

ARTICLES 108 AND 109

TEXT OF ARTICLE 108

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.

TEXT OF ARTICLE 109*

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any 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.

*After 12 June 1968. For the background of the amendment, see *Repertory, Supplement No. 3*, vol. IV, under Articles 108 and 109, paras. 15-18 and 45-50.

INTRODUCTORY NOTE

1. In this study the general structure of the previous studies of Articles 108 and 109 is maintained. However, a discussion in the Security Council as to whether a certain resolution implied an indirect revision of the Charter, thus calling for the procedure under Article 108, is included under a new heading, "Question of the applicability of Article 108".

2. A proposal to amend the Statute of the International Court of Justice is also dealt with in this study, since according to Article 69 of the Statute of the International Court of Justice the procedure is the same in principle as for Charter amendments.

I. GENERAL SURVEY

3. During the period under review, no proposals to amend the Charter under Article 108 were made.

4. In 1968, the Security Council adopted a resolution concerning safeguards to non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons. Before the adoption of the resolution, there was considerable discussion on the question whether the draft resolution was in fact an amendment to the Charter. It was therefore a discussion of the possible applicability of Article 108 in relation to the draft resolution.

5. In 1969, the Security Council and the General Assembly adopted, respectively, a resolution concerning the participation by parties to the Statute of the International Court of Justice that were not Members of the United Nations in regard to amendments to the Statute. These resolutions were adopted following the submission by the Court of a proposal to amend certain provisions of the Statute of the Court. Consideration of the proposal itself was, however, postponed until the following session.

6. Concerning Article 109, it is to be noted that by resolution 2285(XXII) of 5 December 1967 the General Assembly decided to keep in being the Committee on arrangements for a conference for the purpose of reviewing the Charter. At its twenty-fourth session in 1969, the General Assembly decided¹ to include the item entitled "Need to consider suggestions regarding the review of the Charter of the United Nations" in the agenda of that session, but postponed its consideration to its twenty-fifth session.

¹See G A resolution 2552(XXIV).

II. ANALYTICAL SUMMARY OF PRACTICE

A. Procedure for the amendment or review of the Charter

1. QUESTION OF THE APPLICABILITY OF ARTICLE 108

Question whether a resolution of the Security Council concerning safeguards to non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons implied an indirect revision of the Charter

7. In a letter² dated 12 June 1968 addressed to the President of the Security Council, the representatives of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America requested an early meeting of the Security Council to consider the following draft resolution jointly submitted by them:

"The Security Council,

"Noting with appreciation the desire of a large number of States to subscribe to the Treaty on the Non-Proliferation of Nuclear Weapons, and thereby to undertake not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly or indirectly, not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices,

"Taking into consideration the concern of certain of these States that, in conjunction with their adherence to the Treaty on the Non-Proliferation of Nuclear Weapons, appropriate measures be undertaken to safeguard their security,

"Bearing in mind that any aggression accompanied by the use of nuclear weapons would endanger the peace and security of all States,

"1. Recognizes that aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State would create a situation in which the Security Council, and above all its nuclear-weapon State permanent members, would have to act immediately in accordance with their obligations under the United Nations Charter;

"2. Welcomes the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act or an object of a threat of aggression in which nuclear weapons are used;

"3. Reaffirms in particular the inherent right, recognized under Article 51 of the Charter, of individual and collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."³

8. Reference was also made in the letter to General Assembly resolution 2373(XXII), adopted on the same date, commending the Treaty on the Non-Proliferation of Nuclear Weapons and expressing the hope for the

widest possible adherence to the Treaty by both nuclear-weapon and non-nuclear-weapon States.

9. At the 1430th meeting of the Council, on 17 June 1968, the representatives of the USSR, the United Kingdom and the United States made identical declarations for their Governments. In those declarations, reference was made to the concern of certain States parties to the Treaty on the Non-Proliferation of Nuclear Weapons that appropriate measures be undertaken to safeguard their security. Aggression with nuclear weapons, or the threat of such aggression, against a non-nuclear-weapon State would create a qualitatively new situation in which the nuclear-weapon States which were permanent members of the United Nations Security Council would have to act immediately through the Security Council to take the measures necessary to counter such aggression or to remove the threat of aggression in accordance with the United Nations Charter, which called for taking effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. As a consequence, any State which permitted aggression accompanied by the use of nuclear weapons or which threatened such aggression had to be aware that its actions were to be countered effectively by measures to be taken in accordance with the United Nations Charter to suppress the aggression or remove the threat of aggression.

