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OVERCOMING COLLECTIVE ACTION FAILURE IN THE SECURITY COUNCIL: WOULD DIRECT REGIONAL REPRESENTATION BETTER PROTECT UNIVERSAL HUMAN RIGHTS?

*Noah Bialostozky**

I. INTRODUCTION

Over the past two decades, the United Nations Security Council (“Security Council” or “Council”) has acknowledged a direct linkage between its mandate to prevent threats to international peace and security and the prevention of gross human rights violations. The Council has accordingly taken both direct and indirect measures to address such violations. Direct measures have included the authorization of multilateral military intervention and peacekeeping missions, and indirect measures have included sanctions regimes and the establishment of ad-hoc tribunals. Yet, despite its capacity under the United Nations Charter (“Charter”) to take binding action, the Council has failed to fulfill its global mandate consistently or comprehensively.

Security Council failures have resulted largely from the collective action failures inherent in its nation-state composition. The nation-states in the Council have been unable to overcome their particular national interests to consistently and comprehensively fulfill their Charter obligations. Replacing the current system with a system of regional representation could prove beneficial to the Council’s effectiveness in maintaining international peace and security, including the prevention of gross human rights violations. Direct regional representation could prove beneficial by: (1) making the Council a more representative and thus more globally legitimate institution; (2) easing the Council’s global burden to maintain peace and security; (3) mitigating the effects of inherent nation-state constraints on decision-making and implementation; (4) enabling the Council to more effectively overcome collective action problems; and (5) facilitating the use of indirect methods of human rights enforcement.

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II. THE UNITED NATIONS SECURITY COUNCIL

The United Nations (“UN”) was established in 1945 to maintain international peace and security through collective measures for the prevention and removal of threats to the peace.¹ Specifically, the Security Council was given primary responsibility for fulfilling this mandate.² The UN and the Council continue to have a broad and strong mandate for the prevention, management and resolution of threats to the peace around the world.³ The Council has the capacity under Chapter VII of the Charter to take various forms of action to address threats to the peace, breaches of the peace and acts of aggression.⁴ Council resolutions are legally binding on all UN state parties,⁵ but require the support of all five permanent members (“P5”) because each retains a veto power.⁶ In effect, the veto power has allowed the P5 to largely steer the direction of Council decision-making and intervention.

During the Cold War, the veto power of the USSR and the US left the Council in a continual stalemate.⁷ Even in the post-Cold War era, however, the Rwandan genocide,⁸ the Balkan crisis,⁹ and the current crisis in

¹ U.N. Charter art. 1, para. 1.

² The Council is comprised of five permanent members and ten rotating non-permanent members. The ten non-permanent members are elected by regional groups: two seats elected by the WEOG (Western Europe), one by the EEG (Eastern Europe), two by the Latin American Group, and five by African and Asia groups.

³ See UN Millennium Declaration, G.A. Res. 55.2, 8th plen. Sess., U.N. Doc A/55/22 (Sept. 8, 2000).

⁴ Chapter VII of the U.N. Charter, specifically Articles 39-43 provide for various measures, both military and non-military, to enforce the peace and the Charter. See U.N. Charter arts. 39-43.

⁵ U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

⁶ The Permanent Five Members are China, France, Russia, the United Kingdom, and the United States.

⁷ Elizabeth M. Cousens, *Conflict Prevention*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 101,102-03 (David M. Malone ed., 2004) (“A central theme of the Cold War UN was deadlock between the superpowers in the Council and the frequent use (and threat) of the veto.”) [hereinafter Cousens in *THE UN SECURITY COUNCIL*].

⁸ During the years 1993 and 1994, it is estimated that 800,000 Rwandans were killed in an intrastate conflict. MICHAEL N. BARNETT, *EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA* 97(2002).

Darfur, Sudan¹⁰ highlight the Council's persistent failure to effectively address human rights crises and international security breaches. The reliance on nation-states for both decision-making and peacekeeping has led to significant collective action failures. Nation-states are reluctant to take action in regions where they have little or no national interest.¹¹ Nevertheless, the Council remains widely perceived as an indispensable means to reconcile competing points of view and to maintain a basic level of continuity, order and predictability as global power relationships evolve.¹² In order for the Council to effectively fulfill its mandate, the UN has recognized that the Council needs greater credibility, legitimacy and representation. Specifically, the UN recognizes that in years to come the Council will need to depend on collective strategies, collective institutions and collective responsibility to fulfill its global mandate.¹³

III. THE SECURITY COUNCIL AND HUMAN RIGHTS

The Security Council has a unique mandate among international actors to produce lawful, binding resolutions to address threats to interna-

⁹ In the 1990s, the former Yugoslavia disintegrated into intrastate ethnic conflict during which there was widespread ethnic cleansing and crimes against humanity. See generally WILLIAM JOSEPH BUCKLEY, *KOSOVO: CONTENDING VOICES ON BALKAN INTERVENTIONS* (2000).

¹⁰ Since early 2003, Sudanese government forces and ethnic militia known as "Janjaweed" have engaged in an armed conflict with Sudanese rebel groups. As part of its operations, government forces and the Janjaweed have waged a systematic campaign of ethnic cleansing against the civilian population of Darfur, Sudan. See Human Rights Watch: Crisis in Darfur, <http://www.hrw.org/english/docs/2004/05/05/darfur8536.htm> (last visited May 7, 2007).

¹¹ See, e.g., Bardo Fassbender, *The Better Peoples of the United Nations? Europe's Practice and the United Nations*, 15 EUR. J. INT'L L. 857, 876 (2004) (describing how EU states, sitting in a national capacity on the Security Council during the Iraq crisis of 2002-2003, positioned themselves based on national interests) [hereinafter Fassbender].

¹² SHEPARD FORMAN AND ANDREW GRENE, *COLLABORATING WITH REGIONAL ORGANIZATIONS*, reprinted in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 295, 303 (David M. Malone ed., 2004) [hereinafter FORMAN AND GRENE].

¹³ See U.N. General Assembly, *Secure World Report: Follow-up to the outcome of the Millennium Summit*, ¶ 15, U.N. Doc. A/59/565, 59th Sess., Agenda Item 55 (Dec. 2004) available at <http://www.un.org/secureworld/report.pdf>. ("But in the twenty-first century, more than ever before, no State can stand wholly alone. Collective strategies, collective institutions and a sense of collective responsibility are indispensable.").

tional peace and security. Over the past few decades, the Council's operational definition of international peace and security has evolved to include a broad range of security concerns, including gross human rights violations.¹⁴

The Council first began recognizing the relevance of human rights to international peace and security with its sanctions in response to human rights violations in Southern Rhodesia in 1968¹⁵ and South Africa in 1977.¹⁶ The Council expanded its consideration and enforcement of human rights protection in the early 1990s and has since occasionally responded to gross violations with military authorizations.¹⁷ The Council has also authorized ad-hoc tribunals to hold perpetrators of gross human rights violations accountable¹⁸ and has integrated human rights protection with its authorization of peacekeeping missions.¹⁹ Growing recognition that human rights protection should be integrated with humanitarian interventions and peacekeeping efforts has led the Council to become a critical actor in inter-

¹⁴ ROGER A. COATE, DAVID P. FORSYTHE & THOMAS G. WEISS, *THE UNITED NATIONS AND CHANGING WORLD POLITICS* 161 (2004) [hereinafter COATE ET AL.].

¹⁵ See S.C. Res. 253, ¶ 1-2, U.N. Doc. S/RES/253 (May 29, 1968) (condemning the violation of Southern Rhodesians' fundamental rights and freedoms, calling on the United Kingdom to take measures to protect civilians' Charter rights, and imposing sanctions).

¹⁶ See S.C. Res. 421, U.N. Doc. S/RES/421 (imposing sanctions on South Africa for the treatment of civilians under the apartheid regime).

¹⁷ See COATE ET AL., *supra* note 14, at 156-57. In 1992, as a result of Security Council Resolution 814, the UN took control of a military operation to maintain the order necessary to feed starving civilians in Somalia. Also, in 1991, after the Persian Gulf War, Council Resolution 688 declared that the international repercussions of the human rights situation in Iraq, especially pertaining to the repression of Iraqi Kurds, constituted a threat to international peace and security. Many argue that the Council implicitly authorized the use of force to stop Iraqi repression of its citizens. The Resolution led to UN creation of a protected area for Iraqi Kurds. See Joanna Wechsler, *Human Rights, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 55, 57-58 (David M. Malone ed., 2004) [hereinafter Wechsler *in THE UN SECURITY COUNCIL*].

¹⁸ In 1993 and 1994, the Council authorized ad-hoc tribunals for the post-conflict situations in the former Yugoslavia and Rwanda. Joanne Lee and Richard Price, *Criminalization of International Violence, in THE UNITED NATIONS AND GLOBAL SECURITY* 123, 124 (Richard M. Price & Mark W. Zacher eds., 2004).

¹⁹ See Wechsler *in THE UN SECURITY COUNCIL*, *supra* note 17, at 55-56 (discussing the human rights component in Security Council peace-keeping authorizations in El Salvador, Cambodia and Haiti).

national efforts to mitigate and end such violations.²⁰ More prominent examples of Council authorizations with significant human rights components include multidimensional responses to crises in East Timor and Sierra Leone.²¹ And over the past two decades there have also been several other examples of UN missions with significant human rights components.²²

Despite the significant human rights element in several Council authorizations, some argue that the Council's role should be restricted to interventions in response to humanitarian violations.²³ It is true that there are two separate bodies of international law: one for human rights and another for humanitarian law – with the latter pertaining only to situations of armed conflict. There is increasing consensus, however, that fundamental human rights law also applies in times of armed conflict.²⁴ In fact, because of the intrastate nature of recent threats, there is growing recognition that gross human rights violations are often indistinguishable from war crimes. The

²⁰ See The Secretary General, *Report of the Secretary General, An Agenda for Peace*, ¶ 15, delivered to the General Assembly, U.N. Doc. A/47/277, S/23111 (Jan. 17, 1992) [hereinafter *An Agenda for Peace*] (“UN has moved to integrate, to the extent possible, its human rights and humanitarian efforts with its peace efforts.”).

²¹ In 1998, the Council established the UN Mission in Sierra Leone (UNAMSIL); one of the tasks of UNAMSIL was to provide regular reports on violations of international human rights and humanitarian law to the COUNCIL. Wechsler in THE UN SECURITY COUNCIL, *supra* note 17, at 63.

²² Examples include the United Nations Angola Verification Mission (UNAVEM I), the United Nations Transition Assistance Group (UNTAG) in Namibia, the United Nations Protection Force (UNPROFOR) in the Balkans and the United Nations Transitional Authority in Cambodia (UNTAC). COATE ET AL., *supra* note 14, at 172.

²³ See, e.g., David Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT'L L. 695, 705 (2005) (discussing the significance of distinctions between international humanitarian and human rights law for decision-making in military operations).

