ARTICLE

Am I My Brother's Keeper?
The Reality, Tragedy, and Future of
Collective Security

_____

Mohamed S. Helal*

Table of Contents

Introduction

On February 4, 2012 the UN Security Council considered a draft resolution addressing the escalating civil war in Syria. The proposed text, which condemned human rights violations perpetrated by Syrian authorities and endorsed an Arab League plan to end the conflict,[1] received widespread support. Of the Security Council's fifteen member states, thirteen delegations voted in favor of the draft resolution while two opposed it.[2] Nonetheless, the resolution was not adopted because China and Russia, two of the Council's five permanent members, exercised their power to veto Security Council resolutions. Expectedly, the delegations that supported the resolution denounced this outcome. The French Ambassador described it as "a sad day for all friends of democracy," while his German counterpart called the vote "a crying shame" for the Security Council. U.S. Ambassador Susan Rice agreed, and expressed disgust that "two members continued to prevent the Council from fulfilling its sole purpose: addressing a deepening crisis in Syria and a growing threat to regional peace and security."[3]

Even a cursory reconnoitering of scholarly opinion, diplomatic discourse, and popular punditry reveals that criticism of this sort of the Security Council is widespread. Every U.S. veto of draft resolutions censuring Israeli practices in the occupied Palestinian territories is met with a chorus of Arab condemnation of the Council for its perceived failure to intervene on behalf of the Palestinian people.[4] The

---

[1] Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, and United States of America: draft resolution, at 2, UN Doc. S/2012/77 (Feb. 4, 2012), http://perma.cc/M3U7-VXZL.

[2] Paul Harris, *Syria Resolution Vetoed by Russia and China at United Nations*, GUARDIAN (Feb. 4, 2012), http://perma.cc/DJ5S-UB96.

[3] Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League's Proposed Peace Plan, UN Press Release SC/10536 (Feb. 4, 2012), http://perma.cc/V6RZ-WXJM.

[4] For example, after the U.S. vetoed a draft resolution criticizing Israeli settlement activity in the West Bank, the Palestinian Ambassador to the UN stated: "the Security Council has failed to uphold its responsibilities to respond to the crisis in the long search for peace and security in the

failure of the Security Council to enforce an arrest warrant issued against Sudanese President Omar Bashir was described by the Prosecutor of the International Criminal Court as an "insult to the plight of Darfur's victims."[5] Even internal UN reports, such as a review conducted of UN responses to the conflict in Sri Lanka,[6] have faulted the Security Council for its inaction in the midst of a worsening political crisis. And, in an unprecedented act of diplomatic theatrics, Saudi Arabia forfeited a hard-won non-permanent seat on the Security Council to express its discontentment with the Council's posture regarding numerous issues of importance to the desert kingdom.[7]

These expressions of disaffection reflect unfulfilled assumptions about the nature of the Security Council and frustrated expectations regarding its role in world politics. In describing its role and nature, scholars and diplomats routinely describe the Security Council as a collective security system.[8] This view is buttressed by the substance and

---

Middle East," *quoted in*: UN SCOR, 66th Sess., 6484 mtg. at 10, UN Doc. S/PV.6484 (Feb. 18, 2011), http://perma.cc/2BUA-ZT5F.

[5] *Security Council Hears Criticism Over 'Inaction and Paralysis' in Darfur Crisis*, UN NEWS CENTER (Dec. 11, 2013), http://perma.cc/EVM5-VUX5.

[6] UN Secretary-General, *Report of the Secretary General's Internal Review Panel on UN Action in Sri Lanka*, at 27, (Nov. 2012), http://perma.cc/8KNW-KRD8 (noting that Council left "Sri Lanka in a vacuum of inaction").

[7] Robert Worth, *Saudi Arabia Rejects Security Council Seat in Protest Move*, N.Y. TIMES (Oct. 18, 2013), http://perma.cc/65CE-9XNJ.

[8] The features of a collective security system are discussed in detail in Part I. In the meantime, it suffices to define collective security as an "arrangement by which states act collectively to guarantee one another's security." GARY WILSON, THE UNITED NATIONS AND COLLECTIVE SECURITY 5 (2014). The term "collective security" is often used to describe the structure and functioning of the UN Security Council. *See, e.g.*, Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 66 (Lori Damrosch & David Scheffer eds. 1991) ("It is often referred to as collective security, an expression not used in the Charter, but widely regarded as the principal goal of the United Nations"); Jose Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 2 (1996) (Some scholars view the UN Charter as a "hierarchical collective security scheme with the Council at its apex"); Ved Nanda, *Preemptive and Preventive Use of Force, Collective Security, and Human Security*, 33 DENV. J. INT'L L. & POL'Y 7 (2004–2005) (arguing that the

structure of the UN Charter. Substantively, the Charter's preamble promised to "save succeeding generations from the scourge of war," followed in Article 2 by a peremptory prohibition on the resort to force by states.[9] Structurally, the Charter established the Security Council and designated it as the organ bearing the primary responsibility for maintaining international peace and security. Read together, these features of the UN Charter generate the impression that the Security Council is intended to function as a collective security system that protects the survival and sovereignty of states by providing an assurance that every victim of aggression is "protected by all, and a wrongdoer punished by all."[10]

UN Charter established a system where "the collective security concept was the touchstone of the new emerging world order"); Bardo Fassbender, *Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures Against Iraq*, 13 EURO. J. INT'L L. 273, 298 (2002) (concluding that the UN-authorized intervention to end the Iraqi occupation of Kuwait "was able to revitalize the collective security scheme set down in the UN Charter"); Carsten Stahn, *Enforcement of the Collective Will After Iraq* 97 AM. J. INT'L L. 804, 811 (2003) (describing Chapter VII of the UN Charter as a "centralized model of collective security"); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and* Iraq, 4 SAN DIEGO INT'L L. J. 7, 19 (2003) (explaining that the UN Charter allowed for preemptive action against threats to security as "a major feature of the regime of collective security created by the Charter"); Karl Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT'L L. 341 (2003) (explaining that the UN Charter prohibited using force "unless authorized under the provisions on collective security laid down in Chapter VII of the UN Charter"); Thomas Franck, *Collective Security and UN Reform: Between Necessity and the Possible*, 6 CHI. J. INT'L L. 597, 605 (2006) (explaining that the "postwar system of collective security" was designed by the UN's founders in 1943–1945).

[9] UN Charter, art. 2, para. 4.

[10] MALCOLM SHAW, INTERNATIONAL LAW 1235 (6th ed. 2012). *See also*, Robert Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System* 56 CATH. U. L. REV. 871, 871– 872 (2006–2007) (The UN members accepted the prohibition on using force enshrined in the Charter on the "belief that the Charter's scheme of collective security would afford them at least as much protection for their national security as they had agreed to relinquish"); John Norton Moore, *Toward a New Paradigm: Enhancing Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT'L L. 811, 814 (1997) (The "original central purpose of the organization was collective security against aggression in order to end war").

