

**A CASE FOR DELEGATION:
THE U.N. SECURITY COUNCIL, REGIONAL CONFLICTS, AND REGIONAL
ORGANIZATIONS**

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I. INTRODUCTION: THE NEED FOR SECURITY COUNCIL REFORM

The United Nations (U.N.) was created with the primary purpose of ensuring international peace and security.¹ In order to carry out that purpose, Chapter VII of the U.N. Charter confers power on the Security Council to deal decisively with threats to international peace.² If the Security Council determines that a nation's actions constitute a "threat to the peace, breach of the peace, or act of aggression," it is empowered to "decide what measures shall be taken ... to restore international peace and security."³ Among the measures at its disposal are sanctions barring trade, either in whole or in part, with offending states,⁴ the power to order U.N. member states to sever diplomatic ties and refrain from communicating with offending states,⁵ and the power to authorize the use of military force.⁶

* J.D. 2007, New York University School of Law. I thank Professor Thomas Franck of NYU School of Law for his insight, direction, and inspiration, the faculty and staff of NYU School of Law for their help with research materials and facilities, and, as always, Doug and Jeannie Kreykes for their constant support.

¹ See U.N. Charter pmbl. (stating the primary purpose of the United Nations is to "save succeeding generations" from the horrors of war).

² See generally U.N. Charter ch. VII; The Secretary-General, *Report of the Secretary General's High-Level Panel on Threats, Challenges, and Change, delivered to the General Assembly*, U.N. Doc A/59/565 (Dec. 2, 2004) [hereinafter *High-Level Panel Report*].

³ U.N. Charter art. 39.

⁴ *Id.* at art. 41.

⁵ *Id.*

⁶ *Id.* at art. 42; see also *id.* at 43, para. 1 (suggesting that member states would enter into "special agreements" to make military forces available to the Security Council to be used by the U.N. as its own standing army); THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 24 (Cambridge University Press 2002) (stating that no state agreed to provide military forces, and Article 42 has been interpreted to allow the Security Council to authorize the use of force by ad hoc forces made up of willing member states).

The Security Council is in desperate need of reform. Scholars and practitioners alike acknowledge that the Council in its current form is ineffective due to two major problems.⁷ First, the Security Council is widely criticized as unrepresentative and lacking in geographic diversity.⁸ Second, the veto power enjoyed by the five permanent members creates a collective action problem in which the Council can only act effectively to address threats when the action would not threaten the interests of any of the permanent members.⁹

A. The Problem of Geographic Diversity in Security Council Composition

The Security Council has been widely criticized as unrepresentative and lacking in geographic diversity.¹⁰ The Council is designed to be a representative body. It is made up of fifteen member states: the five permanent members and ten other states that are elected for two-year terms.¹¹ The non-permanent members are elected by the General Assembly, which takes concerns such as geographic diversity into account when making its decisions.¹² In order to

⁷ See, e.g., Michael C. Davis, *International Intervention in an age of Crisis and Terror: U.N. Reform and Regional Practice*, 15 TUL. J. INT'L & COMP. L. 1 (2006); Christine Gray, *A Crisis of Legitimacy for the UN Collective Security System?*, 56 INT'L & COMP. L.Q. 157 (2007); Allen Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415 (2006).

⁸ David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 562 (1993); see also Nico Krisch, *The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 879, 905 (Christian Walter et al. eds., 2003). The Council's "composition is criticised for being too limited" and that "the Council is often perceived merely as a tool of its Western members and in particular of the United States." *Id.*

⁹ See U.N. Charter art. 27, para. 3; see also FRANCK, *supra* note 6, at 7-8 (stating that, despite the language in article 27(3) of the U.N. Charter requiring the five permanent members of the Security Council to vote in concurrence in order for it to take action, that article has been interpreted as allowing action as long as a permanent member does not cast a vote against the proposed resolution. Therefore, the Security Council may act despite the abstention of any given permanent member).

¹⁰ Caron, *supra* note 8, at 562; see *High-Level Panel Report*, *supra* note 2, ¶ 41; see also Krisch, *supra* note 8, at 905. The High-Level Panel Report stated that "[t]oo often, the United Nations and its Member States have discriminated in responding to threats to international security" and comparing the swift response to the September 11, 2001 attacks on the World Trade Center to the lack of U.N. action during the 1994 massacres in Rwanda. *High-Level Panel Report*, *supra* note 2, ¶ 41.

¹¹ U.N. Charter art. 23.

¹² *Id.* at para. 1.

assure that different member states are given a chance to sit on the Security Council, the Charter prohibits non-permanent members from serving consecutive two-year terms.¹³

Despite these institutional safeguards, scholars and practitioners widely deride the Council as being no longer representative of the international community.¹⁴ When formed, the U.N. had fifty-one member states. At the time of this writing, that number had grown to 192.¹⁵ Even considering the fact that the Security Council's membership has been expanded from its original eleven members to a total of fifteen, the Council has become less representative over the life of the U.N. For example, if we look at the number of U.N. member states per seat in 1945, we find that there was one seat on the Security Council for every 4.64 member states. At the time of writing, that number was one seat for every 12.8 member states, an increase of roughly 275%. The decreased availability of representation on the Security Council makes it less likely that U.N. member states will have a chance to contribute to the Council's decision making process, and therefore less likely that those member states will support the Council's decisions.¹⁶

More important than the overall growth in U.N. membership compared to the availability of representation on the Security Council is the problem posed by the permanent seats held by the United States, the United Kingdom, China, France, and Russia. The permanent members represent the balance of international power at the time the U.N. was formed in 1945, and the Security Council's structure has been widely criticized for allowing Western nations to advance their interests at the expense of other regions.¹⁷

¹³ *Id.* at para. 2.