²⁴ Customary international law prohibits violations of fundamental human rights in times of armed conflict and of relative peace. See John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 VAND. J. TRANSNAT'L L. 1447, 1448 (2006) (“[A] consensus is evolving in favor of the view that human rights law applies in full alongside humanitarian law during times of armed conflict and occupation.”); see also Interim Report of the Commission of Experts Established Pursuant to Council Resolution 780 (1992), U.N. SCOR, 48th Sess., Annex 1, ¶ 39, U.N. Doc. S/25274 (1993) (citing “relevant human rights law” and international humanitarian law as rules of international law applicable to the conflict in the former Yugoslavia).

nature of threats to international peace and security increasingly do not involve well-defined armies, and thus human rights protection is now often considered the general protection of internationally recognized rights, regardless of the underlying circumstance.²⁵

The increasingly meaningless distinction between interventions based on human rights or humanitarian law is demonstrated by the Council's authorization responding to the Somalian crisis of the early 1990s. In 1992, the Council authorized intervention to curtail human suffering and the threat to international peace and security in Somalia.²⁶ To some, this resolution was nothing more than traditional Council action responding to a situation of armed conflict. Yet, to many international lawyers the Council had, in effect, expanded the concept of international security to include intrastate human rights violations.²⁷ More specifically, the authorization of force was seen by many as a response to the codified human rights to life, adequate nutrition and health care.²⁸ Nevertheless, because of the uncertain identity of the warring parties, and the parties responsible for the gross human rights violations, whether the Council authorization was for reasons of human rights or humanitarian law was a theoretical distinction without operational significance.²⁹ The compelling point was that massive violations of recognized international rights, whether or not they occurred as part of an armed conflict, were recognized as a threat to international peace and security.

Although Council protection of human rights has been intermittent depending on the political will of the P5, overall, the Council's attitude has been evolving towards general acceptance of human rights violations as an

²⁵ COATE ET AL., *supra* note 14, at 126.

²⁶ S.C. Res. 794, ¶ 10, U.N. Doc. S/RES/794 (Dec. 3, 1992).

²⁷ COATE ET AL., *supra* note 14, at 126.

²⁸ *Id.* The right to life is codified in Article 6 of the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), arts. 9, 17, U.N. Doc. A/6316 (Dec. 16, 1966). The right to an "adequate standard of living" and the right to the "enjoyment of the highest attainable standard of physical and mental health" are codified in Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 11, ¶ 1, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, 993 U.N.T.S. 3 (Dec. 16, 1966).

²⁹ *Id.* *But see* FERNANDO R. TÉSON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 5 (1988) (discussing the importance of retaining the distinction between humanitarian interventions and human rights interventions); RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 418 (James Crawford & John S. Bell eds., 2002) (detailing operational distinctions between the application of human rights law and humanitarian law).

integral part of its decision-making.³⁰ In the early to mid-1990s, each time the Council addressed human rights violations, it felt compelled to justify that the situation in question constituted a threat to international peace and security.³¹ But over time, the traditional inviolability of state sovereignty has eroded, and the Council appears to have firmly accepted a direct link between international security and human rights violations.³² Gross human rights violations have thus likely become an enduring part of the Council's global sphere of responsibility.

IV. THE NATION-STATE SECURITY COUNCIL MODEL WILL CONTINUE TO INCONSISTENTLY AND INEFFECTIVELY FULFILL ITS GLOBAL MANDATE

Despite its global mandate, the Security Council has been unable to achieve a balanced and systematic record on human rights protection. Since the end of the Cold War stalemate, the Council has been repeatedly hamstrung by the P5's veto power.³³ The regions represented in the P5

³⁰ Wechsler in *THE UN SECURITY COUNCIL*, *supra* note 17, at 66.

³¹ For example, in April 1991, the Council passed Resolution 688 on the situation in Iraq, condemning "the repression of the Iraqi civilian population in many parts of Iraq . . . [the consequences] of which threaten international peace and security in the region." S.C. Res. 688, ¶ 1, U.N. Doc. S/RES/688 (Apr. 5, 1991). *See also* S.C. Res. 745, ¶ 1-2, U.N. Doc. S/RES/745 (Feb. 28 1992) (establishing the UN Transitional Authority in Cambodia in order to protect civilians based on the need to create conditions suitable for the maintenance of peace and security).

³² *See, e.g.*, S.C. Res. 1001, U.N. Doc. S/RES/1001 (June 30, 1995) ("calling on the Liberian factions, especially the combatants, to respect the human rights of the civilian population," without establishing a link between the human rights situation and the maintenance of international peace and security). Also, in 1998, the Council established the mandate for the UN Mission in Sierra Leone. The Council was "gravely concerned at the loss of life and immense suffering undergone by the people of Sierra Leone" and stipulated that the UN Mission should "report on violations of international humanitarian law and human rights in Sierra Leone" and "assist the Government of Sierra Leone in its efforts to address the country's human rights needs," without drawing a link between the human rights violations and international peace and security. S.C. Res. 1181, ¶ 8-12, U.N. Doc. S/RES/1181, (July 13, 1998). Furthermore, in Resolution 1265 passed in 1999 on the targeting of civilians in armed conflict, the Council condemned the deliberate targeting of civilians by combatants as a violation of humanitarian *and* human rights law. *See* S.C. Res. 1265, ¶ 4-5, U.N. Doc. S/RES/1265 (Sept. 17, 1999).

³³ *See* Cousens in *THE UN SECURITY COUNCIL*, *supra* note 7, at 103-05 (detailing the Council's paralysis with respect to the conflict in the former Yugoslavia and Rwanda during the 1990s).

have led to disparate incentives for action in differing parts of the world.³⁴ Accordingly, the inherent constraints of nation-state decision-making based on national interests have led to consistent collective action failures in the Council.

A Security Council composed of nation-states inevitably produces negotiations beset by the inherent constraints of national decision-making, including economic and strategic considerations. The current nation-state model has prevented the Council from fulfilling its global responsibility to consistently address human rights violations that constitute threats to peace and security. The nation-state composition has left the Council paralyzed on nearly every issue – even on the most egregious violations of international law on which unanimity might be expected.³⁵ The P5 and other Council members have been very reluctant to intervene in conflicts that do not pose a direct threat to their national interests, or that involve countries with which bilateral relations might be compromised.³⁶

The political failings of the Council have been well-documented³⁷ and numerous reforms have been proposed.³⁸ One notable set of potential

³⁴ *Id.* (discussing post-Cold War Security Council failures with respect to Bosnia, Angola, Somalia and Rwanda in the late 1980s and 1990s).

³⁵ Sebastian Mallaby, *Bound to Fail*, NEWSWEEK, Mar. 5, 2007, at 16 (discussing the Council paralysis with regard to the recent crises in Darfur, Sudan and the Congo, the human rights violations in Zimbabwe, and the crimes against humanity in Kosovo in the 1990s).

³⁶ See Fassbender, *supra* note 11, at 870 (describing failures of European states and the United Nations to take action on issues of war, poverty and human rights in Africa).

³⁷ See, e.g., Christine Gray, *A Crisis of Legitimacy for the UN Collective Security System?*, 56 INT'L & COMP. L.Q. 157, 157-170 (2007) (questioning legitimacy of UN collective security system because of Council's limited and delayed responses to gross humanitarian disasters in Bosnia Herzegovina and Rwanda); Thomas G. Weiss, *R2P After 9/11 and the World Summit*, 24 WIS. INT'L L.J. 741, 756-60 (2006) (describing Council paralysis on Kosovo and failure to intervene in the Congo and Sudan).

³⁸ Several models of reform have been proposed to make the Security Council more representative and responsive to global needs. In Secretary General Kofi Annan's report, *The Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 170, delivered to the Security Council and General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005), two models for reform were presented: Model A would add six permanent members without a veto and three more non-permanent two-year seats; Model B would add eight four-year renewable non-permanent seats and eleven two-year non-renewable non-permanent seats. However, the most contentious issues of any proposed reform have always

reforms was produced by a High-Level Panel convened by Secretary General Kofi Annan in 2003. The Panel concluded, in part, that in order to more effectively fulfill its global mandate, the Council must become more representative and more willing and able to take action when needed.³⁹

V. DIRECT REGIONAL REPRESENTATION WOULD MAKE THE COUNCIL A MORE REPRESENTATIVE AND LEGITIMATE GLOBAL INSTITUTION

Regional representation in the Security Council would enable more representative leadership with greater legitimacy to address global crises. Regardless of the nation-states involved, a Council composed of nation-states will always be divorced from the strengths the UN was envisioned to possess: multilateral legitimacy and neutrality derived from a lack of vested interests.⁴⁰ Direct regional representation would make the institution more globally representative and would enhance the Council's capacity to make binding decisions that positively impact all regions of the world.⁴¹

been which new nation-states would receive permanent seats and whether new permanent members would receive a veto power. See Mark W. Zacher, *The Conundrums of International Power Sharing: The Politics of Security Council Reform*, in *THE UNITED NATIONS AND GLOBAL SECURITY* 211, 211-17 (Richard M. Price and Mark W. Zacher, eds., 2004). Nevertheless, all models involving nation-state actors, regardless of increased representation, would likely continue to be plagued by the inherent constraints of nation-state decision-making and the resulting inconsistent fulfillment of Charter principles.

³⁹ Report of the Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 170, U.N. Doc. A/59/2005, (Mar. 21, 2005) (detailing the two proposals for UN reform referenced *supra* in note 38).

⁴⁰ See COATE ET AL., *supra* note 14, at 87 (stating that the strength of UN institutions rests on their multilateral legitimacy and neutrality).

⁴¹ This paper is meant to serve as an introduction to the possible benefits of such a system of representation. Admittedly, significant obstacles stand in the way of implementing such reform and such a system would involve substantial risks. Nevertheless, the aim of this paper is to prompt further study and consideration of the potential long-term efficacy of such reform. There is often significant delay between the initial conception of a means of social advancement, and the fulfillment of the idea. Proposals for reform that are not currently realizable are generally met with significant initial opposition, but over the long-term, the ideas originally only considered by a few, very often become realistic. See Richard Noyes, *The Time Horizon of Planned Social Change*, 39 AM. J. ECON. & SOC. 65 (1980) (discussing how social progress often trails by many years the initial insight that triggered the progress); see also THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 66-67 (3rd ed.1996) (explaining how discoveries prompt scientific gain only when previously standard beliefs are discarded and there is "paradigm destruction").

1. *A regional Security Council would be more representative*

Regional representation in the Council would better reflect current geopolitical realities, both in terms of power distribution and security needs. A Council without permanent representation for any South American or African country not only arguably violates the UN Charter,⁴² but may also explain the Council's failure to consistently deal with crises on both continents.⁴³ Furthermore, the P5 no longer reflect the global distribution of power or the distribution of global security needs.⁴⁴ A Council composed of regional actors would provide more global representation in an institution tasked with global responsibility.

Although the decision to give permanent representation to five Northern countries was based on the distribution of world power after World War II ("WWII"), the Council as presently constituted no longer reflects the current distribution. After WWII, the P5 held about sixty or seventy percent of the world's economic, political and military power.⁴⁵ More than sixty years later, several members of the P5 are no longer among the most powerful nation-states in the world.⁴⁶ The P5 collectively now only contribute thirty-five percent of the UN budget.⁴⁷ Powerful actors, both in the world community at-large, and within the context of UN activ-

⁴² U.N. Charter art. 23, para. 1 (stipulating that representation in the Security Council should be based on contribution to the maintenance of peace and security *and* equitable geographic distribution).