For others, this understanding of collective security, which is committed to promoting the security and sovereignty of states, is politically inadequate and normatively antiquated. It is politically inadequate because by the end of the twentieth century, political and socio-economic phenomena that primarily occur domestically but which have transnational ramifications—such as civil war, terrorism, poverty, environmental degradation, epidemics, and natural disasters—overtook interstate war and superpower competition as the principal sources of instability globally.[11] This necessitated broadening the notion of "security" to account for these novel threats and to empower the UN to confront these phenomena.[12] A definition of security dedicated to defending states and ensuring their survival was also considered normatively antiquated because human rights had become "the ideology of our times."[13] The rise to preeminence of human rights required reorienting the purposes of collective security towards privileging the rights, security, and dignity of human beings over protecting the survival and sovereignty of states. Indeed, despite the inconsistency and inadequacy of many of its responses to conflicts causing gross human victimization, recent UN practice is argued to signify the recognition of the prevention of mass atrocities as the central policy objective of the Security Council.[14]

---

[11] Michael Klare, *Redefining Security: The New Global Schisms*, *in* GLOBALIZATION AND THE CHALLENGES OF A NEW CENTURY 138 (Patrick O'Meara et. al. eds. 2000) (arguing that economic, demographic, and environmental factors are "will force policymakers to rethink their approach to international security").

[12] Erika de Wet and Michael Wood, *Collective Security*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013), http://perma.cc/8GS7-99PF.

[13] Louis Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, *in* REALIZING HUMAN RIGHTS 3 (Graham Allison & Samantha Power, eds. 2000).

[14] Daphna Shraga, *The Security Council and Human Rights – From Discretion to Promote to Obligation to Protect*, *in* SECURING HUMAN RIGHTS? ACHIEVEMENTS & CHALLENGES OF THE UN SECURITY COUNCIL 13 (Bardo Fassbender, ed. 2011) ("By the end of the 20th century, the recognition of human rights as a quintessential element of a stable world order and their massive violation as a 'threat to the peace,' . . . placed the Security Council at the center of the human rights protection system.").

In this Article, I make two claims regarding the structure and policy purposes of the UN Security Council. First, I claim that depicting the Security Council as a collective security system misrepresents its nature and structure. Instead, I argue that the Security Council bears the features of and operates in a manner akin to a great power concert, not a collective security system. Second, I claim that the purpose of the Council is not to protect against aggression or guarantee the survival of states. Rather, the primary objective of the Council is to facilitate the maintenance of peaceful relations between the great powers. Furthermore, I challenge the contention that preventing grave human rights abuses has evolved into the principal purpose of the UN security regime. Despite repeatedly intervening to halt mass human suffering, the UN continues to prioritize the preservation of peaceful relations between the great powers over preventing atrocities against human beings.

This Article also makes a third claim about the future of the UN security regime. I argue that, as the world transitions from a unipolar American order to an international system in which multiple states and various non-state actors exercise relatively increasing influence in global affairs, it is unlikely that the Security Council will develop into a collective security system or that humanitarian objectives will eventually become accepted as its principal policy purpose.

This brief summary of the arguments advanced in this Article deserves elucidation. My first claim is a historical argument about the intentions of the founding fathers of the UN. It uncovers the reality of the so-called UN collective security system. A close reading of the Charter and its *travaux préparatoires* reveals that the Security Council was never envisioned as a collective security system. Rather, the Security Council resembles a great power concert that oversees global security affairs.[15] The primary objective of

---

[15] As discussed in Part I, the defining feature of a "great power concert" is that it does not entail a commitment to protect against aggression. Rather, it is a security regime that enables great powers to manage their relations and oversee global security affairs through *ad hoc* interventions in specific crises. Viewing the Security Council in these terms alters the

this concert was to facilitate the peaceful coexistence of the allied powers of World War II in the post-war order. This is demonstrated by the absence from the Charter of any assurance of protection against aggression or against threats to the territorial integrity, political independence, or sovereignty of states. When faced with threats to their security, states are merely granted a right to make their case before the Security Council. Beyond that, the Council retained discretion whether to intervene against aggression or threats to the security of states. Calling the Security Council a "collective security system" obscures this reality of the UN system and generates illusory expectations of intervention on behalf of victims of aggression.

The second argument made in this Article challenges the claim that the prevention of mass atrocities has become the primary purpose of the UN security regime. In the years after the end of the Cold War, the Security Council increasingly recognized mass violations of international human rights and humanitarian law as threats to international peace and security.[16] This process was partially driven by the changing nature of war and the rise of internal armed conflicts and state failure as sources of instability and human victimization.[17] This increased attention to protecting human rights by the UN system was not only a policy response to the civil wars of the 1990s. It also reflected a normative shift in the values of international law. For centuries, international law was a servant of the sovereign state. The state was its

---

standard according to which its performance is evaluated and changes our understanding of its value in the international political process. Seen as a power concert, the Security Council should be evaluated on the basis of its contribution to facilitating peaceful relations among the great powers and its role as a forum for the joint management by these powers of global security affairs. For an insightful reflection on the Council as a great power concert, *see*: David Bosco, *Assessing the UN Security Council: A Concert Perspective*, 20 GLOBAL GOVERNANCE 545 (2014).

[16] SYDNEY BAILEY, THE SECURITY COUNCIL AND HUMAN RIGHTS 123 (1994).

[17] Between 1945 and 2008, 313 conflicts occurred. Most of these were non-international, and it was in these conflicts that most victims of armed conflict, estimated to be between 92 and 101 million individuals, occurred. *See* M. CHERIF BASSIOUNI ed., THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE (2010).

master and beneficiary. International legal regulation sought, above all else, to facilitate interstate relations and promote the peaceful coexistence of sovereigns.[18] The rise of human rights, however, challenged this state-centrism of international law. The human being, not the state, became perceived as the principal beneficiary of international law, and the protection of individual rights and freedoms, not the preservation of the sovereignty of states, was identified as the overarching purpose of the international legal system.[19] In short, international law was being humanized.[20]

These changes in the global political and normative environments are argued to have contributed to the redefinition of the concept of "security" and the reconfiguration of the objectives of the UN security regime. *Human*-security, touted as "the dominant framework of international regulation today,"[21] is said to be displacing *state*-security as the dominant definition of security.[22] With human beings brought front and center of the international legal system, some scholars, such as Anne-Marie Slaughter, have suggested that the UN, "an organization founded on a commitment to the protection of state security," became required to "subordinate state security to human security."[23] Meanwhile, as security was being humanized and as superpower competition subsided, the Security Council was

---

[18] As a result, this form of international legal regulation was dubbed "the international law of coexistence." *See* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 60 (1964).

[19] Paul Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 5 (2000).

[20] *See* THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW (2006); Menno Kamminga, *Humanisation of International Law*, *in* CHANGING PERCEPTIONS OF SOVEREIGNTY AND HUMAN RIGHTS 29 (Ineke Boerefiijn & Jenny Goldschmidt eds. 2008); Vassilis Tzevelekos, *Revisiting the Humanisation of International Law: Limits and Potential*, 1 ERASMUS L. REV. 62 (2013).

[21] David Chandler, *Human Security II: Waiting for the Tail to Wag the Dog – A Rejoinder to Ambrosetti, Owen, and Wibben*, 39 SECURITY DIALOGUE 463, 465–466 (2008).

[22] *See* BARRY BUZAN ET. AL., SECURITY: A NEW FRAMEWORK FOR ANALYSIS 36 (1998) (explaining that the state has traditionally been the referent object of security).