¹⁴ *See, e.g.,* Caron, *supra* note 8, at 562; Krisch, *supra* note 8, at 905.

¹⁵ United Nations member states, <http://www.un.org/members/growth.shtml> (last visited Jan. 11, 2008).

¹⁶ *See High-Level Panel Report, supra* note 2, ¶ 245 (“[T]he paucity of representation from the broad membership [of the U.N.] diminishes support for Security Council decisions.”).

¹⁷ *See id.* ¶ 246 (“The financial and military contributions to the United Nations of some of the five permanent members are modest compared to their special status....”); Krisch, *supra* note 8, at 905 (“[T]he Council is often perceived merely as a tool of its Western members and in particular of the United States.”).

B. Collective Action Problems and Security Council Practice From 1945 to the Present

In addition to allegedly being unrepresentative and lacking geographic diversity, the Security Council is often criticized as ineffective due to collective action problems. While lack of political will on the part of U.N. member states to provide the Security Council with the necessary resources and personnel to effectively intervene in conflicts is undoubtedly part of the problem, the majority of the Council's ineffectiveness stems from the possession of a veto by the five permanent members.¹⁸ In order to designate or act on threats to international peace, the Security Council must pass a resolution by affirmative vote of at least nine of its 15 members.¹⁹ Any of the five permanent members may veto a given resolution.²⁰ The other members of the Council cannot overrule a veto.²¹

A historical analysis of Security Council practice confirms that the veto possessed by the five permanent members has often rendered the Council unable to address threats to international peace. Until the fall of the Soviet Union, Cold War tensions between the Union of Soviet Socialist Republics and western nations with permanent seats such as the U.S., the U.K., and France resulted in gridlock within the Security Council.²² The end of the Cold War brought a renewed sense of cooperation to the Security Council.²³ That cooperation, however, was

¹⁸ See INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT ¶ 6.20 (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (“[M]any interlocutors regarded capricious use of the veto, or threat of its use, as likely to be the principle obstacle to effective international action in cases where quick and decisive action is needed to stop or avert a significant humanitarian crisis.”).

¹⁹ U.N. Charter art. 27, para. 3.

²⁰ *Id.*; see FRANCK, *supra* note 6, at 7-8.

²¹ See U.N. Charter art. 27, para. 3.

²² See *High-Level Panel Report*, *supra* note 2, ¶ 10, at 18; see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 196 (2d ed. 2004).

²³ See *High-Level Panel Report*, *supra* note 2, ¶ 12, at 18; see also GRAY, *supra* note 22, at 204-05.

fleeting.²⁴ The Council's failure to act to address new threats to international peace such as genocide, terrorism, and regional conflicts has led to widespread calls for reform.²⁵

The process of globalization has exacerbated the collective action problem caused by the possession of a veto over Security Council actions by the five permanent members. Industries and corporations that once operated almost exclusively within the territory of the permanent member states now have interests spread throughout the world. The increasingly global nature of business and trade make it more likely that at least one of the five permanent members of the Security Council will possess an economic interest in assuring that the use of force is not authorized against a third party state, even if that third party state creates a threat to international peace and security.

1. *The Security Council During the Cold War*

The first major action authorized by the Security Council was a collective response to the invasion of the Republic of Korea (South Korea) by the Korean People's Republic (North Korea) on June 25, 1950. The day of the invasion, the Council called for an immediate ceasefire and the withdrawal of North Korean troops to the 38th parallel.²⁶ Two days later, after North Korea refused to comply, the Security Council authorized U.N. member states to use military force to

²⁴ See *High-Level Panel Report*, *supra* note 2, ¶ 13, at 18 ("It quickly became apparent that the United Nations had exchanged the shackles of the cold war for the straightjacket of Member State complacency and great Power indifference."); see also GRAY, *supra* note 22, at 205.

²⁵ See *High-Level Panel Report*, *supra* note 2, ¶ 13, at 18 ("Although the United Nations gave birth to the notion of human security, it proved poorly equipped to provide it. Long-standing regional conflicts, such as those involving Israel/Palestine and Kashmir, remained unresolved. Failures to act in the face of ethnic cleansing and genocide in Rwanda and Bosnia eroded international support. Optimism yielded to cynicism about the willingness of Member States to support the Organization.").