10. The three Governments affirmed their intention, as permanent members of the Security Council, to seek immediate Council action to provide assistance, in accordance with the Charter, to any non-nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons that was a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons were used. In addition, the inherent right of individual and collective self-defence in an armed attack, as recognized in Article 51 of the Charter, was underlined.

11. At the same meeting, the representative of France explained that he would abstain from voting on the draft resolution and that his abstention was based on the position that the real problem was that of the elimination of all nuclear weapons. The draft resolution, on the other hand, in no way changed the provisions of Chapter VII of the Charter. That was clear from the very contents of the draft, from the declared intention of its sponsors and from the fact that there had been no recourse to the procedure laid down in Article 108 for any amendment to the Charter.

12. At the 1431st meeting, it was stated that the resolution was an important step in applying the Charter but did not alter it.

13. At the 1433rd meeting, it was observed that the draft resolution and the three-Power declaration included new machinery of a discriminatory nature, for example, the benefit of nuclear "protection" accrued only to the signatories of the Treaty. Also, it was quite unprecedented for the Security Council to act as guarantor for any treaty. In addition, up to now the preservation and maintenance of peace had depended upon the agreement of the five permanent members. The new machinery, however, would require the agreement of only three of those members, thus upsetting the balance arrived at with such difficulty when the Security Council was established. In the view of the speaker, either of two things would have to happen. Either the members of the Security Council who were sponsoring the resolution would, in the event of a dispute, be able to secure

²S C, 23rd yr., Suppl. for April-June, 1968, pp. 216-218, S/8630.

³To become S C resolution 255(1968).

the support of the other two permanent members—and in this case it was not clear to him why this could not be done immediately, so as to forestall an abstention by France or the exclusion of China—or, alternatively, in the case that it would be impossible to obtain such support, the draft resolution would in effect amount to stripping the Security Council of its prerogative in respect of the maintenance and safeguarding of nuclear peace. There was no need to point out that the adoption of such machinery through the draft resolution was tantamount to an indirect alteration of the Charter.

14. The same representative pointed out that if it was accepted that the permanent members were the only Powers to possess nuclear weapons, it would sooner or later be necessary to take that fact to its logical conclusion. If, on the other hand, the view was adopted that the nuclear Powers were not only those which, under the Charter and in their capacity as permanent members, had assumed a special responsibility in respect of the maintenance of peace, then it would be clearly necessary to amend the Charter. If there was not to be two categories of peace, the United Nations would have to make a proper amendment to Article 23.

15. Some delegations maintained that the draft resolution and the declaration added nothing new to the Charter; one delegation observed that the basis for any action by the Security Council for the maintenance of international peace and security was the Charter of the United Nations. Any linking of security assurances to the signature of a non-proliferation treaty would be contrary to its provisions, because the Charter did not discriminate between those who might adhere to a particular treaty and those who might not. It would be inappropriate for the Security Council to welcome the partial assurances mentioned in the second operative paragraph. To encourage non-nuclear States to remain in that category could only be done by ensuring the security of all non-nuclear-weapon States in conformity with the Charter.⁴

16. At the same meeting, the draft resolution was adopted by 10 votes to none, with 5 abstentions.⁵

2. PROPOSALS SUBMITTED UNDER ARTICLE 108

Amendment to Article 22 of the Statute of the International Court of Justice

17. Pursuant to rule 13 (d) of the rules of procedure of the General Assembly, the International Court of Justice proposed the inclusion in the agenda of the twenty-fourth session of the General Assembly of an item entitled "Amendment to Article 22 of the Statute of the International Court of Justice (Seat of the Court) and consequential amendments to Articles 23 and 28".⁶ The purpose of the Court's proposal was to obtain for the International Court of Justice the latitude enjoyed by the United Nations itself, and by its other principal organs and all the specialized agencies, to be established

at whatever place, in the course of years, it may be considered that it could function most harmoniously and effectively.