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

argued to have shed its archaic nineteenth century-*esque* image of a great power concert and evolved into "a comprehensive public order system."[24] The Council was imagined as gradually maturing from its original design as a political body dedicated to minimizing violence, even if at the cost of compromising justice,[25] into an organ committed to promoting justice and resolving disputes among states according to the strictures of international law.[26] In short, the Security Council began to be perceived as an enforcer of international law,[27] or as France's UN Ambassador put it somewhat poetically, the Security Council was destined to "raise the fragile barrier of law against the brutal nature of international relations."[28] This Article challenges these views of the purposes and structure of the Security Council. Although in the decades since the Cold War protecting human rights became a global *cause célèbre* and preventing mass atrocities has achieved prominence on the UN agenda, the Security Council remains primarily dedicated to preserving great power peace by protecting the vital interests of these powers. Preventing mass atrocities, while constituting a legitimate aim of Security Council action, remains a subsidiary objective that may be sacrificed at the altar of great power peace. This becomes evident when the history and content of the Responsibility to Protect (RtoP)—a policy framework developed to mobilize and guide intervention to prevent mass atrocities—are unpacked. Although scholars have hailed RtoP as evincing "the

---

[24] James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 738 (7th ed. 2008).

[25] F.H. HINSLEY, POWER AND THE PURSUIT OF PEACE: THEORY AND PRACTICE IN THE HISTORY OF RELATIONS BETWEEN STATES 33 (1963) ("The Charter was less interested in legal and just settlement; the great danger was war and any settlement was better than war").

[26] ALEXANDER ORAKHELASHVILI, COLLECTIVE SECURITY 19 (2011) (Rejecting "doctrinal views on the primacy of peace over justice," and arguing that it is "unsound to see collective security aimed at political resolution of pertinent crises as opposed to their resolution based on legal merit").

[27] Mary Ellen O'Connell, *The Counter-Reformation of the Security Council*, 2 J. INT'L L. & INT'L REL. 107, 119 (2005–2006) (arguing that "[l]awful armed force today is for the purpose of law enforcement. It is force to counter previous unlawful use of force or threat of force.").

[28] UN SCOR, 69th Sess., 7138 mtg. at 5, UN Doc. S/PV.7138 (March 14, 2014), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7138.

paradigm shift from sovereignty to humanity,"[29] the reality is that RtoP neither guarantees intervention to halt human suffering nor does it oblige the great powers to compromise their vital interests in favor of protecting human lives. The adoption of RtoP did little to alter the structure, procedures, or policy objectives of the Security Council. This is the tragedy of collective security. The prevention of the most heinous crimes, such as those perpetrated in the Syrian civil war, remains, like repressing aggression, subject to the limitless discretion of the Security Council and ultimately contingent on great power acquiescence.

The third claim made in this Article predicts that the future does not portend the transformation of the Security Council into a collective security system that guarantees peace and security and actively protects human security globally. One reason is because the world is witnessing the emergence to prominence of states that are committed to a state-centric vision of international law. The unipolar American system of the post-Cold War years is giving way to a non-polar system in which numerous great powers, pivotal states, and non-state actors will vie for global influence. As these powers accrue clout and prestige, they will seek to recalibrate the normative infrastructure of global politics to reflect their values and interests.[30] One matter on which rising powers are unanimous, including the democracies and autocracies among them, is apprehension of the attenuation of sovereignty to permit intervention in the affairs of states to protect human security.[31] This casts doubts over the likelihood that the UN system will eventually prioritize the

---

[29] Anne Peters, *Are We Moving Towards Constitutionalization of the World Community?*, *in* REALIZING UTOPIA 121 (Antonio Cassese ed. 2012).

[30] Stewart Patrick, *Irresponsible Stakeholders*, 89 (6) FOREIGN AFFAIRS 44, 44 (2010) (These powers will test "the institutional foundations of the post-World War II liberal order … Global visions will compete, norms will shift, and yesterday's rule takers will become tomorrow's rule makers.").

[31] Zaki Laidi, *BRICs: Sovereignty Power and Weakness*, 49 INT'L POLITICS 614, 615 (2012) (The BRICs "consider that state sovereignty trumps all, including of course, the political nature of its underpinning regimes. Thus, the BRICs—even the democratic ones—fundamentally diverge from the liberal vision of Western countries.").

protection of human lives over the preservation of state security, or that the Security Council will develop into a collective security system that enforces international law and upholds justice globally.

Although this Article is about the structure, purposes, and future of the UN security regime, its claims and conclusions have implications that extend beyond the question of the operation of those institutions housed at UN headquarters in Turtle Bay, New York. At a broader level, this Article engages with debates about the political purposes of international law. In a view shared by many scholars on the emerging and/or desired role of law in world politics, Philip Allott imagines international law combined with the increasingly dense network of transnational institutions inhabiting the global arena as driving a process whereby the "international unsociety" of states is evolving into a global community of humankind. [32] This emerging, but still imperfect, community is predicated on common humanitarian values and is united by shared interests engendered by the centripetal socio-economic forces of globalization.[33] For the many international lawyers who subscribe to this liberal internationalist ideal,[34] underlying our discipline is a political project that promotes this metamorphosing of the society of states into a global community constituted, and governed, by law. [35] In other words, international law is imagined as capable of depoliticizing international relations and pacifying global politics. The aspiration is that law, not power, would

---

[32] Philip Allott, *The Concept of International Law*, 10 EURO. J. INT'L L. 31, 35 & 50 (1999); *see also*, Philip Allott, *The True Function of Law in the International Community*, 5 IND. J. GLOBAL L. STUD. 391 (1998).

[33] *See* Pemmaraju Rao, *The Concept of International Community in International Law: Theory and Reality*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION 104 (Isabelle Buffard et. al. eds. 2009); *see also*, Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, 281 RECUEIL DES COURS 1, 42 (1999).

[34] Jack Goldsmith and Eric Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463, 483 (2006) (The "the traditional liberal internationalist agenda" continues to dominate international legal scholarship).

[35] Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 3 (2007).

ultimately become the arbiter of relations among nations, and that order, not anarchy, would become a defining feature of the international system.[36] As part of this image of international law and institutions, the UN security regime is portrayed, not as a political forum for managing great power relations, but as "a global public order institution" dedicated to promoting and enforcing the peremptory norms of international law.[37] This hope of moving towards an orderly, peaceful, and law-abiding world dovetails with the impressions of some scholars about the contemporary structure of the international system. The portrayal of self-proclaimed "realists" of world politics as an unceasing competition for power, many claim, has ceased to be realistic. Instead, we are told that "the age of great powers is coming to an end,"[38] and that a world that is interdependent, globally connected, and equally vulnerable to transnational threats has "supplanted the realist world order dominated by sovereign states."[39]

This Article does not offer a comprehensive critique of this perception of the role performed by law and institutions in world politics. It does, however, suggest that, even in today's interconnected and increasingly institutionalized world where the vernacular of human rights has become omnipresent in global politics,[40] the UN security regime is still predicated on a set of divergent policy purposes and is still driven by incoherent assumptions about the role of law in international affairs. This is because, ultimately, the UN Charter is an ambivalent document. It simultaneously conveys multiple–and potentially conflicting–

---

[36] *See* STEPHEN NEFF, JUSTICE AMONG NATIONS 4 (2014) (noting that, very broadly, international law seeks "to bring order and stability to international relations on the basis of the (or at least *a*) rule of law").

[37] NICHOLAS TSAGOURIAS & NIGEL WHITE, COLLECTIVE SECURITY 27–28 (2013).

[38] Rosa Brooks, *Transnational Security Advisers*, FOREIGN POLICY (June 13, 2013),
http://perma.cc/MV2S-PFHM.

[39] Harold Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U.L.J. 293, 303 (2002).