²⁶ See S.C. Res. 82 (V), ¶ 1, U.N. Doc. S/1501 (June 25, 1950). The resolution called for "the immediate cessation of hostilities" and called "upon the authorities in North Korea to withdraw forthwith their armed forces to the 38th parallel." *Id.*

assist South Korea.²⁷ The Council's swift response to the invasion of South Korea was made possible only because of the absence of the U.S.S.R., which was boycotting the Security Council at the time in protest of the U.N.'s recognition of Taiwan as the legitimate representatives of China.²⁸ When the Soviet Union returned to the Council, the gridlock caused by the exercise of vetoes by permanent members on opposite sides of the Cold War ideological divide resumed.²⁹

Frustrated with the inaction of the Security Council during the Cold War, the General Assembly assumed a greater role in assuring collective security than originally envisioned by the U.N. Charter.³⁰ The Assembly passed the Uniting for Peace resolution, stating that:

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including ... the use of armed force when necessary, to maintain or restore international peace and security.³¹

For the next forty years, the General Assembly used the Uniting for Peace resolution to circumvent the deadlocked Security Council and make recommendations regarding collective security, including recommending the use of armed force and authorizing the creation of peacekeeping forces.³² During that time, the Security Council failed to authorize Chapter VII action to address any of the threats to international peace found by the General Assembly.³³

²⁷ See S.C. Res. 83 (V), U.N. Doc. S/1511 (June 27, 1950) ("Recommend[ing] that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.").

²⁸ GRAY, *supra* note 22, at 199.

²⁹ *Id.*; see also FRANCK, *supra* note 6, at 33.

³⁰ FRANCK, *supra* note 6, at 33-40; see also GRAY, *supra* note 22, at 200.

³¹ G.A. Res. 377 (V), ¶ 1, U.N. Doc. A/1775 (Nov. 3, 1950).

³² See FRANCK, *supra* note 6, at 33-40; GRAY, *supra* note 22, at 200 (The legality of the Uniting for Peace resolution was hotly contested at the time it was passed. The resolution was upheld by the International Court of Justice in *Certain Expenses of the United Nations*, Advisory Opinion, 1961 I.C.J. 151 (July 20), but many scholars and practitioners found the Court's analysis unconvincing). Although the issue concerning the legality of the Uniting for Peace resolution is beyond the scope of this article, its existence is important for our purposes only as a

2. *Post-Cold War Optimism and the Response to Iraq's Invasion of Kuwait*

The fall of the Soviet Union in 1989 brought renewed hope for cooperation between the permanent members of the Security Council.³⁴ The Council responded swiftly to the August 2, 1990 invasion of Kuwait by Iraq. Explicitly invoking Article 39 of the U.N. Charter, the Security Council passed a resolution the day of the invasion stating that “there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait” and demanded that Iraq withdraw its forces.³⁵ When Iraq failed to comply, the Council passed Resolution 678, which authorized member states cooperating with the government of Kuwait to use “all necessary means” to repel Iraqi forces from Kuwait and restore international peace and security in the region.³⁶

3. *Efforts to use Peacekeeping Forces to Address Regional and Humanitarian Crises*

The Security Council's response to Iraq's invasion of Kuwait was hailed as a success and resulted in widespread optimism that the Council might finally overcome the collective action problem posed by the possession of a veto by the five permanent members.³⁷ That optimism is demonstrated by then-Secretary General Boutros Boutros-Ghali's Agenda for Peace, a document in which he called for an expanded role for peacekeeping forces that blurred the line between peacekeeping and enforcement actions.³⁸

demonstration of the widespread frustration with Security Council gridlock caused by the exercise of permanent member vetoes during the Cold War.

³³ GRAY, *supra* note 22, at 204.

³⁴ See *id.*; *High-Level Panel Report*, *supra* note 2, ¶ 12, at 18.

³⁵ S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990).

³⁶ S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990). The phrase “use all necessary means” in Resolution 678 was widely understood to contemplate the use of military force. All subsequent Security Council resolutions authorizing the use of force have utilized the same language. GRAY, *supra* note 22, at 204-05.

³⁷ See *High-Level Panel Report*, *supra* note 2, ¶ 12, at 18; GRAY, *supra* note 22, at 204.

³⁸ See The Secretary-General, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping*, ¶ 44, delivered to the General Assembly, U.N. Doc. A/47/277-S/24111 (June 17, 1992); see also GRAY, *supra* note 22, at 217.

In 1992, the first of such forces was deployed to the Balkans in order to “create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis” among factions struggling for power after the collapse of the Socialist Federal Republic of Yugoslavia.³⁹ That force was hindered, however, by squabbling among members of the Security Council as to its size and mandate, and by lack of political will by U.N. member states to provide military forces to the Secretary-General.⁴⁰ The force found it impossible to protect so-called “safe areas” from attack.⁴¹ Genocide and conflict continued in the region until a negotiated ceasefire took effect in 1995.⁴²

The deployment of a similar peacekeeping mission to Somalia in 1992 served to further highlight the problem of lack of collective action by the Security Council and lack of political will to provide funding and personnel for U.N. forces by member states.⁴³ The Security Council responded slowly to the developing crisis caused by a civil war in Somalia in which warring factions systematically deprived civilians of food and other basic necessities, leading to loss of life on a scale much greater than that in the former Yugoslavia.⁴⁴ In January 1991, the Security Council issued a Presidential Statement on the developing Somali crisis, but it was not until a year later in January 1992 that the Council was able to agree on an initial resolution expressing alarm at the heavy loss of life and property caused by the conflict.⁴⁵ In April 1992, the Security Council finally took action in the form of Resolution 751, which stated that continuation of the

³⁹ See S.C. Res 743, ¶ 2, U.N. Doc. S/RES/743 (Feb. 21, 1992) (establishing a United Nations Protection Force (UNPROFOR) to implement the peacekeeping recommendations of the Secretary General); S.C. Res. 713, ¶ 6, U.N. Doc. S/RES/713 (Sep. 25, 1991) (“[U]nder Chapter VII of the Charter of the United Nations... all states shall... implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia.”).