⁴³ Since the inception of the UN Charter, both South America and Africa have been plagued by persistent and gross violations of human rights and humanitarian disasters. For further discussion of the Council's inconsistency in Africa, see *infra* Part VII.2. *But see* Blanca Antonini, *El Salvador*, in 423 THE UNITED NATIONS SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY (David M. Malone ed., 2004) (detailing the Council's key role ending a war in El Salvador in the 1980s). However, the Council's involvement in El Salvador was arguably related to US national interests. *See id.* (stating that the United States' close involvement with El Salvador was a significant factor in the UN's role). Moreover, the Council stood by while the United States allegedly supported or covered up the acts of brutal regimes in South America. *See, e.g.*, Michael Dobbs, *Negroponte's Time in Honduras at Issue*, WASHINGTON POST, Mar. 21, 2005, at A1 (describing the U.S. Embassy's cover-up of the work of Honduran death squads in the 1980s).

⁴⁴ *See* Yozo Yokota, Address at the Foreign Policy Association: The Future of the United Nations (Apr. 15, 2005) (transcript available at <http://www.fpa.org>) (stating that the P5 no longer represent the majority of power in the world).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

ity, are thus not represented in the Council. Even more, only one “developing country,” China, and no countries from the Southern hemisphere currently have a veto power.⁴⁸

One powerful actor that has never had a significant voice in the Council is the Group of 77 (“G-77”).⁴⁹ The G-77 was established in 1964 to provide a voice to seventy-seven developing countries in the UN. The G-77 aims to articulate and promote the collective interests of countries from the Southern hemisphere.⁵⁰ Despite any individual weaknesses, Southern states have collectively been very active in UN affairs, and, since the mid 1990s, UN peacekeeping missions have been almost exclusively Southern-state operations.⁵¹ Despite their collective strength and implementation capacity, the G-77 has never been given a significant voice in Council decision-making, and thus the G-77 continues to see much of Council activity through the distorting lens of the “North-South divide.”⁵² Council resolutions that interfere with the domestic affairs of Southern states are viewed as hypocritical, illegitimate meddling by the North and calls for UN reform are viewed as efforts by the North to further consolidate power.⁵³ Direct regional representation would remove the Council as a perpetual source of the North-South divide.

2. *Direct regional representation would give the Security Council greater legitimacy*

Regional representation would also rehabilitate the universal legitimacy of Council decision-making and action. As a global institution, the

⁴⁸ Although increasingly controversial, the term “developing country” remains in use as a way of classifying countries with a lower level of economic development. See, e.g., International Monetary Fund, Emerging and Developing Economies List, Apr. 2009, available at <http://www.imf.org/external/pubs/ft/weo/2008/02/weodata/groups.htm#ae>.

⁴⁹ The G-77 is a group, and often a voting block, of seventy-seven developing countries assembled among the country representatives in the UN General Assembly. The Group of 77 at the United Nations, About the Group of 77, available at, <http://www.g77.org/doc/> (last visited May 7, 2007).

⁵⁰ *Id.*

⁵¹ Brian L. Job, *The UN, Regional Organizations, and Regional Conflict: Is There a Viable Role for the UN?*, in *THE UNITED NATIONS AND GLOBAL SECURITY* 227, 232 (Richard M. Price & Mark W. Zacher eds., 2004) [hereinafter Job in *THE UN AND GLOBAL SECURITY*].

⁵² *The United Nations: Mission Impossible?*, *THE ECONOMIST*, Jan. 6-12, 2007, at 21.

⁵³ *Id.*

UN needs multilateral legitimacy to survive, and legitimacy in the UN context relies on weaker states and regions being able to exert a degree of influence. Moreover, actions taken by a more representative Council would likely be subject to less resistance – there would likely be more global support and more nation-state hesitation to oppose Council decisions.

The erosion of Council legitimacy has been largely a product of its nation-state composition and the correlated inconsistent intervention based on nation-state interests. Nation-state decision-making and interests are most often based on unilateral or bilateral considerations. Inevitably, allegiances to domestic interests and *realpolitik*, and ties to bilateral partners and strategic allies, will continue to dominate nation-state decision-making. A Council composed of nation-states will thus never achieve the collective, universal strength that UN institutions were envisioned to possess. The strength of universally legitimate UN institutions is founded in their multilateral legitimacy and neutrality, derived from their lack of vested interests.⁵⁴ Inversely, as currently constituted, Council decision-making is accompanied by actual or perceived allegiances to specific nation-state interests. Council resolutions are therefore not perceived as legitimate efforts to fulfill its Charter mandate, but instead are perceived as spasmodic efforts dependent on the P5's national interests.

The concern would inevitably exist that regional organizations would be equally plagued by the power dynamics of member states. It is possible that regional representation would just create another level of supranational bureaucracy in which powerful states would dictate both action and inaction. Political and economic interests of specific nation-states may continue to dominate regional discourse and decision-making. Even when given a voice through regional representation, poorer countries may continue to be dominated by countries with more economic and military leverage. But regional organizations have proven better able at focusing their efforts on collective security and human rights concerns. Both Europe and South America have successfully overcome nation-state divisions to advance collective action on issues of security and human rights.⁵⁵ For example, many traditionally powerful European Union ("EU") countries have been willing to cede political and sovereign power for the benefits of re-

⁵⁴ See COATE ET AL., *supra* note 14, at 86 (describing the strengths of UN institutions that have maintained global legitimacy and neutrality).

⁵⁵ See Organization of American States, American Convention on Human Rights, Nov. 22 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3 1953, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights]; The Maastricht Treaty on European Union, Feb. 7 1992 [hereinafter Maastricht Treaty].

gional economic and strategic interdependence.⁵⁶ Moreover, European powers have agreed to the jurisdiction of the European Court of Human Rights⁵⁷ and have been increasingly willing to cede foreign policy discretion to the EU's Common Foreign and Security Policy.⁵⁸ As has been seen in Europe, developing economic and strategic interdependence can create significant incentives for even powerful nation-states to compromise within regional arrangements.

Direct regional involvement in the Council would offer more global representation that would in turn enable more legitimate decision-making. A more globally legitimate institution, more divorced from nation-states' unilateral interests, would be better able to provide comprehensive and consistent application of the Council's Charter mandate.

VI. DIRECT REGIONAL REPRESENTATION WOULD EASE THE SECURITY COUNCIL'S GLOBAL BURDEN AND ENABLE MORE COMPREHENSIVE FULFILLMENT OF ITS CHARTER MANDATE

Direct involvement of regional organizations in the Security Council would effectively lighten its global burden and enable more comprehensive fulfillment of its Charter mandate. Chapter VIII of the Charter specifically develops the role of regional organizations in fulfilling the Council's mandate. Chapter VIII states that:

The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the ini-

⁵⁶ See Maastricht Treaty, *supra* note 55, arts. G, J.2 (stipulating European Union Member State commitment to both economic and strategic foreign policy interdependence).

⁵⁷ See European Convention on Human Rights *supra* note 55, arts. 32-35 (establishing the jurisdiction of the Court over contracting parties to the European Convention).

⁵⁸ The Common Foreign and Security Policy set forth obligations specifically addressed to EU representation in international organizations: "Member States shall coordinate their action in international organizations and at international conferences. They shall uphold the common position in such forums." Maastricht Treaty, *supra* note 55, art. J.2. Even before the Maastricht Treaty, the European Community had agreed to coordinate national positions on foreign policy and adopt common positions in its representation to international organizations. See The Single European Act, art. 30(2), Feb. 2, 1986 ("The High Contracting Parties shall endeavour to avoid any action or position which impairs their effectiveness as a cohesive force in international relations or within international organizations.").

tiative of the states concerned or by reference from the Security Council.⁵⁹

Although there are as of yet no formal arrangements whereby regional organizations answer to the Council for the security of their region, the Charter expressly foresaw that regional organizations would be vital to maintaining international peace and security and lightening the Council's global burden. Indeed, since the mid-1990s, regional organizations have played a central role in the implementation of Council resolutions.⁶⁰ Under international law as presently conceived, however, regional organizations relied upon for implementing action must wait for Council authorization.⁶¹ To this point, such authorization has been irregular and inconsistent based on the P5's national interests. Direct participation by regional organizations in the Council would serve to effectively decentralize and streamline decision-making and implementation.⁶²

Prior to the mid-1990s, the major powers managed regional conflicts which promoted their geopolitical advantage, and regional institutions were not involved. When it was in their national interest to resolve conflicts, the P5 would interpose peacekeeping forces between fighting parties.⁶³ While this style of peacekeeping was effective when collective national interests inspired collective political will, it has not consistently addressed intrastate and regional conflicts that have become the primary threats to international peace and security.⁶⁴ Early in the 1990s, UN Secretary General Boutros Boutros-Ghali realized that the Council was in an increasingly untenable position. Its institutional capabilities to organize and

⁵⁹ U.N. Charter art. 52, paras. 1-3.

⁶⁰ See FORMAN AND GRENE, *supra* note 12, at 296-99 (describing the rise in UN-regional peacekeeping partnerships in the 1990s in both Africa and Europe).

⁶¹ See U.N. Charter, art. 53, para. 1 ("no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state . . . [or] directed against renewal of aggressive policy on the part of any such state . . ."); see also U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .").

⁶² See *An Agenda for Peace supra* <CITE _Ref166262717">, ¶ 5; see also Michèle Griffin, *Retrenchment, Reform and Regionalization: Trends in UN Peace Support Operations*, 6 INTERNATIONAL PEACEKEEPING 1-31 (1999).

⁶³ See Job in THE UN AND GLOBAL SECURITY, *supra* note 51, at 230 (discussing the policy inconsistencies among the P5 in responding to regional and intrastate conflicts during the 1990s).

⁶⁴ See *id.*

supervise peacekeeping missions were inadequate to deal with the breadth and nature of intrastate and regional conflicts. Boutros-Ghali thus turned to regional organizations for support, advocating the deeper involvement of regional actors to ease the Council's burden.⁶⁵ Boutros-Ghali, in effect, promoted a division of labor for Council peace enforcement: regional actors were to provide the manpower and the resources, while the Council was to authorize, establish mandates, and oversee operations. In other words, in exchange for capabilities, the UN would provide universal legitimacy.⁶⁶

Despite Boutros-Ghali's vision, formal decentralization and delegation arrangements for security tasks never materialized.⁶⁷ But regional actors have, in many instances, become informally responsible for implementing Council resolutions. The devolution of Council tasks to regional actors arguably began with the Balkan crisis, continued with peacekeeping missions in Liberia and Tajikistan,⁶⁸ and is further exemplified by the current reliance on the African Union in Darfur, Sudan.⁶⁹

Nevertheless, despite reliance and devolution to regional actors for implementation, as presently constituted, the very possibility of internationally lawful action depends on P5 authorization. Direct reliance on regional organizations would serve to overcome the collective action failures of the

⁶⁵ *An Agenda for Peace* *supra* note 20, ¶ 64 (calling for "regional action as a matter of decentralization, delegation, and cooperation . . . [to] not only lighten the burden of the Council but also contribute to a deeper sense of participation consensus and democratization in international affairs.")