[40] David Kennedy, *The Mystery of Global Governance*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 37 (Jeffrey Dunoff & Joel Trachman eds, 2009).

messages about the nature of world politics.[41] On one hand, it pledges to promote "social progress," to attain "common ends," to use force only in the service of "the common interest," and to seek "universal peace." This evokes images of "universal solidarity," wherein the welfare of all states is the concern of the broader community of nations.[42] Embedded within the UN system, however, is a contrasting image of world politics that finds its clearest expression in the security regime established by the Charter. The authors of the Charter purposively avoided constructing a collective security system to protect the peace or prevent aggression. Instead, a concert of great powers was established to oversee global security affairs. Peace, under this arrangement, was defined as the absence of war between these powers, and security, it was assumed, was best served by maintaining amicable relations between these states. It appears, therefore, that the pursuit of security was, and remains, predicated on a recognition, not a renunciation, of global political pluralism. This approach realizes that, especially among the greatest powers, agreement on political objectives and strategic direction remains contingent and transient. This reflects an awareness of the fact that in international politics, security is never absolute, and that peace is often precarious. The law and institutions of the Charter, it seems, seek not to displace power from the operation of politics, but rather to maintain a tenuous balance among the greatest powers. It hopes to manage, as opposed to banish, insecurity, and to minimize, not to exorcise, violence from relations among nations. It aspires above all to provide a policy space for the political colossi of our age to interact peacefully and achieve a modicum of cooperation, and not to uphold, enforce, or promote peremptory norms of international law. This is a far cry from the solidarist image that many international lawyers paint or portend of a community of nations sharing common interests and values.

---

[41] *See* Bruce Cronin, *The Two Faces of the United Nations: The Tension Between Intergovernmentalism and Transnationalism*, 8 GLOBAL GOVERNANCE 53 (2002).

[42] Bardo Fassbender, *The Security Council: Progress is Possible but Unlikely*, *in* REALIZING UTOPIA 56 (Antonio Cassese ed. 2012) (Highlighting an "idealistic component" of the UN system based on "universal solidarity of states resulting in collective action whenever a state became a victim of aggression.").

This Article proceeds as follows: Part I defines the two concepts that are the focus of this Article: collective security and great power concert. It also briefly examines the history of the Concert of Europe to shed light on the nature of a great power concert. Part II examines the *travaux préparatoires* of the Charter to demonstrate that the Security Council was not designed as a collective security organization, but rather, was intended to function as a great power concert. Part III considers whether the purposes and structure of the UN security regime have evolved in recent decades. It discusses the emergence of human security as an alternative understanding of security and highlights how the Security Council adopted an expanded definition of threats to peace in the post-Cold War years. This Part concludes, however, that despite the humanization of international law and the evolution of its practice, the Council remains a great power concert dedicated to the protection of the vital interests of these leading states. Finally, Part IV considers the future of collective security. It suggests that, given the normative commitments of the rising powers, the protection of human rights is unlikely to become the primary policy priority of the Security Council.

I. Of Concerts, Congresses, and Collective Security

States inhabit an anarchic world. [43] It is an environment where states are constantly uncertain about the intentions of other states, making war a permanent possibility and generating an enduring sense of insecurity among states.[44] The preservation of peace and the prevention of war have therefore been the perennial challenges facing both world politics and international law. For centuries, conquerors and dreamers, theologians and statespersons,

---

[43] Anarchy is the absence of a central authority to enforce international law and establish order in international relations. *See* ROBERT GILPIN, WAR & CHANGE IN WORLD POLITICS 27 (1981).

[44] Benjamin Frankel, *Restating the Realist Case: An Introduction, in* REALISM: RESTATEMENTS AND RENEWALS xv (Benjamin Frankel ed. 1996) ("A major reason why the fierce competition for security may lead to war is the profound uncertainty state have about each other's intentions . . . the absence of a central authority to adjudicate disputes and enforce its verdicts, heighten anxiety, suspicion, and fear.").

generals and pacifists have grappled with "the fundamental problem of international relations: how to create and maintain order in a world of sovereign states."[45]

A solution that is repeatedly proposed to overcome these challenges is to institute a system of collective security.[46] To many scholars, the United Nations Charter represents the latest attempt to establish such a system.[47] This, I contend, misunderstands the UN's purposes and structure. The UN security regime,[48] with the Security Council at its epicenter, is not a collective security organization. Rather, it resembles a great power concert designed to contribute to preventing conflict between the leading states in the international political system.

Demonstrating this requires defining the terms "collective security" and "great power concert," which scholars and politicians often use either without definition or according to differing understandings.[49] Part I of this Article

---

[45] G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS 3 (2001).

[46] Michael Glennon and Allison Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power be Delegated to the United Nations?* 82 GEO. L. J. 1573, 1576 (1993–1994) ("The notion that nations could combine to create a collective force is ages old.").

[47] Danesh Sarooshi, *The United Nations Collective Security System and the Establishment of Peace*, 53 CURRENT LEGAL PROB. 621, 623 (2000) (The "elements of the ideal collective security system … are in existence in the system constituted by the United Nations (UN) Charter.").

[48] Because I reject the label "collective security" as an accurate description of the Security Council, I prefer the term "UN security regime" to describe the system established by the UN Charter to maintain international peace and security. Indeed, collective security and power concerts are different forms of 'regimes' that seek to organize collective responses to threats to international security, albeit through different mechanisms and tools. The authoritative definition of a regime is: "principles, norms, rules, and decisions-making procedures around which actor expectations converge in a given issue-area." Stephen Krasner, *Structural Causes and Regime Consequences*, *in* INTERNATIONAL REGIMES 1 (Stephen Krasner ed. 1983).

[49] Charles Kupchan and Clifford Kupchan, *Concerts, Collective Security, and the Future of Europe*, 16 INT'L SECURITY 114, 115 (1991) ("A thorough analysis of collective security is also needed because, even though the concept has been invoked with increasing frequency by

outlines the features of collective security and a great power concert, and then examines the operation of the Concert of Europe, which is the paradigmatic example of a great power concert.

A. Collective Security

Jurists, political scientists, and historians have developed numerous definitions of collective security and have identified a range of elements necessary for it to function.[50] Despite variations among these definitions, a single premise undergirds collective security: "a war against one state is, *ipso facto*, considered a war against all."[51] Two characteristics flow from this premise that distinguish collective security from other security regimes developed to protect against aggression such as alliances, balances of power, or power concerts.

First is a belief in the indivisibility of peace. This reflects a conviction held by members of a collective security system that their individual safety and security, and indeed security and order everywhere, are undermined by acts or threats of aggression anywhere.[52] Underlying this assumption is a high degree of interdependence between members of a collective security system,[53] and more profoundly, "a certain degree of political solidarity,"[54] among these states. This means that the successful operation of collective security

---

scholars and politicians alike, the debate is muddied by differing interpretations of what collective security is . . . .").

[50] S*ee* Joseph Ebegbulem, *The Failure of Collective Security in the Post-World Wars I and II International System*, 2 (2) TRANSCIENCE 23 (2011).

[51] JOHN GERARD RUGGIE, CONSTRUCTING THE WORLD POLITY 108 (1998).

[52] Andrew Hurrell, *Collective Security and International Order Revisited*, 11 INT'L RELATIONS 37, 41 (1992) (Collective security "assumes that each member of international society is prepared to see an aggression anywhere as a threat to the peace, and to view an attack against one as an attack against all. Peace, in other words, must be seen as indivisible.").