⁴⁰ See GRAY, *supra* note 22, at 217-21.

⁴¹ *Id.* at 219.

⁴² See *id.* at 217-20.

⁴³ See generally *id.* at 222-24.

⁴⁴ *Id.* at 222.

⁴⁵ See S.C. Res 733, U.N. Doc. S/RES/733 (Jan. 23, 1992).

situation in Somalia constituted a threat to international peace and security and established a peacekeeping force to ensure that humanitarian aid was delivered to civilians.⁴⁶

The delay in responding to the crisis in Somalia led to criticism that the Security Council was less concerned about conflict in Africa than in Europe.⁴⁷ Despite the delay and intensive negotiations among Security Council members, the force established was not given the necessary resources to achieve its mandate.⁴⁸ The force was largely dependent on U.S. troops, and when those troops were withdrawn following an engagement in Mogadishu in which 16 U.S. soldiers were killed, the peacekeeping force lacked the resources to continue its mission.⁴⁹ Somalia still has no functioning central government, and civil war continues to result in the death of civilians and other abuses.⁵⁰

The Security Council's approach to the genocide that occurred in Rwanda beginning in 1994 demonstrated a more cynical approach and a failure of political will on the part of both the Security Council and U.N. member states.⁵¹ Member states were not willing to commit resources to Rwanda while still involved in peacekeeping operations in both Yugoslavia and Somalia.⁵² When massacres began taking place in April 1994, the Secretary-General asked the Security Council to act by either (1) authorizing a large Chapter VII force to avert the massacres; (2) authorizing a small force to act as intermediary between the two parties; or (3) calling for complete withdrawal of U.N. personnel from harm's way.⁵³ The Security Council chose the second option, and passed Resolution 912 providing for a small force.⁵⁴ That force, however,

⁴⁶ S.C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992).

⁴⁷ GRAY, *supra* note 22, at 222.

⁴⁸ *Id.*

⁴⁹ *Id.* at 223.

⁵⁰ *Id.* at 224.

⁵¹ *See, e.g., id.* at 228; Davis, *supra* note 7, at 4.

⁵² GRAY, *supra* note 22, at 228.

⁵³ *Id.* at 229.

⁵⁴ *See* S.C. Res 912, U.N. Doc. S/RES/912 (Apr. 21, 1994).

did not have the power to protect civilians and refugees.⁵⁵ The Security Council delayed until May 1994 before it passed Resolution 918, which gave U.N. forces the power to establish secure humanitarian areas and contribute to the security of refugees and civilians.⁵⁶ Even after Resolution 918, the Secretary-General found it impossible to convince member states to contribute troops to the peacekeeping force.⁵⁷ By the time a ceasefire was declared in July 1994, millions had been killed.⁵⁸

4. Use of Force by Regional Organizations Faced with Security Council Inaction

In December 1989, rebel forces supported by nearby African states began a campaign against the government of Liberia.⁵⁹ Within six months, hundreds of thousands of refugees had fled to neighboring states and thousands had been killed in the conflict.⁶⁰

Samuel Doe, the President of Liberia, appealed to the Economic Community of West African States (ECOWAS), a regional organization to which Liberia belonged, to send a force to fight on the side of the government and help him defeat the rebels.⁶¹ Finding a “state of anarchy and total breakdown of law and order ... [with] the spilling of hostilities into neighboring countries,” ECOWAS decided to establish a neutral Cease-Fire Monitoring Group (ECOMOG) to enforce a truce between the warring factions.⁶² Starting on August 24, 1990, ECOWAS deployed 15,000 troops, along with tanks and military aircraft, in order to bring an end to the

⁵⁵ *Id.*

⁵⁶ See S.C. Res. 918, U.N. Doc. S/RES/918 (May 17, 1994).

⁵⁷ See GRAY, *supra* note 22, at 229.

⁵⁸ *Id.*

⁵⁹ FRANCK, *supra* note 6, at 155.

⁶⁰ *Id.*

⁶¹ *Id.* at 156.