18. In a draft resolution submitted together with the explanatory memorandum it was proposed that the General Assembly should decide, *inter alia*,

" . . . to adopt in accordance with Article 69 of the Statute of the International Court of Justice and Article 108 of the Charter of the United Nations, the following amendments to the Statute and to submit them for ratification by States parties to the Statute:

"(a) In Article 22, paragraph 1, the first sentence shall be replaced by the following:

"The seat of the Court shall be at The Hague or at such other place as shall at any time be approved by the General Assembly on the recommendation of the Court.";

"(b) In Article 23, the second paragraph shall be replaced by the following:

"Members of the Court are entitled to periodic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between the seat of the Court and the home of each judge.";

"(c) Article 28 shall be replaced by the following:

"The chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at the seat of the Court."

19. The Security Council was informed of the agenda item by a letter of the President of the General Assembly dated 23 September 1969,⁷ in which the attention of the Council was drawn to Article 69 of the Statute of the Court which read:

"Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of States which are parties to the present Statute but are not Members of the United Nations."

In the letter it was pointed out that since Liechtenstein, San Marino and Switzerland were parties to the Statute but not Members of the United Nations, the Council might wish to recommend provisions concerning the participation of such States in the procedure for effecting amendments to the Statute.

20. The Security Council debated the item at its 1514th meeting, on 23 October 1969. The President of the Council introduced a draft resolution. In the debate the importance of Article 108, as reflected in the draft resolution, was stressed. The draft resolution was adopted as resolution 272(1969);⁸ the recommendations it contained were adopted by the General Assembly in resolution 2520(XXIV) of 4 December 1969, as follows:

"(a) A State which is a party to the Statute of the International Court of Justice, but is not a Member of the United Nations, may participate in the General Assembly in regard to amendments to the Statute in the same manner as the Members of the United Nations;

⁷S C, 24th yr., Suppl. for Oct.-Dec. 1969, p. 86, S/9462.

⁸For texts of relevant statements, see S C, 24th yr., 1514th mtg.: President (United Kingdom), paras. 6-10; USSR, para. 14. See also *Repertoire of the Practice of the Security Council*, Suppl. 1969-1971, pp. 70 and 71.

⁴For texts of relevant statements, see S C, 23rd yr., 1430th mtg.: USSR, paras. 7-19; United Kingdom, paras. 21-30; United States, paras. 32-44; France, paras. 45-52; 1431st mtg.: Canada, paras. 2-9; Hungary, paras. 35-43; 1433rd mtg.: Algeria, paras. 2-17; Brazil, paras. 27 and 30; Ethiopia, paras. 43 and 44; China, para. 59; Pakistan, paras. 82 and 83; India, paras. 107-110.

⁵S C, 23rd yr., 1433rd mtg., para. 15. S C resolution 255(1968).

⁶G A (XXIV), Annexes, a.i. 93. Letter dated 16 May 1969 from the President of the International Court of Justice to the Secretary-General. For the explanatory memorandum attached to the proposal, see G A (XXIV), Suppl. No. 5, annex.

“(b) Amendments to the Statute of the International Court of Justice shall come into force for all States which are parties to the Statute when they have been adopted by a vote of two thirds of the States which are parties to the Statute and ratified in accordance with their respective constitutional processes by two thirds of the States which are parties to the Statute and in accordance with the provisions of Article 69 of the Statute and Article 108 of the Charter of the United Nations.”

21. The Sixth Committee took up agenda item 93 at its 1173rd meeting on 8 December 1969.⁹ Pursuant to the above-mentioned resolution, the Chairman invited the representatives of States parties to the Statute, but not Members of the United Nations (i.e. Liechtenstein, San Marino and Switzerland), to participate in the consideration of the item.¹⁰ The Chairman suggested that in view of the insufficient time to give to the item the necessary consideration, the Sixth Committee recommend that the General Assembly decide to postpone consideration of the item and request the Secretary-General to include it in the provisional agenda of the twenty-fifth session.¹¹ The Sixth Committee adopted this suggestion and at its 1821st plenary meeting, on 12 December 1969, the General Assembly decided as recommended.¹¹