[53] *See* Maxwell Chibundu, *Assessing the High-Level Panel Report: Rethinking the Causes and Consequences of Threats to Collective Security*, *in* UNITED NATIONS REFORM AND THE NEW COLLECTIVE SECURITY 145 (Peter Danchin & Horst Fischer eds. 2010).

[54] Peter Danchin, *Things Fall Apart: The Concept of Collective Security in International Law*, *in* UNITED NATIONS REFORM AND THE NEW COLLECTIVE SECURITY, *supra* note 53, at 44.

requires states to reconceptualize their national interests in a manner that identifies their individual safety and security with the security and stability of the collectivity. As Hans Morgenthau observes, collective security requires forsaking "national egotisms and the national policies serving them. Collective security expects policies of the individual nations to be inspired by the idea of mutual assistance and the spirit of self-sacrifice, which will not shrink even from the supreme sacrifice of war should it be required."[55]

The second characteristic of collective security is that its members are granted legal assurances that the collectivity will unfailingly come to their aid in the event of aggression. This certainty of a collective response "permits no *ifs* or *buts*."[56] In other words, collective security functions in a non-discriminatory manner; all aggressors will be equally opposed and all victims will be equally defended.[57] Therefore, participation in a collective effort to confront aggression must be forthcoming regardless of the identity of either the aggressor or the victim and independently of whether the

---

[55] HANS MORGENTHAU, POLITICS AMONG NATIONS 415 (3rd ed. 1960). Political solidarity, the indivisibility of peace, and the commitment to mutual assistance distinguish collective security from a system where security is guaranteed through balances of power. The latter is a system whereby *ad hoc* alliances are continuously reformed to counter any hegemonic state or alliance of states. Under a balance of power, political solidarity is absent, alliances continuously shift, and war is never ruled out to confront hegemony. *See* KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS 116–123 (1979); RICHARD LITTLE, THE BALANCE OF POWER IN INTERNATIONAL RELATIONS: METAPHORS, MYTHS, AND MODELS 3–4 (2007).

[56] INIS CLAUDE, SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 259 (1956) (emphasis in original).

[57] *See* THOMAS WEISS, DAVID FORSYTHE, & ROGER COATE, THE UNITED NATIONS AND CHANGING WORLD POLITICS 25–26 (3rd ed. 2001) ("Under true collective security, all aggressors have to be treated the same. All threats to and breaches of the peace have to be firmly opposed."). The element of non-discrimination distinguishes collective security from alliances, which guarantee common defense against *specific* adversaries, as opposed to guaranteeing protection against *unknown* enemies. *See* GLENN SNYDER, ALLIANCE POLITICS 2–4 (2007).

threat or act of aggression jeopardizes vital interests of the participating state.[58]

Combining these elements of certainty, non-discrimination, and the irrelevance of the specific interests of the responding states warrants likening collective security to the operation of law enforcement domestically. Collective security recreates what "police action does for the domestic community . . . Through the action of police or "fire-brigades" on a world scale, collective security has as its goal two comparable objectives. It would *prevent* war by providing a deterrent to aggression. It would *defend* the interests of peace-loving states in war . . ."[59] NATO is a paradigmatic example of an institution that embodies these features of collective security.[60] By establishing that an 'attack against one is an attack against all,' article five of the North Atlantic Treaty expresses the unequivocal nature of the legal obligation to aid a victim of aggression, which is the distinguishing feature of a collective security system.[61]

---

[58] John Yoo and Robert Delahunty, *Peace Through Law? The Failure of a Noble Experiment*, 106 MICH. L. REV. 923, 937 (2008) ("Nations must be willing to intervene to counter aggression, even (or perhaps especially if) their vital interests are not at stake").

[59] Kenneth Thompson, *Collective Security Reexamined*, 47 AMERICAN POLITICAL SCIENCE REVIEW 753, 755 (1953).

[60] As John Ruggie explains, NATO is:

> [A] collective self-defense arrangement of indefinite duration, *de jure against any potential aggressor* though de facto against one. Nevertheless, internally the scheme was predicated on two multilateral principles. The first was the indivisibility of threats to the collectivity – that is, it did not matter whether it was Germany Great Britain, the Netherlands, or Norway that was attacked, nor in theory by whom. And the second was its *requirement* of, and organization for, a collective response.

Ruggie, *supra* note 51, at 109 (emphasis added).

[61] Article five states:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective

Collective security, therefore, ameliorates the security dilemma and diminishes the omnipresent threat of violence in the anarchic international system. It aspires to achieve this by establishing the principle that "everyone is his brother's keeper; it is an international translation of the slogan, 'one for all and all for one'; it is the proposition that aggressive and unlawful use of force by any nation against any nation will be met by the combined force of all other nations."[62]

B. Great Power Concert

History has not been kind to the ideas and ideals of collective security.[63] Nations large and small have been reticent to bear the burden of a commitment to confront aggression everywhere. Great powers and peripheral players alike have failed to overcome their mutual mistrust and entrust their safety and survival to the collectivity of nations.[64] These challenges inherent in implementing collective security led states to devise other mechanisms to facilitate cooperation in security matters without significantly diminishing their political margin of appreciation. One such mechanism is the great power concert.

> self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
>
> Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 UNT.S. 243.
[62] INIS CLAUDE, *supra* note 56, at 251.
[63] Robert Kolb, *The Eternal Problem of Collective Security: From the League of Nations to the United Nations*, 26 REFUGEE SURVEY QUARTERLY 220, 220 (2007) ("It stands to experience that a system of perfect collective security has never been realized in history, and may never be realized.").
[64] ORAKHELASHVILI, *supra* note 26, at 7.

A great power concert is best understood when contrasted to collective security. First, while the latter *requires* states to collectively resist threats or acts of aggression, under the former, there is no such duty.[65] A great power concert affords its members discretion regarding whether and how to react to acts of aggression. In other words, where under collective security all cases of aggression are treated alike, when acting in concert, great powers are entitled to treat like cases differently. Second, the success of collective security hinges on the sense of "political solidarity and moral community" among its members.[66] A concert, however, operates on the basis of political understandings between the great powers on the principal threats to international order and the appropriate means to confront them. This indicates that while collective security is predicated on deep levels of interdependence, integration, and ultimately camaraderie, a concert functions on an attenuated sense of solidarity between the great powers. Among states engaged in a concert, the security dilemma is mitigated but never extinguished, strategic competition is blunted but rarely eliminated, and mistrust, while moderated, is continuously manifested.[67]

---

[65] Kupchan and Kupchan, *supra* note 49, at 120 ("[A] concert entails no binding or codified commitments to collective action.").

[66] Kenneth Thompson, *supra* note 59, at 761.

[67] Kupchan and Kupchan, *supra* note 49, at 120 (Despite sharing "compatible views of a stable international order," a concert "allows for subtle jockeying and competition" among its members). Max Weber's distinction between communal and associative relationships provides a useful analogy to distinguish between collective security and a power concert. A communal relationship, which undergirds collective security, is marked by "a subjective feeling of the parties, whether affectual or traditional, that they belong together." Relationships of this kind include "a religious brotherhood, an erotic relationship, a relation of personal loyalty, a national community, the *esprit de corps* of a military unit. The type of case is most conveniently illustrated by the family." Associative relationships, like power concerts, are founded on expediency and "consist only in compromises between rival interests, where only a part of the occasion or means of conflict has been eliminated, or even an attempt has been made to do so. Hence, outside the area of compromise, the conflict of interests, with its attendant competition for supremacy, remains unchanged." MAX WEBER, ECONOMY AND SOCIETY 40–43 (Guenther Roth & Claus Wittich eds. 1978).