⁶² *Id.*

violence.⁶³ ECOWAS did not seek approval from the Security Council before deploying the force.⁶⁴

Under Article 53 of the U.N. Charter, ECOWAS acted illegally by resorting to military force without authorization from the Security Council.⁶⁵ Nevertheless, the Council retroactively signaled its approval of the action by issuing a Presidential Statement “commend[ing] the efforts made by the ECOWAS heads of State and Government to promote normalcy in Liberia.”⁶⁶ After the parties to the conflict agreed to a ceasefire agreement in November 1990, the Security Council actively cooperated with ECOWAS to ensure stability in the region.⁶⁷ That cooperation included commending ECOWAS for intervening in a later civil war in Sierra Leone, despite once again lacking the Security Council authorization required by Article 53.⁶⁸

The retroactive approval of ECOWAS actions in both Liberia and Sierra Leone demonstrates an implicit recognition by the Security Council itself of the collective action problems inherent in its structure.⁶⁹ The Council, knowing that it lacked the political will to deal with the conflicts, effectively endorsed actions by ECOWAS that were an illegal usurpation of Security Council power by the regional organization.⁷⁰ The endorsement of such actions led to the impression on the part of many scholars and practitioners that humanitarian intervention by

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See U.N. Charter art. 53 (“[N]o enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.”).

⁶⁶ The President of the Security Council, *Statement by the President of the Security Council, delivered to the Security Council*, U.N. Doc. S/22133 (Jan. 22, 1991).

⁶⁷ See FRANCK, *supra* note 6, at 156-64; see also The President of the Security Council, *Statement by the President of the Security Council, delivered to the Security Council*, U.N. Doc. S/PRST/1994/9 (Feb. 25, 1994).

⁶⁸ FRANCK, *supra* note 6, at 160-61.

⁶⁹ See *id.* at 162 (“The ECOWAS interventions in Liberia and Sierra Leone can be said to have demonstrated the reticent UN system’s increasing propensity to let regional organizations use force, even absent specific prior Security Council authorization, when that seemed the only way to respond to impending humanitarian disasters.”).

⁷⁰ *Id.*

regional organizations would be tolerated where the Security Council had shown either an inability or unwillingness to act.⁷¹

That impression was reinforced by events surrounding the North Atlantic Treaty Organization's (NATO) forcible intervention in Kosovo in 1999 to stop genocide being perpetrated against ethnic Albanians by Serbian government authorities.⁷² In contrast to the ECOWAS engagements in Liberia and Sierra Leone, NATO's intervention was actively opposed by Russia and China, both of whom had threatened to veto any Security Council resolution calling for military action to end the conflict.⁷³

Despite the Security Council disapproval of the use of force implicit in Russia and China's veto threats, NATO began air strikes aimed at halting the violence on March 24, 1999.⁷⁴ In response, Russia demanded that the Security Council convene to discuss the action.⁷⁵ In that meeting, Russia and China called for a Security Council resolution condemning NATO's intervention.⁷⁶ China's Ambassador stated that "[t]he question of Kosovo, as an internal matter of the Federal Republic of Yugoslavia, should be resolved among the parties concerned in the Federal Republic.... We oppose interference in the internal affairs of other States, under whatever pretext or in whatever form."⁷⁷ The Russian Ambassador argued that, if NATO's intervention were not condemned by the Security Council, it would create "a dangerous precedent that could cause acute destabilization and chaos on the regional and global level" and

⁷¹ See David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 157, 160 (Lori Fisler Damrosch, ed., 1993). With respect to the Security Council's retroactive endorsement of the ECOWAS intervention in Liberia "the international community now appear[ed] to be willing not only to tolerate but to support a considerable degree of intervention in internal conflicts when necessary to restore order and save lives." *Id.*

⁷² For a detailed account of the facts leading up to NATO intervention, see FRANCK, *supra* note 6, at 163-66.

⁷³ *Id.* at 163.

⁷⁴ *Id.* at 166.

⁷⁵ *Id.*

⁷⁶ *Id.* at 167-68.

⁷⁷ U.N. SCOR, 54th Sess., 3988th mtg. at 12, U.N. Doc. S/PV.3988 (Mar. 24, 1999).

result in a “virus of illegal unilateral approaches.”⁷⁸ Following two days of Security Council debate, Russia offered a draft resolution condemning NATO’s “unilateral use of force” as “a flagrant violation of the United Nations Charter.”⁷⁹ The draft resolution invoked the Security Council’s Chapter VII powers and demanded “immediate cessation” of NATO’s intervention.⁸⁰ The resolution was defeated overwhelmingly by a vote of 3 in favor and 12 opposed.⁸¹

After a ceasefire was signed between NATO and Belgrade on June 9, 1999, the Security Council passed Resolution 1244 with 14 favorable votes and one abstention.⁸² That resolution implicitly approved of NATO’s intervention by authorizing “relevant international organizations to establish the international security presence in Kosovo” in order to “establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.”⁸³

The events surrounding the ECOWAS interventions in Liberia and Sierra Leone and the NATO intervention in Kosovo demonstrate the collective action problem faced by the Security Council. Such interventions have been held to be technically illegal under the terms of the U.N. Charter, but morally justified.⁸⁴ That view, however, serves only to highlight the discord between the requirements of international law and the goals that the law is meant to serve. The question then becomes, how can the collective action problems of the Security Council be overcome in order to make that body more likely to intervene in situations like Kosovo where action to stop abuse is morally required?

⁷⁸ *Id.* at 24.

⁷⁹ U.N. SCOR, 54th Sess., 3989th mtg. at 6, U.N. Doc. S/PV.3989 (Mar. 26, 1999).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² FRANCK, *supra* note 6, at 169.