⁶⁶ See generally W.A. Knight, *Towards a Subsidiarity Model for Peacemaking and Preventive Diplomacy: Making Chapter VIII of the UN Charter Operational*, 17 *THIRD WORLD Q.* 31, 31-52 (1996) (characterizing subsidiarity as a potentially efficacious organizing principle to achieve improved division of labor and responsibility in collective security efforts).

⁶⁷ See Joint Inspection Unit, *Report on Sharing Responsibilities in Peace-keeping: the United Nations and Regional Organizations*, ¶¶ 47-54, JIU/REP/95/4 (1995) (prepared by Faith K. Bouayad-Agha & Boris P. Krauslin) (detailing several areas of collaboration between the UN and regional organizations, but noting that because of varying resources and capacities, "there should not be a rigid formula for the division of labour between [regional organizations] and the United Nations.")

⁶⁸ See FORMAN AND GRENE, *supra* note 12, at 297 (detailing the UN Observer Mission in Liberia that partnered with the Economic Community of West African States, and the UN Observer Mission in Tajikistan that partnered with the Commonwealth of Independent States).

⁶⁹ See [Bbc.co.uk](http://news.bbc.co.uk/2/hi/africa/5362762.stm), *AU Extends Darfur Troop Mandate*, Sept. 21, 2006, available at <http://news.bbc.co.uk/2/hi/africa/5362762.stm> (announcing that AU force responding to humanitarian crisis in Sudan would be strengthened, along with logistical support from the UN).

current P5 by ensuring that for every human rights crisis there is a representative in the Council with a direct interest in addressing the issue.

VII. A SECURITY COUNCIL COMPOSED OF REGIONAL MEMBERS WOULD
MITIGATE COLLECTIVE ACTION FAILURES AND MORE EFFECTIVELY
ADDRESS HUMAN RIGHTS CRISES

A system of direct regional representation would better overcome the collective action problems of Security Council decision-making. The Council's current structure has led to consistent collective action failures in response to gross human rights violations. There is a significant disincentive for any nation-state to authorize action that interferes with another nation-state's sovereignty. The disincentive is also codified in the Charter as a prudential limit on interference with national sovereignty.⁷⁰ Of course, the prudential limit was meant to be overcome by the Council when necessary to fulfill its global mandate.⁷¹ But when balancing national interest against their global responsibility, the P5 nation-states have consistently favored their national interest. Thus, the current Council model has resulted in consistent collective action failures, even in response to the most egregious human rights violations. A system of regional representation would better overcome the collective action problems that have plagued the current nation-state model. Decision-making as well as implementing action taken by strategically interdependent regional organizations would provide more efficient, more accountable and more comprehensive fulfillment of the Council's mandate.

1. *Nation-states and collective action problems*

The nation-state Security Council model, regardless of the nation-states involved, will likely continue to be plagued by collective action failures. Collective action failures result when parties to a group have divergent incentives and interests, but are meant to achieve collective results.⁷² Achieving collective action therefore relies on the coordination of separate and selective incentives to stimulate all members to act in a group-oriented

⁷⁰ See U.N. Charter art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.").

⁷¹ *Id.* ("but [the domestic jurisdiction principle] shall not prejudice the application of enforcement measures under Chapter VII.").

⁷² See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION chs. 1-4 (1965) (explaining the theory of collective action and collective action failure).

way.⁷³ The Council is prone to collective action problems because the intended result, the maintenance of international peace and security, is often non-excludable and usually does not specifically benefit the decision-makers. Collective action becomes especially difficult where individual members can unilaterally block coordination. Achieving collective action in the Council context thus relies on both ensuring at least one group-member's incentive to initiate action, as well as mitigating other P5 members' interest in unilaterally blocking collective action.

With the Council's current composition, collective action has only been achieved when a specific member of the P5 has had a strong incentive for action and when no P5 member has had an incentive to block collective intervention. In 1991, the Council achieved collective authorization of the Persian Gulf War because the US had a particular interest in the region and the Iraqi government was universally condemned for its invasion of Kuwait.⁷⁴ Universal condemnation of international law violations, however, including gross human rights violations, has not consistently inspired collective action. The breakup of the former Yugoslavia demonstrated the collective action difficulties of a Council composed of nation-states. Even though the Council had declared the same linkage between human rights and international peace and security as it had previously recognized in response to the Persian Gulf conflict, the Council remained reluctant to authorize the use of force.⁷⁵ The political will of the P5 influenced Council decision-making on the Balkans, and the gravity of the conflict was insufficient to overcome the perceived political costs of intervention.⁷⁶ Therefore, despite similarly gross human rights violations, the military intervention authorized in the Persian Gulf was never authorized in the Balkans.⁷⁷

⁷³ *Id.*

⁷⁴ See S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) (condemning Iraq's violations of international law and authorizing Member States to use "all necessary means . . . to restore international peace and security").

⁷⁵ Despite authorizing the use of "all necessary means" and a multinational implementation force (IFOR) for delivering humanitarian assistance and preventing further human rights violations in the Balkans, the Council made clear that it remained more reluctant to use force in the Balkans than in the Persian Gulf. COATE ET AL., *supra* note 14, at 158. See also S.C. Res. 1034, ¶ 1-2, U.N. Doc. S/RES 1034 (Dec. 21, 1995) (condemning "in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb forces" but not authorizing military intervention). *But see* S.C. Res. 1035, ¶ 1-4, U.N. Doc. S/RES/1035 (Dec. 21 1995) (establishing a UN civilian police force).

⁷⁶ COATE ET AL., *supra* note 14, at 158.

⁷⁷ *Id.* at 157.

Failures in the Council have also resulted from unilateral national interests that prompt a block of collective action. For example, no member of the Council has denied the exigency of the current crisis in Darfur, Sudan. But despite the unanimity of rhetoric, China has had a strong commercial interest in tempering its condemnation because it buys eighty percent of Sudan's oil exports.⁷⁸ China has thus used its veto power to delay and dilute Council efforts.⁷⁹ The failure to achieve collective action with regard to Darfur is not an isolated example, but instead further exemplifies the Council's failure to overcome nation-state interests.

In the post-Cold War period, reasons for Council paralysis have included economic, political and strategic interests among the P5. During the crisis in Kosovo in the late 1990s, Russia's strategic interests and alliances in the region severely limited the Council's ability to react to gross human rights violations.⁸⁰ Also, in 2000, members of the Council sought to condemn Zimbabwe's dictator, Robert Mugabe, for Zimbabwe's violent expropriation of white farms that violated international human rights. Yet, China's economic interests in the country once again led to a block of all Council action.⁸¹ Even more, Russia and China's oil interests in Burma led them to block a recent resolution condemning Burma's regime for its extreme brutality and human rights violations.⁸²

Security Council collective action failures have also been a product of nation-state disinterest. As much as particular nation-state interests have served to block Council action in particular crises, the lack of any particular national interest among P5 members in a specific crisis has also precluded or stalled collective action. Many more people died in Rwanda in 1994 and in the Democratic Republic of the Congo in 2002 than died in Kosovo in 1999. Yet the Council, pushed by Western allies, demonstrated far more interest in the human rights violations in the Balkans than in Africa.⁸³ The tragic experience of Council inaction with regard to Rwanda exposed the limitations of the current Council model and further eroded the Council's legitimacy and moral authority as a global institution.⁸⁴

⁷⁸ Mallaby, *supra* note 35, at 14.

⁷⁹ *Id.*

⁸⁰ See Wechsler in THE UN SECURITY COUNCIL, *supra* note 17, at 67 (describing the Council's inability to react to the Kosovo crisis because of the veto system).

⁸¹ Mallaby, *supra* note 35, at 14.

⁸² *Id.*

⁸³ COATE ET AL., *supra* note 14, at 161.

⁸⁴ Job in THE UN AND GLOBAL SECURITY, *supra* note 51, at 230.

2. *Nation-states are not well-situated to authorize intervention into sovereign territory*

The inherent sovereign nature of nation-states makes them reluctant to authorize intervention into the sovereign territory of other nation-states. Notably, no interstate complaint has ever been brought under *any* of the UN treaty-based procedures.⁸⁵ Although the multilateral legitimacy of the Council is meant to provide political cover for nation-state actors authorizing intervention into sovereign territories, in reality, the P5, who decide issues under global scrutiny, remain understandably reluctant to authorize such interventions. The responses to human rights crises in Africa demonstrate this reluctance and the resulting inconsistency and ineffectiveness of the current Council model.

In 1992, the Council authorized a UN military operation in response to the Somalian crisis.⁸⁶ A crucial factor to overcoming traditional nation-state reluctance to interfere in intranational crises was Somalia's unique situation of not having a national government.⁸⁷ Therefore, unlike the later crises in Rwanda, Burundi, the Democratic Republic of the Congo and Sudan, the Council did not have to bypass the consent of any sovereign government to intervene.

By contrast, in Burundi in the early 1990s, intrastate ethnic violence was resulting in the "slow-motion genocide" of about 150,000 persons over a five-year period.⁸⁸ In considering an intervention force, the Council asked fifty UN member-states if they would provide troops for a peacekeeping mission. Only twenty-one responded, and, of these, only three offered troops because of their reluctance to intervene in an intrastate conflict.⁸⁹ Also, in Rwanda in 1994, intrastate ethnic violence and exten-

⁸⁵ INTERNATIONAL HUMAN RIGHTS IN CONTEXT 776 (Henry J. Steiner & Philip Alston eds., 2000) (stating that no interstate complaint has ever been lodged through any of the various UN treaty-based complaint procedures, including the International Covenant on Civil and Political Rights Article 41 procedure).

⁸⁶ S.C. Res. 751, ¶ 2, U.N. Doc. SEC/RES/751 (Apr. 24, 1992). In the early 1990s, Somalia experienced human rights disasters because of societal breakdown and famine resulting from political and economic problems. See generally George B. N. Ayittey, *The Somali Crisis: Time for an African Solution*, 205 CATO POL'Y ANALYSIS J. (1994).

⁸⁷ See Robert Cryer, *International Criminal Law vs. State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979, 985 (2006) (stating that there was no Somali government to control the various warring factions during the civil war).

⁸⁸ COATE ET AL., *supra* note 14, at 160.