A third distinguishing feature of a great power concert relates to its membership. As its name indicates, a great power concert consists of the most powerful states, whether globally or within a specific geographical area.[68] These states, by virtue of their power and influence, arrogate to themselves the authority to administer security-related matters falling within the purview of the concert. In exercising this authority, great powers consult among themselves and agree on the appropriate measures to confront aggression or other threatening situations. The great powers are under no obligation to confer with smaller states, even those implicated or affected by an act of aggression.[69]

Fully understanding the features of a great power concert requires examining, albeit briefly,[70] the history and functioning of the Concert of Europe. This is because, first, the Concert is considered to be the precursor to the international organizations of the twentieth century, especially the UN[71] Second, this Article argues that the Security Council was designed and functions as a great power concert, not a collective security organization. This makes a brief examination of the Concert of Europe— considered the "best example of a security regime" and the paradigmatic illustration of a great power concert [72] — particularly apposite for this Article.

The foundations of the Concert of Europe were laid by Austria, Britain, Prussia, and Russia in the Treaty of

---

[68] Kupchan and Kupchan, *supra* note 49, at 120 (noting that "[a] concert's geographical scope is flexible.").

[69] Richard Elrod, *The Concert of Europe: A Fresh Look at an International System*, 28 WORLD POLITICS 159, 163 (1976) (At the Concert of Europe, "lesser states were occasionally consulted when their interests were involved, but they possessed few rights and certainly not that of equality.").

[70] For a history of the Concert of Europe, *see* PAUL SCHROEDER, THE TRANSFORMATION OF EUROPEAN POLITICS 1763–1848 (1994).

[71] BOB REINALDA, ROUTLEDGE HISTORY OF INTERNATIONAL ORGANIZATIONS: FROM 1815 TO THE PRESENT DAY 26 (2009) ("[T]he Concert of Europe produced the prototype for an executive council of the great powers that was later found in the League of Nations (1919) and the UN (1945).").

[72] Robert Jervis, *Security Regimes*, *in* INTERNATIONAL REGIMES 178 (Stephen Krasner ed. 1983).

Chaumont on 9 March 1814.[73] Although their immediate aim was to defeat the *Grand Armée* and dethrone the French Emperor, these powers also set their sights on the post-war order. The allies not only vowed to vanquish Napoleon, but also sought to determine "the means best adapted to guarantee to Europe, and to themselves reciprocally, the continuance of peace."[74] To realize this objective, the allies developed what became the Concert of Europe. Inaugurated at the Congress of Vienna and codified in the 1815 Quadruple Alliance,[75] the Concert of Europe was not an organization akin to the League of Nations or the UN, with organs and councils, headquarters and secretariats. Rather, it operated through periodic congresses, occasionally held at the level of Sovereigns but often convened at the level of foreign ministers, to deliberate on a whole range of security-related matters.[76]

A principal feature of concert diplomacy was that it instituted "a great power directorate" for European affairs.[77] The great powers, by virtue of their prowess and clout, assumed the authority to determine the fate of Europe. Indeed, at the Congress of Vienna, while representatives from minor monarchies, principalities, and duchies wined, dined, and enjoyed especially choreographed festivities, including a performance by Beethoven,[78] the 'Big Four' privately restored order in Europe.[79] As Friedrich von Gentz, the

---

[73] MARK JARRETT, THE CONGRESS OF VIENNA AND ITS LEGACY 57 (2013).

[74] *Id.* (quotation marks omitted).

[75] The Quadruple Alliance was transformed into the Quintuple Alliance when France, the former enemy that had brought Europe's great powers together, acceded to the Quadruple Alliance.

[76] Louise Richardson, *The Concert of Europe and Security Management in the Nineteenth Century*, *in* IMPERFECT UNIONS: SECURITY INSTITUTIONS OVER TIME AND SPACE 53 (2002).

[77] F.R. BRIDGE & ROGER BULLEN, THE GREAT POWERS AND THE EUROPEAN STATES SYSTEM 1814–1914 26 (2nd ed. 2005).

[78] The Congress of Vienna was a social extravaganza as much as a restoration of European order. *See* ADAM ZAMOYSKI, RITES OF PEACE 353–357 (2007).

[79] HENRY KISSINGER, A WORLD RESTORED 152 (1957) (while France, Portugal, Spain, and Sweden would be consulted, "[t]he 'Big Four' left no doubt, however, that they intended to continue their private discussions and to treat the 'Eight' merely as a ratifying instrument or to settle peripheral issues.").

Secretary of the Congress, observed, this right to design the post-war order reflected a realization that the great powers "are the only ones who could destroy the system by a change of policy. The twists and turns of the others could never have this effect."[80]

Second, the Concert of Europe operated on the basis of understandings between the great powers on the sources of insecurity in Europe. It was agreed that the great powers would resist bids to achieve continental hegemony as Napoleon had attempted.[81] In addition, realizing that only they possessed the capability to destabilize the post-war order, the great powers determined that maintaining peaceful relations among themselves was the principal purpose of the Concert of Europe.[82] To achieve this, it was agreed that they would neither threaten each other's vital interests nor affront their honor, prestige, and standing.[83] Unilateral revisions of the territorial adjustments decided at the Congress of Vienna were also proscribed and it was agreed that modifying the political status quo would be only undertaken with the mutual consent of the great powers.[84]

Unlike under collective security, however, the Concert of Europe neither guaranteed the agreements reached in Vienna nor ensured the enforcement of understandings agreed upon at subsequent congresses. While unilateral territorial alterations, acts of aggression, and threats to the European order were proscribed, the great powers were not obliged to intervene in such situations. Every crisis would be examined individually at ad hoc congresses during which it would be determined whether and how to respond to specific situations. In short, "no one mechanism operated to deter every challenge, and neither was there a condominium of five great powers vigilant and ready to defend the status quo."[85]

---

[80] F.H. HINSLEY, POWER AND THE PURSUIT OF PEACE 198 (1967).

[81] Branislav Slantchev, *Territory and Commitment: The Concert of Europe as Self-Enforcing Equilibrium*, 14 SECURITY STUDIES 565, 585 (2005).

[82] Richard Elrod, *supra* note 69, at 166–167.

[83] *Id.*

[84] F.H. HINSLEY, *supra* note 80, at 225.

[85] Branislav Slantchev, *supra* note 81, at 591.

Ultimately, however, the concert bore the seeds of its own demise. [86] Although they had adopted a broader understanding of their national interests in a manner that promoted restraint and respect for the interests of other powers,[87] the concert never expunged strategic competition or mistrust between the erstwhile allies. As Austria's Prince Metternich quipped, when acting in concert one should "keep an eye on the allies no less than on the enemy."[88] Even before Napoleon's defeat, mistrust lurked among the allies as each sought to advance its interests and limit its ally's influence over the post-war order.[89] Even after the Congress of Vienna, in dealing with each crisis that threatened continental stability, the great powers remained vigilant of strategic advances achieved by their allies.[90]

Furthermore, as memory of the Napoleonic wars faded, divergences emerged between the great powers on the purposes of the concert. For Britain, the concert was a mechanism to mobilize collective responses against states harboring hegemonic designs over Europe, especially France. The continental powers, however, especially Austria and Russia, considered the concert a tool to repress revolutions or social upheavals that threatened these absolute monarchies.[91] These differences culminated when Britain rejected Tsar Alexander's proposal at the 1818 Congress of Aix-la-

---

[86] The concert system operated until the 1853 Crimean War. *See* BOB REINALDA, *supra* note 71, at 25.

