 1965 amendment to Article 109, going into force in 1968, modified its Paragraph (1) to account for the earlier amendment that enlarged the SC membership and, therefore, what constitutes a two-thirds majority; however, it did not delete Paragraph (3) therefore, not rendering it irrelevant or obsolete. In fact, in 1965, at the time of signing of the Amendment to Article 109, the Preparatory Committee to prepare and set the “time” for the Review Conference, under Paragraph (3) was still active.

Given the fact that Review Conference initiation, per special and facilitated provisions of Article 109 (3) in 1955, is not dead, how can it be invoked again?

The possible options and sources that can re-initiate and continue the 1955 General Assembly agenda item based on GA Resolution 992 (X) and SC Resolution 110, are the five options below:

1. *International Court of Justice (ICJ) - a member State versus UN as an International Organization:* A State can claim that its Charter rights granted for a chance for a Review Conference in 1955 has been violated. Although, this case is possible and certainly will stir interest and global publicity, a positive outcome is unlikely, since it is generally believed that a member State of the UN cannot have a claim against the UN as an

26. “GA Resolution 992(X),” *Charter of the United Nations*. <http://www.un.org/documents/ga/res/10/ares10.htm>

27 “SC Resolution 110.” Official Documents System of the United Nations. <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/107/66/IMG/NR010766.pdf?OpenElement>

international organization.²⁸ However, a State as a member of the General Assembly can make a proposal for a Review Conference to the General Assembly (covered in five below).

2. *International Court of Justice (ICJ) - For Advisory Opinion:* Excluding the unlikely case of (1) above, another international organization, and probably the UN itself thru the Secretary General or General Assembly can ask for an Advisory Opinion of the Court. This is highly desirable and the World Court can have an opportunity to rule and give its legal *Advisory Opinion* on such a vital issue on UN Charter adaptability, its dynamics, and its effects in world governance.

3. *Security Council:* “According to Rules 13(c)(d)(e) and (g) of the Rules of Procedure of the GA, each member, the GA itself, and each main organ (including the SG) is competent to initiate a proposal for review in the GA.”²⁹ However, considering that the permanent members of the Security Council probably will lose some, or all of their privileged status, under any substantive SC reform, therefore, it will be unlikely that the Security Council will initiate a Review Conference.

4. *Secretary General:* As per the GA Rules of Procedure, mentioned above, the Secretary General can initiate Review Conference himself, according to Rules 13(c)(d)(e) and (g) of the Rules of Procedure of the GA, as the Secretariat is undoubtedly a main UN organ.³⁰ Thus by referring to the GA Resolution 992 (X), putting the Review Conference on GA’s agenda.

28 Philippe Sands and Pierre Klein. *Bowett's Law of International Institutions*, 6th ed. (London: Sweet & Maxwell, Thomson Reuters, 2009):360.

29 Simma, *A Commentary*, 1366.

30. *Ibid.*

5. *General Assembly:* The most likely option for revival of the Article 109 (3) is through the GA, by one or more states putting it on the agenda for a particular GA session. All they have to do is refer to GA Resolution 992 (X) and ask for its status and invocation of the pending Review Conference. Considering the limited independence that the Secretary Generals of the UN have exercised in the past, and the political nature of the SG position, probably this option through the General Assembly is the quickest and the most feasible option for the revival of the Article 109(3). Further, in my view this option should only be brought up at the GA floor after achieving a critical mass of at least 20 countries representing different regions of the world which are committed to pushing and realizing *the San Francisco promise* of 1945.

The question might arise: Why bother reviving Article 109 (3) and convening a Review Conference when still any permanent member of the SC can veto and put an end to the whole effort? Assuming the desirability for UN reform and Security Council reform, the answer lies in the difficult take-off and initiation stage of the UN amendment and reform process. Once that stage is passed and an amendment is brought to vote, historically, it seems the P5 are more prone to cooperate with the majority wishes. If a Review Conference can be convened with just a simple majority of the states in favor, and not encumbered by the two-thirds majority of the GA and SC, it will be easier through the process of democratic exchange between nations at the Review Conference to promote the simple majority wish, who have the consensus that the UN needs to be reformed, to achieve the two-thirds majority required for the ratification of the proposed Charter revisions. As to the important veto threat of the P5, past voting records of the Permanent Five on previous amendments has shown that political weight has forced the P5 to

finally agree with amendments that they had refused to support and previously opposed in the General Assembly; however, once the amendments came to the Security Council floor, they voted in favor.³¹

Conclusion

As witnessed with several other major treaties, it seems that review conference is the logical, common way of changing the constitution of an international organization or a treaty to adapt to the changing realities and variables of the times, thereby making them more effective. The United Nations Treaty is no exception; in fact, Article 109 was the promise of 1945 to that effect, which the UN founders in San Francisco had made, to those opposed to the veto privilege of the Permanent Five at the Security Council. Article 109, particularly its Paragraph (3), was the means to fulfill the expectations of many of the Charter's signers. It provided a facilitated procedure within the Charter to convene a General Conference for review of the Charter of the United Nations, to revise its structure, and particularly reform the Security Council within ten years from its founding.³²

With the changes in the global economical and political structure in the past sixty-five years and a Security Council that is more active in the global war and peace—and particularly its recently revealed potential for being a world legislator—Security Council reform is needed more than ever.

Within the current Charter, utilizing Article 108 or its very similar provisions in Article 109(1) and (2), introducing any substantial and qualitative UN or Security Council reform is unlikely. With the Permanent Five's pattern of behavior on previous UN reform proposals—that is, typically not lending support—and by using delay tactics, reform proposals

31. Simma, *A Commentary*, 1348.

32. *Ibid.*, at 1184.

simply fade away. The events of 1955 to 1967 and delaying to determine a time and place for the Charter Review Conference, even with the 1955 backing of both General Assembly and Security Council, is witness to this violation of the intent of the UN founding fathers to an anticipated and facilitated Charter review and the UN reform.

The 1955 GA Resolution 992(X) and the Security Council Resolution 110 (S/3504) are still valid. The General Assembly, through the coordination of Secretary General, should set the time and place for the General Conference to review the Charter. International Court of Justice can be consulted, and a favorable Advisory Opinion will further justify the legality and validity of the 1955 GA and SC resolve and concurrence to hold the Conference.

Once the difficult phase of authorizing and convening a Charter Review Conference is taken, the stage will be set for the interaction of ideas toward revising and enhancing the United Nations and the Security Council. After reaching a two-thirds majority agreement on the outcome of the Conference, surely the global political weight will prevent any single veto from derailing the formation of a new generation United Nations.

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