⁸⁹ *Id.* (citing N.Y. TIMES, Aug. 22 1996, at A9).

sive atrocity crimes caused the deaths of approximately 800,000 persons.⁹⁰ The lack of incentives among Council members to take action, combined with the existence of a sovereign Rwandan government, caused paralysis in the Council and a collective failure to mitigate the egregious atrocities.⁹¹ In the case of Rwanda, the Chinese delegation was particularly unwilling to authorize similar action in Rwanda as it had agreed to in the former Yugoslavia. China was afraid that two such intervention resolutions would establish too great a precedent for international interference in a nation-state's sovereign territory.⁹²

Chinese membership in the Council exemplifies the inherent problems of nation-state decision-making for a global institution. A pattern has emerged with regard to China's voting that demonstrates its "principled position" on Chapter VII resolutions: China is reluctant to authorize the use of the Council's enforcement authority to intervene in a UN member state's sovereign territory.⁹³ China's reluctance has been exhibited across a variety of enforcement resolutions, including peace enforcement in the cases of Bosnia, Haiti and Rwanda, sanctions in Libya and Yugoslavia, and the establishment of ad-hoc tribunals to prosecute widespread human rights abuses in Rwanda and the former Yugoslavia.⁹⁴ The Chinese block to collective action has only been overcome when another member of the P5 has had sufficient incentive to apply significant bilateral pressure to secure Chinese abstention instead of veto.⁹⁵ Collective action failures thus result, as is currently occurring with regard to Darfur, Sudan, whenever there is no other P5 state with a direct national interest in overcoming the Chinese "principled position." Moreover, the principle of non-intervention, although uniquely articulated as a national position by China, has been embraced by Russia as well.⁹⁶ The international community was forced to intervene in Kosovo in the late 1990s without Council authorization be-

⁹⁰ COATE ET AL., *supra* note 14, at 160.

⁹¹ Howard Adelman & Astri Suhrke, *Rwanda*, in *THE SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 483, 485-87 (David Malone ed., 2004).

⁹² Nigel Thalakada, *China's Voting Pattern in the Council*, in *THE ONCE AND FUTURE SECURITY COUNCIL* 83, 94-95 (Bruce Russett ed., 1997).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ For example, the remaining P5 were able to obtain Chinese abstention to establish the ad-hoc tribunals in the former Yugoslavia and Rwanda. *See id.*

⁹⁶ During the cold-war period, the veto, or the threat of veto paralyzed the Council. *See* David M. Malone, Introduction, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 1, 1-4 (David M. Malone ed., 2004). Also, during the Kosovo crisis, the Russian veto severely limited the Council's ability to

cause of Russia's threatened veto.⁹⁷ And Russia has also embraced non-intervention as a defense to accountability for its international legal obligations in Chechnya.⁹⁸

3. *Direct regional involvement would mitigate collective action problems*

The direct involvement of regional organizations would ensure that a party with a direct interest in any human rights crisis, in any region of the world, would be a part of Council decision-making. Human rights crises most often result from intrastate or regional conflicts, and thus regional representation is most likely to guarantee consistent incentives for Council intervention. Regional organizations' direct interest in achieving settlement of such conflicts derives primarily from their desire to avoid widespread regional conflicts as well as the spill-over effects of intrastate conflicts.⁹⁹ Furthermore, regional organizations have demonstrated significant consideration of human rights protection and would thus be more likely to take action based on gross human rights violations. Direct regional representation would likely better overcome collective apathy at both the decision-making and implementation stages.

Regional actors with direct concerns about spill-over effects of human rights crises would have strong incentives to overcome collective action problems in the decision-making process. Most human rights crises result in significant refugee flows, miasmas of disease and crime, and potential regional destabilization.¹⁰⁰ Regional organizations, and their nation-state members, would thus likely have the necessary incentives to push for Council authorization for intervening action where necessary. Through greater accountability to directly affected nation-states, regional representation would likely better overcome the collective action problems inherent in current Council decision-making.

react to severe human rights violations. See Wechsler in THE UN SECURITY COUNCIL, *supra* note 17, at 67.

⁹⁷ Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 706 (2006); A.P.V. Rogers, *Humanitarian Intervention and International Law* 27 HARV. J.L. & PUB. POL'Y 725, 729 (2004). For a description of Russia's alleged violations in Chechnya, see *infra* Part VII.3.

⁹⁸ Asbjorn Eide, *Chechnya: In Search of Constructive Accommodation*, 14 LEIDEN J. INT'L L. 431, 433 (2001).

⁹⁹ Job in THE UN AND GLOBAL SECURITY, *supra* note 51, at 235.

¹⁰⁰ Anne-Marie Slaughter, *Security, Solidarity and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT'L L. 619, 624-25 (2005).

A system of regional representation would also better serve collective action problems inherent in multilateral implementation efforts. The Council has already acknowledged the advantages of devolution of implementation to regional organizations.¹⁰¹ A system of direct regional representation would likely further boost the legitimacy and capacity of regional implementation of Council authorizations. When confronting intrastate or regional crises, regional organizations are better able to assemble a coalition force, incur lower costs in doing so, and are able to approach the crisis with cultural sensitivity and local knowledge.¹⁰² Moreover, as regions become more strategically and economically interdependent, nation-state members of regional organizations will likely be more responsive to calls from strategic and economic allies facing the destabilizing effects of human rights crises nearby. Nation-states in interdependent regional organizations have the necessary *realpolitik* incentives to provide resources for regional collective action. Thus, direct regional representation would streamline the process of authorization to implementation, and in the context of human rights crises this would likely save countless lives.

The Council has already recognized the benefit of shifting from general UN responsibility for peace and security to a regionalist approach, where the Council authorizes operations that are primarily executed by regional organizations.¹⁰³ The deeper involvement of NATO in the management of the Balkan crises, as well as the AU's role in the Democratic Republic of the Congo and Sudan, exemplifies the devolution of UN peacekeeping mandates to relevant regional actors.¹⁰⁴

Regional actors' efficacy in responding to intranational conflicts was also strikingly demonstrated by the conflict in Chechnya. The conflict between Russia and Chechen separatist forces in the 1990s involved grave violations of international humanitarian law.¹⁰⁵ As in the intranational

¹⁰¹ Job in THE UN AND GLOBAL SECURITY, *supra* note 51, at 235.

¹⁰² *Id.*

¹⁰³ FORMAN AND GRENE, *supra* note 12, at 295.

¹⁰⁴ MARC OTTE, ESDP AND MULTILATERAL SECURITY ORGANIZATIONS: WORKING WITH NATO, THE UN AND OSCE *reprinted in* 35 THE EU'S SEARCH FOR A STRATEGIC ROLE: ESDP AND ITS IMPLICATIONS FOR TRANSATLANTIC RELATIONS, at 43 (Esther Brimmer ed.) (2002).

¹⁰⁵ See HUMAN RIGHTS WATCH, RUSSIA'S WAR IN CHECHNYA: VICTIMS SPEAK OUT (Jan. 1, 1995), available at <http://www.hrw.org/legacy/reports/1995/Russia.htm> ("Russia's consistent pattern of firing on civilians grossly violates its humanitarian law obligations"); Fred Hiatt, *Moscow Warns West on Criticism over Chechnya*, WASH. POST, Jan. 13, 1995, at A26 (citing the Human Rights Watch report).

armed conflicts in Bosnia and Rwanda, civilians were targeted by the warring parties.¹⁰⁶ Still, the international community consistently characterized the events in Chechnya as an internal matter of the Russian Federation.¹⁰⁷ And the Russian veto power in the Council obstructed any UN ability to hold the Russian government accountable for their international legal obligations. Nevertheless, Russian membership in a regional organization prompted supranational involvement in the conflict. Russian membership in the Organization for Security and Cooperation in Europe ("OSCE") compelled the Russian government to recognize the applicability of OSCE principles to its conduct in Chechnya.¹⁰⁸ The Russian Federation allowed the OSCE to play a role in resolving the conflict and monitoring human rights violations.¹⁰⁹ OSCE delegations determined that Russia's bombing campaigns had targeted civilian populations and had thus violated OSCE and international legal norms. As a result, Russia was forced to admit that it had violated the human rights of its citizens.¹¹⁰ In the end, the OSCE's

¹⁰⁶ *Id.*

¹⁰⁷ In Bosnia, the Council found a threat to international peace and security that justified international intervention. *See* S.C. Res. 770, U.N. Doc. S/INF/48 (Aug. 13, 1992) ("Recognizing that the situation in Bosnia and Herzegovina constitutes a threat to international peace and security."). With respect to Chechnya, however, foreign governments demonstrated a general unwillingness to label that crisis an international conflict or a threat to international peace and security. *See* Patrick Bishop, *West Turns Blind Eye to Terror Tactics*, DAILY TEL. (London), Jan. 5, 1995, at 14, ("Europe and United States quick to reinforce Russian claim that Chechnya is an internal matter"); Hiatt, *supra* note 105, at A26.

¹⁰⁸ OSCE Chairman-in-Office, *Gyarmati's Moscow Mission*, MTI ECONews (Hungary), Jan. 11, 1995, available at LEXIS, World Library, Curnws File ("The OSCE and Moscow also agree that settlement of the Chechen conflict is a common interest and that it should be carried out through political negotiations in conformity with the constitution of the Russian Federation and the basic principles of the OSCE.").

¹⁰⁹ *See OSCE Delegation to Visit Chechnya Within Days*, REUTERS NEWS JAN. 18, 1995, available at LEXIS, World Library, Curnws File ("A delegation from the [OSCE] will travel to Russia's rebel region of Chechnya this week to . . . examine the observation of OSCE agreements, especially on human rights"); *see also* Chrystia Freeland & John Thornhill, *Russia to Allow Human Rights Team in Chechnya*, FIN. TIMES (London), Jan. 11, 1995, at 22 ("Russia agreed . . . to allow an international diplomatic mission to assess human rights violations and humanitarian needs in Chechnya . . . [t]he move marked an apparent retreat from Russia's insistence that the crisis in the breakaway region was an internal matter.").

¹¹⁰ *See* Press Conference with Russian Federation Justice Minister Valentin Kovalyov on the Results of the OSCE Session, held by Official Kremlin Int'l News

capacity as a regional actor provided the international community with the ability to address what the UN had been essentially forced to characterize as an “internal matter” of Russia.¹¹¹

4. *Economic interdependence as a strategic precursor to further regional cooperation*

The ability of regional organizations to overcome collective action problems to promote human rights protection is demonstrated by the strategic interdependence and collective human rights achievements of the EU and the Organization of American States (“OAS”). In the Americas and Europe, because of strong regional human rights and collective security agreements, the prospects of future conflicts and gross human rights violations appear far more remote. Because of the lure of regional economic and strategic interdependence, nation-states in the EU and OAS have agreed to strong regional human rights arrangements, modifying their insistence on the principles of noninterference and the inviolability of state sovereignty.¹¹²

Despite their emergence in Europe and the Americas, strong regional organizations, with strong regional capacities for the protection of human rights, have not yet taken form in other regions. Human rights and collective security mechanisms in other regional organizations such as the African Union (“AU”) have not achieved the capacity or legitimacy to hold member states accountable for human rights violations.¹¹³ Consequently, a system of direct regional representation may not be an advisable reform for protecting human rights in the short-term. Nevertheless, organizations such as the AU are progressing in their collective commitment to human rights protection.¹¹⁴ Indeed, the AU and the Association of Southeast Asian Na-

Broadcasts, (Feb. 6, 1995), *available at* LEXIS, World Library, Curnws File (“[W]e cannot deny the circumstance that in the course of the [Russian] operation to disarm unlawful [Chechen] armed formations the fundamental right of persons to life was violated. This cannot be denied because stray bullets, stray shrapnel claimed the lives of peaceful totally innocent people.”).

¹¹¹ Duncan B. Hollis, *Accountability in Chechnya – Addressing Internal Matters with Legal and Political International Norms*, 36 B.C. L. REV. 793, 843 (1995).