[87] Robert Jervis, *Security Regimes*, *in* INTERNATIONAL REGIMES 180 (Stephen Krasner ed. 1983).

[88] ADAM ZAMOYSKI, *supra* note 78, at 95.

[89] HENRY KISSINGER, *supra* note 79, at 8, 24 (discussing Austrian fears of Russian influence after the defeat of Napoleon: "Now, as Russian troops swept westward, Metternich feared their success as much as their irresolution. He had not fought nearly a decade for the equilibrium in order to replace the supremacy of the West [i.e. France] by a dominance from the East.").

[90] *Id.* at 249 (discussing British policy on Spain, and noting that Britain "would not permit France to intervene as the agent of the Quadruple Alliance, thus to achieve with the sanction of Europe what had eluded a conquering Napoleon . . . the alternative that Russian troops might march across Europe to Spain was no more acceptable").

[91] HAROLD NICOLSON, THE CONGRESS OF VIENNA: A STUDY IN ALLIED UNITY 1812–1822 260 (1946); *see also* HENRY KISSINGER, *supra* note 79, at 5.

Chapelle to establish an *Alliance Solidaire* that would have upgraded the concert to a collective security regime to protect the territorial possessions and internal stability of European states.[92] The great powers, ever protective of their discretion in matters of war and peace, insisted that aggression, internal disturbances, or threats to the peace should be examined on a case-by-case basis to determine whether intervention was required.[93]

Herein lies the difference between collective security and a power concert. Under the former, states are safe in the realization that their survival is guaranteed by the community of nations because everyone is their brother's keeper. In a condition of anarchy where security is managed by the great powers, however, governments are resigned to the reality that "no power can stake its survival entirely on the good faith of

---

[92] The Tsar proposed that "all the States of Europe should mutually guarantee, not only each other's territories and possessions, but the existing form of government." *See* HAROLD NICOLSON, THE CONGRESS OF VIENNA: A STUDY IN ALLIED UNITY 1812–1822 262 (1946).

[93] HENRY KISSINGER, *supra* note 79, at 227. Britain's response to the *Alliance Solidaire*, contained in a memorandum prepared at Aix-la-Chapelle, illustrates the nature of a great power concert. It stated:

> There is no doubt that a breach of the covenant by any one state is an injury which all other state may, *if they shall think fit, either separately or collectively resent, but the treaties do not impose, by express stipulation, the doing so as matter of positive obligation* . . . The idea of an "Alliance Solidaire," by which each state shall be bound to support the state of succession, government, and possession within all other states from violence and attack, upon condition of receiving for itself a similar guarantee, must be understood as morally implying the previous establishment of a system of government as may secure and enforce upon all kings and nations an internal system of peace and justice . . . Till, then, a system of administering Europe by a general alliance of all its States can be reduced to some practical form, *all notions of general and unqualified guarantee must be abandoned, and States must be left to rely for their security upon the justice and wisdom of their respective systems* . . .

CHARLES WEBSTER, THE CONGRESS OF VIENNA 1814–1815 163 (1963) (emphasis added).

another; this would be an abdication of the responsibility of statesmanship."[94]

II. The Reality of Collective Security

Because war, as Tolstoy lamented, is "a terrible thing,"[95] the yearning to achieve perpetual peace is greatest after the most terrible wars. As the guns fell silent after the two great wars of the twentieth century, collective security was hailed as humanity's hope to vanquish violence among nations. First through the League of Nations, then through the UN, considered "history's most sweeping reorganization of international order,"[96] the world attempted to banish war from world politics by establishing a system of collective security.[97] The centerpiece of the collective security system

---

[94] Henry Kissinger, *The Congress of Vienna: A Reappraisal*, 8 WORLD POLITICS 264, 264 (1956). As aforementioned, scholars and practitioners often refer to "collective security" without defining it. Indeed, the purpose of this Part was to present a definition against which so-called UN collective security could be judged. A critic, however, may argue that collective security is a protean concept and that the definition adopted here is overly restrictive, that it is too high a threshold for the Security Council to realistically meet, and that it denies the possibility of more limited versions of collective security with requirements less exacting than those outlined here. In short, I would be accused of creating an easy-to-beat straw man. I disagree with such criticism. If "collective security" is to mean anything, its features would have to be distinguishable from other security regimes, such as concerts, alliances, or balances of power, which were defined above. As Richard Betts explains, defining collective security less restrictively:

"[b]y making it less collective and less automatic [makes it] hard to differentiate from the traditional balance of power standards it is supposed to replace. Unless collective security *does* mean something significantly different from traditional forms of combination by states against common enemies, in alliances based on specific interests, the term confuses the actual choices . . . [if] collective security is qualified to allow exceptions to the general rule according to case-by-case judgment on the merits of interests and claims, the distinction of the concept from a regular alliance becomes hopelessly blurred." Richard Betts, *Systems for Peace or Causes of War? Collective Security, Arms Control, and the New Europe*, 17 INT'L SECURITY 5, 8-10 (1992).

[95] LEO TOLSTOY, WAR AND PEACE 310 (Nathan Dole trans., 1899).

[96] G. JOHN IKENBERRY, *supra* note 45 at 163.

[97] N. D. WHITE, KEEPING THE PEACE: THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 4 (1997) (arguing that "[t]he United Nations, in particular the Security Council,

that emerged is the Security Council. [98] With its vast prerogatives and unprecedented powers, the Council is perceived as "a grand attempt to subject the use of force to the rule of law," [99] and as a law enforcer capable of effectively and impartially maintaining world peace. [100]

The notion that the Security Council was designed as a collective security organization is based more on myth than on reality. This Part demonstrates that the Security Council lacks the elements of a collective security system and instead bears the features of a great power concert. To do so, this Part makes two claims. The first relates to the policy objectives that the Security Council was designed to pursue. It argues that the Council's policy priority was to help prevent conflict between the Allied Powers of World War II. Second, this Part reviews the *travaux préparatoires* of the UN Charter to illustrate how the normative commitments and policy priorities of the founding fathers of the UN dictated the institutional structure and decision-making procedures of the Security Council. [101] What emerges from this overview of the negotiations over the Charter is that a conscious choice was made to avoid establishing a collective security system, and instead, to institutionalize a concert of great powers.

A. The Purposes of the UN Security Regime

---

represented the world's second attempt at developing a feasible system of collective security.").

[98] EDWARD LUCK, UN SECURITY COUNCIL: PRACTICE AND PROMISE 10 (2006).

[99] Michael Glennon, *Why the Security Council Failed*, 82 FOR. AFF. 16 (2003).

[100] Grayson Kirk, *The Enforcement of Security*, 55 YALE L.J. 1081 (1946) (Many assumed that the UN "would be able to deal with international breaches of the peace almost as swiftly and effectively as law enforcement officers deal with an individual criminal within the state.").

[101] As Michael Reisman notes: "It is a truism that all law is policy, in the sense that every legal arrangement, however humble, procedural or 'technical' it may seem, has been designed in order to achieve some preferred social or economic objective, including objectives about the structure of the decision-making process itself." W.M. Reisman, *The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment*, 351 RECUEIL DES COURS, ACADEMIE DR DROIT INTERNATIONAL 1, 37 (2010).