3. PROPOSALS FOR THE CALLING OF A GENERAL CONFERENCE UNDER ARTICLE 109

a. *Proposals for a review of the Charter*

22. By resolution 2114(XX) of 12 December 1965 the General Assembly decided to keep in being the Committee on arrangements for a conference for the purpose of reviewing the Charter. It invited the Committee to report with recommendations to the General Assembly at its twenty-second session.¹²

23. The Committee met on 11 and 12 September 1967. In its report it indicated that there had been an exchange of views, *inter alia*, as to how the Committee could be convened. It was the understanding of the Chairman that every Member State could request the convening of the Committee and that such a request should be made to the Secretary-General who, on the basis of established procedures, would consult with the Members and would convene the Committee if it was found desirable to do so.¹³

24. The General Assembly, at its 1620th plenary meeting on 5 December 1967, adopted the draft resolution recommended by the Committee as resolution 2285 (XXII), by which it decided to keep in being the Committee on arrangements for a conference for the purpose of reviewing the Charter. One delegation, in explanation of its abstention, observed that the United Nations Charter contained all the necessary elements to make the Organization an effective instrument for maintain-

ing peace and developing co-operation among nations. The fact that the United Nations, when faced with international problems, had been powerless and unable to fulfil its task was in no way due to the content of the Charter but rather to the positions adopted by certain States. The most important task facing the Organization today was to ensure that all its Members complied with the fundamental provisions of the Charter. There was no justification for raising the question of the review of the United Nations Charter and for convening a conference for that purpose.¹⁴

25. During its twenty-fourth session, following a proposal by Colombia,¹⁵ the General Assembly decided, on 1 December 1969, to include the item entitled “Need to consider suggestions regarding the review of the Charter of the United Nations” in the agenda of that session and allocated it to the Sixth Committee.¹⁶ In the explanatory memorandum to the proposal reference had been made to Article 109, paragraph 3, of the Charter.

26. The Sixth Committee debated several draft resolutions at its 1174th and 1175th meetings.¹⁷ The opinions among delegations as to whether there should be a review of the Charter were divided. Some recommended the greatest caution in the matter. The Sixth Committee consequently adopted a draft resolution in which it recommended that the General Assembly, not having had the time to examine adequately the item, should decide to include it in the provisional agenda of its twenty-fifth session.¹⁸

27. At its 1831st plenary meeting on 12 December 1969, the General Assembly adopted resolution 2552 (XXIV) following the recommendation of the Sixth Committee.

**b. *Proposals to amend a specific Article*

B. The powers of the General Assembly in respect of the calling of a general conference to review the Charter

**1. COMPETENCE TO PRESCRIBE THE TERMS OF REFERENCE OF THE CONFERENCE

2. COMPETENCE TO UNDERTAKE PREPARATORY WORK

28. In its resolution 2285(XXII) of 5 December 1967 the General Assembly again requested that the work envisaged in paragraph 4 of General Assembly resolution 992(X), i.e. supplements to the *Repertory of Practice of United Nations Organs*, should be continued. The present *Supplement* covers the period since the last one (*Supplement No. 3*), i.e. from 1 September 1966, and brings the *Repertory* up to 31 December 1969.

**C. Ratifications required for the entry into force of revisions of the Charter

⁹See G A (XXIV), 6th Com., 1173rd mtg., paras. 36-38.

¹⁰G A (XXIV), Annexes, a.i. 93, A/7847, para. 6.

¹¹*Ibid.*, para. 7.

¹²See also *Repertory, Supplement No. 3*, vol. IV, under Articles 108 and 109.

¹³G A (XXII), Annexes, a.i. 26, A/6865, para. 4.

¹⁴G A (XXII), Plen., 1620th mtg.: USSR, paras. 30-35.

¹⁵Letter to the President of the General Assembly dated 21 November 1969, with explanatory memorandum and draft resolution (G A (XXIV), Annexes, a.i. 107, A/7659).

¹⁶G A (XXIV), Plen., 1819th mtg., para. 34.

¹⁷G A (XXIV), 6th Com., 1174th and 1175th mtgs.

¹⁸G A (XXIV), Annexes, a.i. 107, p. 2, A/7870, para. 11.

Chapter XIX
RATIFICATION AND SIGNATURE