¹¹² Job in THE UN AND GLOBAL SECURITY, *supra* note 51, at 238.

¹¹³ Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights*, 101 AM. J. INT’L L. 1, 12 (2007) (discussing the reasons for nation-state noncompliance with non-binding recommendations of the African Commission on Human Rights).

¹¹⁴ *Id.* at 33 (stating that the African Union is more dedicated to the protection of human rights than its predecessor the Organization on African Unity); *see also*

tions (ASEAN) have both pledged to promote regional peace and stability through adherence to the Rule of Law and UN Charter principles.¹¹⁵ Furthermore, the increasing interdependence of regional economic and security interests will likely continue to develop regional commitment to mitigating the regional instability caused by gross human rights violations.

To remain globally competitive in both economic and military terms, regional organizations will likely continue to develop where they have not yet achieved sustained integration. As demonstrated by Europe, economic integration can serve as an effective precursor to strategic interdependence and human rights protection. Although the need for economic integration has been widely recognized among African countries in the African Economic Community (“AEC”),¹¹⁶ the AEC Treaty provides for the gradual establishment of the Community and thus continent-wide integration has not yet been achieved.¹¹⁷ Even more, there is not yet consensus on the most effective form of regional organization.¹¹⁸ But the importance of regional integration in Africa, and the urgency with which it must be pursued, has been well documented.¹¹⁹ The interdependence and infrastructure

RACHEL MURRAY, HUMAN RIGHTS IN AFRICA 28-30 (2004) (discussing the centrality of human rights in Africa’s Conference on Security, Stability, Development and Cooperation in Africa).

¹¹⁵ See The ASEAN Declaration, ¶ 2 (Bangkok 1967) (stating “that the aims and purposes of the [Regional] Association shall be . . . to promote regional peace and stability through . . . adherence to the principles of the United Nations Charter”) [hereinafter ASEAN Declaration]; Commission of the African Union, 2004-2007 Strategic Plan, at 48, available at http://www.africa-union.org/AU_summit_2004/volume_2_final_-_English_-_June_2004.pdf (last visited May 8, 2007) (committing the African Union to strategic objectives of the Rule of Law, good governance and collective human security).

¹¹⁶ Richard Frimpong Opong, *Observing the Legal System of the Community: The Relationship Between Community and National Legal Systems under the African Economic Community Treaty*, 15 TUL. J. INT’L & COMP. L. 41, 44 (2006).

¹¹⁷ Treaty Establishing the African Economic Community, June 3, 1991, 30 I.L.M. 1241.

¹¹⁸ Opong, *supra* note 116, at 44.

¹¹⁹ See, e.g., *id.* at 43; Econ. Comm’n for Afr., *Assessing Regional Integration in Africa*, at IX (2004), available at <http://www.uneca.org/aria1/> (“It is reasonable to assume that the most significant trend in this new millennium is global competitiveness . . . [N]ations are moving to integrate their economies with those of their neighbors. . . . This shift is nowhere more urgent than in Africa, where the combined impact of our relatively small economies, the international terms of trade, and the legacy of colonialism, mis-rule, and conflict has meant that we have not yet assumed our global market share—despite our significant market size.”).

necessary for collective regional human rights protection may thus soon develop.

Although regional representation holds much promise, some regional organizations may shield their member-states from external critiques on human rights, thereby possibly hampering the efficacy of regional responsibility for human rights protection.¹²⁰ For example, contrary to international law, ASEAN has invoked sovereignty to shield member-states who engage in systematic human rights violations.¹²¹ Nonetheless, the reaction of the EU to ASEAN's shielding demonstrates the potential efficacy of institutionalized regional dialogue within the Council. The EU has pressured ASEAN to comply with its international human rights obligations as part of trade negotiations.¹²² Although a nation-state would likely remain reluctant to take on ASEAN for their human rights failures, fearing retaliatory repercussions, the EU has demonstrated the ability of a supranational actor to engage in constructive dialogue and economic pressure in response to human rights violations.¹²³ Where a nation-state would be dominated by unilateral incentives, the EU as a regional actor was able to address supranational and collective concerns.

5. *Won't powerful nation-states continue to dominate decision-making?*

Direct regional representation could produce similar collective action failures as the current Council model because the nation-states that

¹²⁰ See Li-ann Thio, *Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to go Before I Sleep'*, 2 YALE HUM. RTS. & DEV. L. J. 1 (1999) ("ASEAN has marginalized human rights and has consistently opposed the use by foreign states or international organizations of economic or other forms of pressure to induce change in human rights practices."); see also *AU rejects Bashir Darfur charges*, BBC, Jul. 21, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7517393.stm> (describing the AU's call for the Security Council to suspend war crimes accusations against Sudan's President Omar al-Bashir despite alleged gross human rights violations in Darfur).

¹²¹ Invoking sovereignty as a protective shield against a state's treatment of individuals within its territorial boundaries is inconsonant with customary international law—human rights matters fall outside the insulation of the domestic jurisdiction clause in Article 2(7) of the U.N. Charter. See generally Louis Henkin, *Human Rights and State 'Sovereignty'*, 25 GA. J. INT'L & COMP. L. 31 (1994); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990); Rudolf Bernhardt, *Domestic Jurisdiction of States and International Human Rights Organs*, 7 HUM. RTS. L. J. 205 (1986)

¹²² Thio, *supra* note 120, at 50 (discussing the impact of East Timorese and Burmese human rights violations on EU-ASEAN trade negotiations).

¹²³ *Id.*

comprise regional organizations would arguably always align with national interests instead of collective interests in human rights protection and security. Furthermore, many would argue that without a regional intervention capacity, powerful national interests will continue to dominate regional resource-allocation decisions. Although accurate in describing *realpolitik* motivations that have largely dominated the history of nation-states, such arguments are based on assumptions that will not necessarily hold true in the future. First, such arguments assume that it will never be in the national interest of nation-states to concede power to regional institutions and regional human rights conventions. The very existence of the EU, the European Convention on Human Rights, and the American Convention on Human Rights are striking demonstrations of how national interests and alliances can shift. Secondly, it may be wrong to assume that a strong regional capacity must precede the willingness of nation-states to concede power to regional organizations. Instead, the prospect of a Council composed of regional actors could galvanize the large majority of nation-states that would continue to lack a global voice without a system of regional representation. As demonstrated by the G-77, coalitions of less powerful nations can exert significant influence. And coalitions of smaller states have already been able to play an effective constraining role on major powers in regional organizations such as the EU and the Asia-Pacific Economic Cooperation.¹²⁴ Thus, even though some regional organizations are not currently supported by powerful nation-states, large groups of countries aligning could provide the strategic incentives necessary for even the most dominant countries to align with regional decision-making.¹²⁵

Increasing economic and strategic interdependence may also motivate the most powerful nation-states to cooperate with regional organizations. Regional economic cooperation and strategic interdependence has been the premise of successful efforts at regional integration and organiza-

¹²⁴ Nancy Viviani, *Regional Arrangements and Democratic Reform of the United Nations*, in *BETWEEN SOVEREIGNTY AND GLOBAL GOVERNANCE* 312, 325 (Albert J. Paolini, Anthony P. Jarvis & Christian Reus-Smit eds., 1998) (“[I]t is quite clear already in existing regional bodies like APEC and the EU, that coalitions of smaller states play an effective constraining role on the ambitions of their major core powers”).

¹²⁵ Previous alliances with other security arrangements such as NATO also raise issues of practicality in achieving unified European security policy positions. However, an analysis of the continued viability of NATO, OSCE and other multi-lateral security organizations and their relationship to the EU is not within the scope of this paper.

tion.¹²⁶ Both economic cooperation and strategic interdependence are collective results that benefit all nation-state members in regional organizations. Yet, even with significant interdependence, there remains the possibility that powerful nation-states will continue to try to influence regional action based on unilateral interests, through economic and military leverage. However, as the EU and OAS demonstrate, as regions become more interdependent, unilateral interests become increasingly difficult to promote over collective regional interests, including the maintenance of regional human rights norms.¹²⁷

The political cover provided by a Council composed of regional actors could further mitigate powerful nation-states' incentives to block collective action based on unilateral interests. As currently constituted, the Council forces the P5 to balance their global duties under the UN Charter with their unilateral national interests in a universally transparent forum.¹²⁸ Direct regional representation in the Council would reduce the burden on powerful nation-states to balance their competing interests. Powerful countries may relish the opportunity to hide behind the cover of regional organizations on human rights issues that have proven politically sensitive for individual nation-states and their bilateral relations.

Nevertheless, despite the advantage of political cover for decision-making, reliance on regional organizations for implementation may place the burden on those who are comparatively ill-equipped to do so.¹²⁹ Presently, no regional organization has the military capacity to independently

¹²⁶ See, e.g., Treaty Establishing the European Coal and Steel Community (The Treaty of France), *entry into force* Apr. 18, 1951, 261 U.N.T.S. 140; Treaty Establishing the European Economic Community (The Treaty of Rome), *entry into force* Mar. 25, 1957, 298 U.N.T.S. 11; ASEAN Declaration, *supra* note 115.

¹²⁷ The European Court of Human Rights has developed the legitimacy to rule on what would previously be considered the most sovereign of matters, including administration of the military and government. See, e.g., *United Communist Party of Turkey v. Turkey*, 26 Eur. Ct. H.R. 121 (1998) (holding that the dissolution of a Turkish political party by the Turkish government infringed on the European Convention of Human Rights and the right to political participation in democratic societies); *Lustig-Prean and Beckett v. United Kingdom*, 29 Eur. Ct. H.R. 548, (1999) (holding that restriction of gay participation in the military is not necessary in a democratic society).

¹²⁸ U.N. Charter art. 2, para. 7 (expressly codifies this balance, stating that the UN shall not intervene in matters of domestic jurisdiction, but "this principle shall not prejudice the application of enforcement measures under Chapter VII.").

¹²⁹ The OAS, ASEAN do not currently have effective peacekeeping coordination capacity or standing forces. See Int'l Civilian Mission in Haiti, OAS/UN, *Regional Cooperation and Increasing the Peacekeeping Capacity of the UN: Role of the*

take on humanitarian interventions — a state of affairs which would limit the short-term efficacy of any formal regional delegation arrangement. But several regional organizations are developing common security policies and the capacity to take on regional operations. The EU is currently developing their European Security and Defence Policy¹³⁰ and both the OAS and the AU have pledged to develop increased capacity to address conflicts in their respective regions in accordance with the UN Charter.¹³¹ Further, although regional organizations are far from being operational military actors, regional standing armies are likely not prerequisites to the collective action benefits of decision-making and implementation by regional representatives. Even without regional armies, regional organizations remain better suited to inspire collective action to both address conflicts and to assemble coalition forces to intervene.

6. *Will the UN be able to hold regional organizations accountable?*

The Council's mandate is largely based on the legitimacy of global involvement in Charter decision-making and enforcement. Implementation by regional organizations could undermine the global legitimacy of UN intervention. Moreover, the Council may have difficulty holding regional operations accountable. But UN Observer Missions could serve as a model for further regional devolution.¹³² The Council has deployed several UN Observer Missions – peacekeeping operations comprised of a small number of military observers – to monitor and partner with substantial regional stabilization forces.¹³³ Although not without setbacks,¹³⁴ the partnerships have

OAS, (Oct. 26, 1999), available at <http://www.un.org/rights/micivih/rapports/arg.htm>.