⁸³ S.C. Res. 1244, ¶ 7, U.N. Doc. S/RES/1244 (June 10, 1999).

⁸⁴ *See* FRANCK, *supra* note 6, at 170; *see also* THE INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT 164 (2000).

II. THE DESIRABILITY OF DELEGATION TO REGIONAL ORGANIZATIONS

There is no consensus as to how the Security Council should be reformed in order to address the twin problems of assuring geographical balance in representation and allowing for decisive action to address threats. The majority of proposals have focused on expanding the Council's membership in order to make it more geographically diverse and representative.⁸⁵ Such proposals fail to adequately address the collective action problems created by the veto and structure of the Security Council.⁸⁶

One approach that has not been explored would involve the prospective delegation of Chapter VII powers to regional organizations. This type of reform would result in greater benefits than current proposals because it would largely mitigate the collective action problems caused by the possession of a veto over Security Council action by the current five permanent members. Furthermore, delegation of Chapter VII powers to regional organizations would address concerns over the unrepresentative nature of the Council by assuring that decisions regarding intervention in regional conflicts were made by member states from the region that possess a vital interest in maintaining regional peace and their own stability.

A. Charter Provisions Regarding Delegation of Security Council Power

Before any prospective delegation of Chapter VII powers to regional organizations, that delegation would have to be found legal under the terms of the U.N. Charter.⁸⁷ When inquiring

⁸⁵ See *High-Level Panel Report*, *supra* note 2, ¶ 250 (“The Panel believes that a decision on the enlargement of the Council ... is now a necessity.”).

⁸⁶ See *id.* ¶ 256. The High-Level Panel Report stated that although “the institution of the veto has an anachronistic character that is unsuitable for the institution in an increasingly democratic age,” reform proposals advanced thus far give “no practical way of changing the existing members’ veto powers and we would urge that its use be limited to matters where vital interests are genuinely at stake.” *Id.*

⁸⁷ See U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”). Under the terms of Article 103, the states within a regional organization are prohibited from acting in violation of the U.N. Charter. Therefore, if a delegation of power by the Security Council to a regional organization were found to conflict with the Charter, that delegation would be invalid.

as to the legality of delegation, then, we must examine the text of the Charter to determine whether the Security Council is precluded from delegating the powers enumerated therein.

Nothing in the text of Chapter VII precludes the Security Council from delegating its powers to regional organizations. A strict reading of Article 39, which states that “[t]he Security Council *shall* determine the existence of any breach of the peace, or act of aggression,” would seem to reserve the power to designate threats exclusively to the Security Council.⁸⁸ That interpretation was rejected, however, by the International Court of Justice (ICJ) in the *Nicaragua* case.⁸⁹ In that case, the ICJ addressed an argument on the part of the United States that the dispute in question involved “a charge of aggression and armed conflict envisaged in Article 39 of the United Nations Charter, which can only be dealt with by the Security Council in accordance with the provisions of Chapter VII....”⁹⁰ The Court rejected the argument that only the Security Council may determine the existence of a threat to international peace and security, arguing that Article 24 of the Charter confers “*primary* responsibility for the maintenance of international peace and security” on the Security Council, but does not confer “*exclusive* responsibility on the Security Council for the purpose.”⁹¹

The language of Articles 40, 41 and 42 is more conducive to delegation. Each of those articles allows that the Security Council, once it has designated a threat to international peace and security, “may” take a given action.⁹² The use of the permissive word “may,” as opposed to

⁸⁸ See *id.* at 39 (emphasis added).

⁸⁹ See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 392, 434-45 (Jurisdiction of the Court and Admissibility of the Application of Nov. 26).

⁹⁰ *Id.* at 434.

⁹¹ *Id.* (quoting U.N. Charter art. 12).

⁹² See U.N. Charter art. 40 (“In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.”); see also *id.* at art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.”); *id.* at art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have

the mandatory “shall,” cuts in favor of the argument that the Security Council has the ability to delegate the power to take the actions specified by Articles 40, 41, and 42 to regional organizations.

That argument is bolstered by the prevailing interpretation of Article 42, which allows the Security Council to authorize ad hoc forces, composed of military personnel belonging to member states to use force on its behalf to address a specific crisis.⁹³ The authorization of intervention by willing member states in the name of Security Council is, essentially, a delegation of the Council’s authority to take military action under Article 42 to those member states willing and able to take such action. If such case-by-case delegation is legal under the terms of the Charter, there is no logical barrier to expanding the delegation of authority to engage in military intervention to a more prospective model under which regional organizations would automatically be given the power to intervene if certain factual circumstances were found to exist. Put another way, if the Security Council has the power to authorize military intervention by regional organizations when it finds that a specific factual situation constitutes a threat to international peace and security, then it must have the power to prospectively state that analogous factual situations that arise in the future constitute a threat to peace,⁹⁴ and therefore justify the use of force on the part of regional organizations.

For example, the Security Council explicitly invoked Article 39 of the Charter in finding that the invasion of Kuwait by Iraqi forces on August 2, 1990 constituted “a breach of

proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”).

⁹³ FRANCK, *supra* note 6, at 24.