¹³⁰ See Maastricht Treaty, *supra* note 55, art. J.4 (developing the European Common Defence Policy).

¹³¹ FORMAN AND GRENE, *supra* note 131, at 208. See also African Union Non-Aggression and Common Defense Pact, art. 10, Jan. 31, 2005, available at <http://www.africa-union.org/root/AU/Documents/Treaties/text/Non%20Aggression%20Common%20Defence%20Pact.pdf> (agreeing that the African Peace and Security Council shall be responsible for the common defence of Africa; also, agreeing to develop and strengthen the African Standby Force and other regional implementation mechanisms).

¹³² UN Observer Missions have been deployed in Liberia (UNOMIL), Georgia (UNOMIG) and Tajikistan (UNMOT). FORMAN AND GRENE, *supra* note 12, at 296-97.

¹³³ S.C. Res. 866, ¶¶ 3-5, U.N. Doc. S/RES/866 (Sept. 22, 1993) (deciding that UNOMIL will work in cooperation with two regional forces, ECOWAS and ECOMOG, to implement a peace agreement in Liberia); S.C. Res. 937, ¶ 6, U.N.

had success in providing stability to regions faced with intrastate conflicts.¹³⁵ Such joint arrangements could alleviate concerns about regional actors' accountability to the Council, while also maintaining the global legitimacy of UN involvement in Charter enforcement.

VIII. DIRECT REGIONAL REPRESENTATION WOULD ALSO ENHANCE INDIRECT HUMAN RIGHTS ENFORCEMENT BY THE SECURITY COUNCIL

Direct regional representation would also enhance the efficacy of indirect methods of human rights protection. The Security Council currently has several methods at its disposal for addressing gross human rights violations without direct military intervention. Among the methods are: (1) the establishment of ad-hoc tribunals; (2) referrals to the International Criminal Court; and (3) the enforcement of Human Rights Council 1235 procedures. The efficacy of all three of these existing methods would likely be enhanced by a Council composed of regional actors. Direct regional involvement could also enable new methods of human rights enforcement, including collaboration between the Council and regional human rights institutions.

Doc. S/RES/937 (July 21, 1994) (deciding to expand UNOMIG's mandate to include direct observation and cooperation with the Commonwealth of Independent States' peacekeeping force in Abkhazia, Georgia); S.C. Res. 1138, ¶ 6, U.N. Doc. S/RES/1138 (Nov. 14, 1997) (deciding that UNMOT's mandate will include cooperation with the Commonwealth of Independent States' peacekeeping forces as well as the Organization for the Security and Cooperation in Europe's Mission in Tajikistan). UN Observer Missions have also been employed to monitor cease-fires without any partnering regional force. *E.g.*, S.C. Res. 693, ¶ 2, U.N. Doc. S/RES/693 (May 20, 1991) (deciding to deploy the United Nations Observer Mission in El Salvador to monitor peace agreement following civil war); S.C. Res. 1118, ¶ 2, U.N. Doc. S/RES/1118 (June 30, 1997) (establishing the United Nations Observer Mission in Angola to monitor the peace process following civil war in Angola).

¹³⁴ *See, e.g., id.* (stating that the regional force in Liberia (ECOMOG) "was arguably a force for stability in an otherwise chaotic situation", but discussing the "difficult relationship" between ECOMOG and UNOMIL).

¹³⁵ *See id.* (describing that the "impulse for action" in Liberia, Georgia and Tajikistan "came from within the region, and was led by a key power within it, acting through a regional political/security structure"); *see also* Przemyslaw Ozierski, *UNOMIG Prolonged – But Will it Be Effective?*, CENTRAL ASIA-CAUCASUS INSTITUTE ANALYST, Mar. 11, 2009, available at <http://www.cacianalyst.org/?q=node/5061> (discussing the Security Council's renewal of UNOMIG's mandate in October 2008, and the valuable role UNOMIG has played in monitoring the ongoing conflict).

1. *Ad-hoc tribunals*

Using its Chapter VII powers in the early 1990s, the Council established the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) in attempts to hold perpetrators of gross human rights violations accountable. The ICTY and ICTR symbolized novel attempts at establishing ad-hoc tribunals on behalf of the international community instead of leaving justice in the hands of post-conflict victors.¹³⁶ Nevertheless, the Council and the ad-hoc tribunals were denounced for being politicized. Critics distrustful of the PS’s power questioned the selectivity of establishing tribunals for Bosnia and Rwanda, but not for several other post-conflict situations, and thus questioned the tribunals’ legitimacy.¹³⁷

Direct regional representation would enable the Council to establish ad-hoc tribunals with greater objectivity and legitimacy. A major source of resistance to ad-hoc international tribunals, and the resulting inconsistency of their establishment, has been the fact that many states have been leery to establish legal mechanisms that could someday be used against them.¹³⁸ Regional organizations are more inclined to consider the international legal principles in need of protection without being hamstrung by nation-state concerns of sovereignty and future vulnerability. Furthermore, a Council composed of regional actors that better represents global interests would be perceived as, and in reality be, more able to be consistent and equitable in the selection of post-conflict situations deserving of ad-hoc tribunals.

2. *International Criminal Court Referrals*

The Rome Statute on the International Criminal Court (“ICC”) provides that the Security Council can refer any “situation” to the ICC under its Chapter VII enforcement powers for investigation and possible prosecution.¹³⁹ The existence of a permanent international court holds significant

¹³⁶ Joanne Lee & Richard Price, *International Tribunals and the Criminalization of International Violence*, in *THE UNITED NATIONS AND GLOBAL SECURITY* 123, 125 (Richard M. Price & Mark W. Zacher eds., 2004) (stating that the ad-hoc tribunals symbolized a departure from the victor’s justice of the Nuremberg and Tokyo tribunals of the 1940s).

¹³⁷ See GARY BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 278 (2000).

¹³⁸ Lee and Price, *supra* note 136, at 126.

¹³⁹ See Rome Statute on the International Criminal Court, art. 13, July 17, 1998, 2187 U.N.T.S. 90, 99 (establishing jurisdiction of the Court over situations referred by the Security Council) [hereinafter Rome Statute]; see also Phillippe Kirsch, John T. Holmes & Mora Johnson, *International Tribunals and Courts*, in *THE UN SECUR-*

potential for close cooperation with the Council, and the Rome Statute envisions the ICC as a future replacement for ad-hoc tribunals. But referral to the ICC requires the unanimous consent of the P5 and the majority consent of the other Council members. The requirement of unanimous P5 consent has already severely politicized and constrained the ICC referral power.¹⁴⁰ In fact, the United States has been able to veto even hypothetical areas of ICC jurisdiction.¹⁴¹

Direct regional representation in the Council would better enable the close and cooperative relationship with the ICC envisaged by the Rome Statute. As the Council is currently composed, the legitimacy of ICC referrals, and the actual and perceived independence of the ICC's administration of justice remains at risk. Without the inherent constraints of nation-state decision-making, the Council would be able to make decisions divorced from concerns of future national vulnerability or bilateral allegiances, and instead more objectively analyze the gravity of human rights crises in question.

3. *Human Rights Council 1235 Procedures*

Under the UN Economic and Social Council's Resolution 1235, the UN Human Rights Council ("HR Council") is authorized to hold annual debates regarding gross human rights violations.¹⁴² Based on the procedures laid out by Resolution 1235, the HR Council has various options for addressing such violations. One option is to call upon the Security Council to take up the issue with a view to considering the adoption of sanctions or other punitive measures.¹⁴³ To date, the option of referral has never been invoked and, thus, because of the Security Council's unique capacity to take

ITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 281, 287 (David Malone ed., 2004) (describing the Security Council's ability to refer situations to the ICC).

¹⁴⁰ See generally Steven Freeland and Michael Blissenden, *The International Criminal Court: Politics, Justice and Impunity*, in AUSTRALIAN AND NEW ZEALAND SOCIETY OF INTERNATIONAL LAW-INTERNATIONAL GOVERNANCE AND INSTITUTION: WHAT SIGNIFICANCE FOR INTERNATIONAL LAW? (T. Dunworth ed., 2003).

¹⁴¹ Because of concerns that U.S. peacekeepers in Bosnia would become subject to the jurisdiction of the ICC, the U.S. vetoed the renewal of the UN's peacekeeping mandate in Bosnia. See Lee and Price, *supra* note 136, at 133.

¹⁴² Economic and Social Council Res. 1235 (XLII), 42 U.N. ESCOR Supp. (No. 1) at 17, U.N. Doc. E/4393 (June 6, 1967).

¹⁴³ *Comment on the 1235 Procedure and its Potential Outcomes*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT, 620, 621 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000).

binding action, 1235 violations have rarely been addressed with more than studies and advisory reports.¹⁴⁴ The availability of consistent Security Council enforcement, divorced from national interests and concerns about future vulnerability, would likely enhance the prospects of inter-council collaboration.

4. Referral to regional human rights institutions

Direct regional involvement could also enable collaboration between the Security Council and regional human rights institutions. The European Court of Human Rights (“ECHR”) and the Inter-American Court of Human Rights (“IACHR”) have demonstrated the efficacy of regional administration of human rights violations. The regional courts already have strong records of human rights protection and their jurisprudence is largely respected within their respective regions.¹⁴⁵ The ECHR and the IACHR’s ability to develop regional legitimacy has been largely based on their use of region-specific human rights agreements¹⁴⁶ and their nuanced consideration

¹⁴⁴ *Id.* In order for consistent inter-council collaboration to develop, the newly constituted Human Rights Council would also likely need to overcome persistent institutional failures. See generally Morton H. Halperin & Diane F. Orentlicher, *The New UN Human Rights Council*, 13 NO. 3 HUM. RTS. BRIEF 1 (2006). The scope of this paper, however, does not allow for analysis of this issue.

¹⁴⁵ See Andrew Drzemczewski & Jens Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism As Established by Protocol No. 11*, 15 HUM RTS. L. J. 81, 82 (1994) (“The [European] Convention’s achievements have been quite staggering, the case-law of the European Commission and Court of Human Rights exerting an ever deeper influence on the laws and social realities of State parties.”); see also David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 1, 28 (David Harris and S. Livingstone eds., 1998) (describing the relative efficacy of the Inter-American human rights institutions in gaining state compliance).

¹⁴⁶ The Inter-American Court of Human Rights adjudicates based on the Inter-American Convention on Human Rights. Statute of the Inter-American Court of Human Rights, art. 1, O.A.S. 448 (IX-0/79) (1980) (“The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights.”). The European Court of Human Rights adjudicates based on the European Convention on Human Rights, *supra* note 55. See ECHR.coe.int, *The European Court of Human Rights, Basic Information on Procedures*, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Procedure/Basic+information+on+procedures/> (last visited May 7, 2007) (stating that Contracting States to the Convention and individuals claiming to be a victim of a violation of the Convention may lodge an application to the Court).

of region-specific and country-specific differences.¹⁴⁷ At the UN level, the consideration of human rights violations is often criticized for failing to take into account regional differences.¹⁴⁸ Regional court referrals could thus prove to be an attractive mechanism for achieving respected and binding resolutions of human rights cases.

In fact, the availability of Security Council referral to regional courts could enable binding adjudication of far more human rights cases.¹⁴⁹ The jurisdiction of the ICC is expressly limited to consideration of the most serious crimes¹⁵⁰ and the UN currently does not have any other binding judicial institution at its disposal. Although the Council has never had any formal association with regional human rights institutions, as discussed *supra* in Part VI, Chapter VIII of the Charter specifically contemplates collaboration with regional organizations for the maintenance of international peace and security.¹⁵¹ Nevertheless, regional court referral may appear to be an unproductive exercise because regional courts only exist in regions that have already developed advanced mechanisms for the protection of human rights. But only the ECHR has achieved near universal adherence to its decisions.¹⁵² Therefore, the IACHR, and other regional courts if and

¹⁴⁷ See R. St. J. Macdonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 83, 122 (Macdonald, Matscher & Petzold eds., 1993) (describing the ECHR practice of interpreting the Convention with a "margin of appreciation" for country-specific circumstances).

¹⁴⁸ See, e.g., Report of the Special Representative on Iran, U.N. Doc. E/CN.4/1999/32 (Dec. 28, 1998) (submitted by Maurice Danby Capithorne) (reporting to the Human Rights Commission on the human rights situation in Iran without making any mention of Shari'a law).

¹⁴⁹ The regional court admissibility criteria would need to be amended for a Council referral mechanism to become operational. Currently, based on Articles 33-35 of the European Convention on Human Rights, the ECHR only admits interstate applications from a High Contracting Party of the Council of Europe, or any person, non-governmental organization or group of individuals claiming to be a victim of human rights violations by a High Contracting Party. See European Convention on Human Rights, *supra* note 55, arts. 33-35. Also, Article 61 of the American Convention on Human Rights would have to be amended. See American Convention on Human Rights, art. 61, Nov. 22, 1969, 1144 U.N.T.S. 123 ("Only the States Parties and the [Inter-American] Commission shall have the right to submit a case to the Court.").

¹⁵⁰ Rome Statute, *supra* note 139, art. 5.

¹⁵¹ U.N. Charter ch. VIII.

¹⁵² See Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not yet an Ox*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 31, 32 (David Harris & S. Livingstone eds., 1998).

when they develop, would stand to benefit from the global legitimacy of Council referral and the threat of binding Council action in the case of non-compliance with court decisions. And the legitimacy of a formal referral mechanism could spur the development of additional regional courts and thus enhance global human rights protection.

IX. NATION-STATE SOVEREIGNTY AS AN OBSTACLE TO DIRECT REGIONAL REPRESENTATION

The major obstacle for direct regional representation in the Council is nation-state sovereignty. The UN was founded as an intergovernmental organization of independent states¹⁵³ and the Charter specifically defines the Council as consisting of fifteen Member States.¹⁵⁴ The implementation of a system of direct regional representation would thus require an amendment to the Charter. As stipulated by Article 108 of the Charter, an amendment would require a two-thirds majority of the General Assembly and the votes of each P5 member.¹⁵⁵ National resistance to regional representation would likely come from both the P5 as well as nation-states in other regions that do not want to cede security policy discretion to regional organizations.

1. Overcoming the objections of the P5

For a system of regional representation to ever occur, the current P5 would have to relinquish their stranglehold on Council decision-making.¹⁵⁶

¹⁵³ U.N. Charter art. 3 (“The original Members of the United Nations shall be the states which . . . sign the present Charter”). Also, the principle of national sovereignty is arguably codified in the UN Charter. *See* U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”)

¹⁵⁴ U.N. Charter arts. 3, 23 (providing that “Members” are nation-states and that “[t]he council shall consist of fifteen Members of the United Nations,” respectively).

¹⁵⁵ U.N. Charter art. 108.

¹⁵⁶ Any amendment to the Charter, and thus the composition of the Council, would be subject to the veto of the P5. *See* U.N. Charter art. 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.”).

Although the prospects of overcoming the P5's ability to veto such reform may seem daunting or impossible in the short-term, over the long-term, continued Council collective action failures may create sufficient incentives among other UN member-states to exert the necessary diplomatic pressure on the P5 to overhaul the Council. Another critical factor is that, over the long-term, objections from regions that are currently unrepresented will likely grow stronger. As nation-states in unrepresented regions become stronger both economically and militarily, their calls for representation may become impossible to ignore. For example, as South America continues to gain economic strength, states such as Brazil and Venezuela will likely demand equal and thus permanent representation in the Council. A system of regional representation may thus be the best way to appease such calls for representation without further paralyzing the Council by adding more nation-states that each have their own *realpolitik* interests.

2. *Overcoming other national sovereignty objections*

As has been the experience in the development of the EU's Common Foreign and Security Policy,¹⁵⁷ there will inevitably be states that strongly resist ceding their security policy discretion to regional actors. But despite inevitable resistance, economic and strategic interdependence may provide the necessary incentives for even the most reluctant nation-states to cooperate with regional organizations. As regional organizations and international human rights law continue to emerge, national sovereignty may no longer remain as sacrosanct a principle. Much of the reason for codifying the traditional role of nation-state sovereignty in the Charter was to preserve reciprocal respect of domestic sovereignty among state parties. The traditional conception of national sovereignty is eroding, however, based on international human rights law and humanitarian interventions.¹⁵⁸ It is now

¹⁵⁷ See John Temple Lang, *The Main Issues After the Convention on the Constitutional Treaty for Europe*, 27 *FORDHAM INT'L L.J.* 544, 565 (2004) (describing the unwillingness of large EU Member States to give complete discretion to the European Commission over foreign and security policy).

¹⁵⁸ The human rights movement, that began with the Nuremberg Tribunal and is now codified in the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, creates legal obligations for State parties with regard to treatment of their own citizens. See generally International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A(XXI), U.N.Doc. A/6316 (1966). See also Wechsler in *THE UN SECURITY COUNCIL*, *supra* note 17, at 65 (detailing the "chipping away" of the supremacy of state sovereignty).

widely understood that nation-state sovereignty is not absolute, particularly when states agree to international human rights treaties and multilateral arrangements.¹⁵⁹ In fact, international law now prohibits nation-states from using sovereignty as a shield for the treatment of its own civilians.¹⁶⁰ And the “responsibility to protect” is emerging as an additional legal basis for multilateral intervention into intrastate crises.¹⁶¹

Given these developments, the UN as established in 1945 may no longer most effectively address the evolving threats to international security. Proponents of the responsibility to protect agree that the Council remains the most appropriate body to authorize international interventions in response to gross human rights violations.¹⁶² Yet, the notion that individual nation-states can, or will, consistently authorize intervention into human rights crises in other sovereign territories is becoming increasingly tenuous.¹⁶³ Post-cold war threats to peace and security have been largely intrastate conflicts, for which regional operations are likely better suited.¹⁶⁴ As

¹⁵⁹ See *An Agenda for Peace*, *supra* note 20, at 17 (“[t]he time of absolute and exclusive sovereignty . . . has passed; its theory was never matched by reality.”); see generally Jarat Chopra & Thomas G. Weiss, *Sovereignty is No Longer Sacrosanct: Codifying Humanitarian Intervention*, 6 ETHICS & INT’L AFF. 95 (1992) (describing sovereignty as a “legal fiction” and noting that the “exclusivity and inviolability of state sovereignty are increasingly mocked by global interdependence”).

¹⁶⁰ UN interventions based on Chapter VII of the UN Charter themselves demonstrate that the shield of sovereignty is not absolute. See Saira Mohamed, *From Keeping Peace to Building Peace: A Proposal For a Revitalized United Nations Trusteeship Council*, 105 COLUM. L. REV. 809, 836-837 (2005) (stating that a new conception of sovereignty permitting international intervention has been recognized by the UN and by scholars).

¹⁶¹ The “responsibility to protect” principle argues that state sovereignty implies responsibility, and thus in cases where a population is suffering serious harm as a result of internal war, insurgency, repression, or state failure and where the state in question was unwilling or unable to provide protection, the principle of nonintervention yields to an international responsibility to protect. See Gareth Evans and Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99 (Nov./Dec. 2002), available at <http://www.foreignaffairs.org/20021101faessay9995/gareth-evans-mohamed-sahnoun/the-responsibility-to-protect.html>; see also Wechsler in THE UN SECURITY COUNCIL, *supra* note 17, at 66 (discussing the international commission which produced *The Responsibility to Protect* report).

¹⁶² *Id.*

¹⁶³ See OTTE, *supra* 104, at 4.

¹⁶⁴ See FORMAN AND GRENE, *supra* note 12, at 296 (describing the benefits of regional involvement in intrastate conflicts).

provided by the UN Charter, individual states may only use military force in self-defense and thus the legitimacy of multilateralism is becoming a necessary condition for the effective maintenance of peace and security.¹⁶⁵ Constrained by international law and unilateral national interests, nation-states are likely no longer the most effective actors to fulfill the Council's global mandate.

X. CONCLUSION

The Security Council's reliance on nation-states will likely continue to fail as a global mechanism for collective security and the prevention of human rights disasters. When considering the potential efficacy of institutional organization and reform, it is necessary to consider both the short-term and long-term interests involved. While the political realities of nation-states do not often favor short-term compromise in favor of long-term results, supranational organizations are better suited to maneuver in the present with regard for the future. Nation-state actors are prone to act in a limited self-interest, even in the context of an organization that demands global and intergenerational responsibility. The inherent economic and political realities of nation-states disfavor remedial action on a global scale. Nation-state self-interest in the Council has thus often caused collective action failures. And without any prospect for an international standing army, regional organizations will continue to be the best option for implementing Council resolutions. Just as regional actors are better able to overcome collective action problems to take implementing action, regional actors would likely more consistently inspire decisions consistent with Charter principles on human rights protection.

In the short-term, a push to reform the Council would be a formidable and likely unachievable task. Despite the trend towards reliance on regional organizations for implementation, direct representation for many regions is likely not a short-term option. Regional organizations that do exist are not all well-established and parts of the world remain unrepresented. Also, powerful nation-states stand in the way of any short-term overhaul of the Council system. In the long-term, however, an evaluation of the viability and desirability of the proposed institutional reforms should be based on geopolitical trends and likely threats to peace and security. National power and politics change, and thus supranational organizations should not feel constrained by current power distribution when considering

¹⁶⁵ See U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or 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.").

long-term innovation. Instead, to more effectively maintain international peace and security in the long-term, the UN must adjust to evolving geopolitical realities. Since the end of World War II, regional and intrastate conflicts have become the dominant threats to security. Yet nation-states remain understandably reluctant to intervene in the sovereign affairs of other countries. Nation-state interests preclude consistent and comprehensive fulfillment of the human rights protection mandated by the UN Charter. Therefore, if the ultimate goals of the Security Council are global collective security and human rights protection, relying on the collective action of nation-states will continue to be unreliable.