⁹⁴ For more on this point, see Stefan A. Talmon, *The Security Council as World Legislature* 99 AM. J. INT’L L. 175, 179-80 (2005). For a discussion detailing the recent Security Council practice of designating certain phenomena, such as international terrorism, as per se threats to international peace and security rather than designating threats on a case-by-base basis with reference to particular acts of those phenomena, see also Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, in 241 RECUEIL DES COURS 195, 344-46 (1993-IV), arguing that the Security Council enjoys the power to designate certain acts as per se threats to international peace and security.

international peace and security.”⁹⁵ After Iraq refused to withdraw, the Council authorized member states to use “all necessary means” to stop the Iraqi occupation of Kuwait and restore stability to the region.⁹⁶ Under a scheme of prospective delegation of Chapter VII powers to regional organizations, then, the Security Council could specify that the invasion of the sovereign territory of a state within a regional body constitutes a per se “breach of international peace and security” under Article 39.⁹⁷ It could therefore authorize military action by regional bodies such as the European Union, the African Union (A.U.), the Organization of American States, or NATO to repel forces invading the sovereign territory of one of their member states.⁹⁸

The provisions of Chapter VIII dealing with the relationship between the Security Council give further support for the delegation of Chapter VII powers. Article 52 states generally that “[n]othing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action” as long as regional organizations act consistently with the Charter’s requirements that military force may only be used with Security Council authorization or in self-defense.⁹⁹

Article 53 explicitly encourages Security Council delegation of enforcement functions to regional organizations by stating that “[t]he Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority.”¹⁰⁰ That Article goes on to state that “no enforcement action shall be taken under regional arrangements

⁹⁵ S.C. Res 660, U.N. Doc. S/RES/660 (Aug. 2, 1990).

⁹⁶ S.C. Res 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

⁹⁷ See U.N. Charter art. 39.

⁹⁸ The specific regional organizations mentioned are in no way meant to be an exhaustive list of those for whom it would be appropriate for the Security Council to prospectively authorize military intervention. Since a given state may belong to more than one regional organization (for example, the United States is a member of both the O.A.S. and NATO), it is conceivable that more than one regional organization could be prospectively authorized to intervene if the territory of a state that belonged to both organizations were invaded.

⁹⁹ U.N. Charter art. 52, para. 1.

¹⁰⁰ *Id.* at art. 53, para. 1.

or by regional agencies without the authorization of the Security Council,” but does not require that authorization be given on a case-by-case basis.¹⁰¹ Nothing in article 53 precludes the Security Council from making prospective statements that if certain factual circumstances exist, the regional organization is free to engage in military intervention.¹⁰²

B. A Plan for Delegation: Structures and Safeguards

A blanket delegation of Security Council power, which allowed regional organizations to use military force where and when they saw fit, would be both undesirable and illegal under the Charter. Even if regional organizations are given the power to carry out military interventions, the terms of Chapter VII preclude intervention except in cases where a factual situation representing a threat to international peace and security exists.¹⁰³ Any system involving the delegation of Chapter VII powers must, therefore, avoid authorizing regional organizations to take actions that the Security Council itself could not carry out.

Beyond the obvious proposition that the Security Council may not delegate power that it does not possess, a number of prudential concerns persist. In aiming to increase the effectiveness and representative nature of collective security by delegating Chapter VII powers to regional organizations, we must be careful not to erode the U.N. Charter’s prohibition on the use of force and “launch the international system down the slippery slope into an abyss of anarchy.”¹⁰⁴ Specifically, this article proposes that three principles should be respected in any system involving the delegation of Security Council power. First, the delegation of Chapter VII

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at art. 39; *see also id.* at art. 42.

¹⁰⁴ FRANCK, *supra* note 6, at 171-72 (arguing that the U.N. Charter’s prohibition on unauthorized use of force is the founding principle of modern international law, and must be maintained). For discussion on the erosion of the prohibition on force through unilateral military actions undertaken without Security Council authorization, see Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005) and Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607 (2003).

power to regional organizations should be limited to enforcement actions within the organization's geographic territory. Second, the Security Council should give a clear statement when delegating its power enumerating the factual situations that constitute a threat to international peace and security, along with specific instructions as to how those situations are to be addressed. Finally, the Security Council should act to stop any regional organization enforcement action of which it disapproves.

1. The Geographical Restraint on Enforcement Actions by Regional Organizations

Regional organizations to which the Security Council delegates Chapter VII functions should be prohibited from engaging in enforcement actions outside the geographic territory of their member states. The logic behind this rule is threefold. First, allowing regional organizations to designate and act on threats to international peace and security outside the territory of their member states would undermine the goal of creating a representative system of collective security.¹⁰⁵ In fact, a system of delegation in which regional organizations could undertake enforcement actions outside their geographic territory would decrease the representative character of the Security Council by completely removing any possibility that the states affected by the intervention might be consulted. A hypothetical example illustrates this point. If NATO were delegated power to "use all means necessary to repel any force sent by one state into the territory of another without consent," it would be free to forcibly intervene in any invasion, anywhere in the world. In the case of Ethiopia's December 2006 invasion of Somalia, for example, NATO would have the power to intervene in the conflict without consulting either country or the A.U., the regional organization to which both belong.

¹⁰⁵ See generally *supra* Part I.A.

Second, allowing regional organizations to use military force outside the geographic territory of their member states – in the absence of the type of explicit case-by-case authorization traditionally granted by the Security Council – would create the potential for abuse in the form of powerful organizations conducting military interventions based on their own self-interest rather than a genuine concern for international peace and security. That potential for abuse would be especially troubling in light of the current criticisms of the Security Council that allege it is an instrument of Western hegemony and neo-imperialism.¹⁰⁶

Finally, the prohibition on regional organizations using delegated Chapter VII authority to engage in enforcement actions outside their geographic territory would not act as a bar to authorization for such action on the case-by-case basis traditionally utilized by the Security Council. If the Council found that relevant regional organizations lacked the capacity or political will to use the power delegated to them to address threats to international peace occurring within their territory, it would be free to issue a traditional Chapter VII resolution authorizing all U.N. member states to use all necessary means to restore stability.

2. Clear Statements as to when Enforcement Actions are Justified

In order to guard against abuse, the Security Council should limit the discretion of regional organizations in the use of delegated Chapter VII powers as much as possible. Regional organizations should be permitted to engage in enforcement actions only when factual situations that the Security Council has prospectively designated as threats to international peace and security arise. The actions that the regional organization may take with respect to each specific threat to peace should be clearly stated at the time of delegation.

¹⁰⁶ See Krisch, *supra* note 8, at 905 (“[T]he Council is often perceived merely as a tool of its Western members and in particular of the United States.”); see also *High-Level Panel Report*, *supra* note 2, ¶ 41. “Too often, the United Nations and its Member States have discriminated in responding to threats to international security” and comparing the swift response to the September 11, 2001 attacks on the World Trade Center to the lack of UN action during the 1994 massacres in Rwanda. *Id.*

When providing regional organizations guidance on what factual situations constitute threats to international peace and security under Article 39 of the Charter, the Security Council should begin by reviewing the resolutions in which it has found such threats. For instance, it is relatively uncontroversial that invasion of one sovereign state by the forces of another creates a threat to international peace.¹⁰⁷ Other threats to peace and security might include civil wars resulting in genocide,¹⁰⁸ and terrorist attacks on civilians.¹⁰⁹ The prospective designation of threats to international peace and security will be less politicized than the current case-by-case process because designations will deal with future hypothetical situations rather than concrete events that may implicate the vested interests of one or more permanent members. Therefore, it is likely that the Security Council may find common ground to designate a greater number of threats requiring action than it has in the past.

For each factual situation that the Security Council prospectively designates as a threat to international peace and security, regional organizations should be given specific instructions as to how the situation is to be addressed. These instructions should take the form of contingency plans. For example, if the Security Council delegates Chapter VII powers to NATO and prospectively designates the invasion of a NATO member state by the forces of another state as a threat to international peace and security, it should instruct NATO as to the permissible nature and timing of enforcement actions by the regional organization. In the example of invasion, it is likely that the Security Council would instruct the regional body to immediately call for the

¹⁰⁷ See S.C. Res. 82, *supra* note 26; S.C. Res. 83, *supra* note 27; S.C. Res. 660, *supra* note 35.

¹⁰⁸ See S.C. Res. 713, *supra* note 39; S.C. Res. 751, *supra* note 46.

¹⁰⁹ See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (reaffirming the need to combat threats to international peace and security caused by terrorist acts and requiring that states take certain steps to stop terrorist actions).

cessation of hostilities and give a deadline for the invading power to withdraw, after which time the regional organization would intervene and use military force to restore stability.¹¹⁰

3. Security Council Action to Stop Unjustified Regional Organization Interventions

As a final safeguard, the Security Council should overturn regional organization enforcement actions that it sees as unjustified. Under Article 54 of the Charter, regional organizations are required to keep the Security Council “fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.”¹¹¹ When the Security Council is informed of an action that it finds undesirable, unjustified, or in excess of the regional organization’s delegated authority, the Council could pass a resolution calling for a halt to that action and then deal with the underlying threat to international peace and security on a case-by-case basis as it has traditionally done.

Under Article 27(3) of the Charter, any of the five permanent members could perpetuate an enforcement action by a regional organization by vetoing any Security Council resolution calling for its halt.¹¹² The system of delegation to regional organizations would, therefore, encourage a greater amount of intervention to address threats by removing the ability of one permanent member to exercise a “capricious use of the veto” in order to protect its own interests above those of victims of international conflicts and humanitarian crises.¹¹³

¹¹⁰ This model would follow the Security Council’s previous actions during the invasion of South Korea by North Korea and the invasion of Kuwait by Iraq. *See supra* Parts I.B.1-2.

¹¹¹ U.N. Charter art. 54.

¹¹² *See* U.N. Charter art. 27, para. 3; FRANCK, *supra* note 6, at 7-8 (article 27(3) has been interpreted as allowing action as long as a permanent member does not cast a vote against the proposed resolution. An abstention by a permanent member is not counted as a veto).

¹¹³ *See supra* note 18 and accompanying text.