It was hoped, rather naively,[102] that World War I would be "the war to end all wars," and that with the advent of the League of Nations states would conduct their relations amicably and settle their disputes peacefully. The outbreak of World War II tragically shattered these illusions. It was against this background that the Allies of World War II identified the establishment of an organization to protect international peace and security as a principal war aim.[103] That organization was to be the United Nations.

This Allied vision for the UN is expressed in the opening lines of the Charter, which indicate that "*the Paramount Purpose* of the UN, according to Article 1(1) of the Charter, is to maintain international peace and security."[104] To enable the UN to achieve this objective, two elements – one doctrinal and the other institutional – were embedded in the Charter, and together constitute the foundation of the UN security regime.

The doctrinal element, which is the centerpiece of *jus ad bellum*,[105] is the prohibition on the threat or use of force by states,[106] which is a "fundamental or cardinal principal" of international law.[107] The Charter entered two exceptions to this prohibition. The first is the right to use force in self-defense against armed attacks,[108] and the second is the resort

---

[102] Robert Kagan, *The Benevolent Empire*, 111 FOREIGN POLICY 24, 31 (1998) ("We should also not forget that utopian fancies about the obsolescence of military power and national governments in a transnational, 'economic' era have blossomed before, only to be crushed by the next "war to end all wars.").

[103] Declaration of Four Nations on General Security, Moscow, October 30, 1943.

[104] Albert Randelzhofer, *Article 2(4)*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112, 123 (Bruno Simma et al. eds., 2d ed. 2002) (emphasis added). *See also* DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER 26 (2001) ("[A]t the time of its establishment, the maintenance of international peace and security was the main *raison d'être* of the Organization.").

[105] *Jus ad bellum* is the field of international law governing the resort to armed force by states.

[106] UN Charter, Article 2(4).

[107] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 90 (June 27).

[108] UN Charter, Article 51.

to force as part of enforcement action authorized by the Security Council.[109]

The principal institutional component of the UN security regime is the Security Council.[110] This body of fifteen states, five of which hold permanent membership while ten are elected to nonrenewable two-year terms,[111] is endowed with "greater powers than any other international organ in history."[112] Because the structure and procedures of the Security Council are discussed in detail below, it is sufficient here to note that it retained vast prerogatives regarding the use of force in international relations. The Charter designated the Council as the sole entity empowered to authorize enforcement action to confront threats to or breaches of the peace or acts of aggression. In executing this mandate, the Council may resort to measures ranging from

---

[109] UN Charter, Chapter VII.

[110] The Security Council is the centerpiece of the UN security regime. In addition to the Council, however, the Charter assigned limited roles to other organs and offices of the UN system to contribute to efforts to maintain international peace and security. For example, the ICJ has noted, that the Security Council's responsibility to maintain international peace and security "is 'primary,' not exclusive . . . The Charter makes it abundantly clear, however, that the General Assembly is also concerned with international peace and security." International Court of Justice, *Certain Expenses of the United Nations*, Advisory Opinion, 20 July 1962, 163. In addition, Article 99 of the Charter grants the Secretary General the right to alert the Security Council to threats to international peace and security. Various Secretaries-General have used this authority and, more broadly, the prestige of their office to influence discussions in the Security Council. *See* Ian Johnstone, *The Role of the UN Secretary General: The Power of Persuasion Based on Law*, 9 GLOBAL GOVERNANCE 441 (2003).

[111] The Permanent Members are: Britain, China, France, Russia, and the United States. The non-permanent seats are divided geographically: five seats for Africa and Asia, two seats for Western Europe and Other States, two seats for Latin America and the Caribbean, and one seat for Eastern Europe. *See* David Malone, *Eyes on the Prize: The Quest for Nonpermanent Seats on the UN Security Council*, 6 GLOBAL GOVERNANCE 3, 4–5 (2000).

[112] Jochen Frowein and Nico Krisch, *Introduction to Chapter VII*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 701, 702 (Bruno Simma et al. eds., 2d ed. 2002).

diplomatic censure and economic sanctions to imposing blockades and waging war.[113]

Although recognizing that maintaining peace and security is the principal purpose of the UN takes us some distance toward understanding the policy purposes of the UN security regime, it still leaves an elephant in the room. Not unintentionally,[114] the Charter fails to answer the following questions: *What kind of peace* is the UN supposed to uphold? *Whose security* should the Security Council protect? Answering these questions is indispensable to grasping the nature of the policy purposes of the UN security regime. Unless its content, contours, and substance are unpacked, "security" remains a contested concept.[115] Without identifying the relevant beneficiary of security, i.e. *who is being secured*, and determining the threats facing this beneficiary, i.e. *secured against what*, "international peace and security" becomes an empty phrase.[116]

For the Charter's authors, the beneficiaries of the UN security regime were the UN member states. Maintaining peace and security was understood as preventing aggression and protecting the security, sovereignty, territorial integrity,

---

[113] Christine Gray, *The Charter Limitations on the Use of Force: Theory and Practice*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR 86–87 (Vaughan Lowe et. al eds., 2008).

[114] *See infra* notes 162 and accompanying text discussing the decision not to define terms such as "threats to the peace," "breaches of the peace," and "acts of aggression."

[115] BARRY BUZAN, PEOPLE, STATES, & FEAR 7 (1991). *See* W.B. Gallie, *Essentially Contested Concepts*, 56 MEETINGS OF THE ARISTOTELIAN SOCIETY 167, 169 (1956) (Essentially contested concepts are "concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users."). *See also* Andrew Hurrell, *supra* note 52, at 52 ("[I]nternational security is not an easily agreed commodity . . . States are unlikely to defend the status quo unless they are convinced that it embodies their own interests, their own values and their own conceptions of social justice. Security is always relative and subjective.").

[116] David Baldwin, *The Concept of Security*, 23 REVIEW OF INTERNATIONAL STUDIES 5, 10–18 (1997); *see also* ROBERT JACKSON, THE GLOBAL COVENANT: HUMAN CONDUCT IN A WORLD OF STATES 188 (2000) (explaining that "[s]ecurity is a normative idea that can be unpacked by addressing the following questions: security in (or of) what, from what, and by what means?").

and political independence of these states. In other words, the peace to be kept was peace among states, and the threat to peace was the prospect of inter-state war.[117] It was not unnatural for the founders of the UN to adopt this state-centric definition of war and peace. At least in Europe, the primary source of instability during the first half of the twentieth century, and indeed for centuries before that, had been wars between empires and states waged by regular armies across international frontiers. This was war as imagined and described by the likes of Karl von Clausewitz,[118] who allegorized war as a duel between political foes, where the disputants were monarchs, princes, and prime ministers, and the sovereign states they governed.[119] The purpose of these wars was to uphold the security and interests of states, and victory was defined in terms of acquiring strategic territory, maintaining defensible borders, controlling colonies, gaining access to the oceans, and protecting the sea-lanes.[120]

Given their recent experiences, however, the Allied Powers realized that maintaining peace and security required more than striving to prevent conflict between any and all states. Having endured two wars of epic proportions that engulfed the world's major powers, the creators of the post-World War II order assumed that global stability hinged on maintaining peace and cooperation between the great powers.[121] Therefore, the UN Charter drafted by the

---

[117] HANS KELSEN, THE LAW OF THE UNITED NATIONS 19 (1950) ("The peace the maintenance or restoration of which is the purpose of the United Nations is characterized as 'international' peace. In ordinary use of language, 'international peace' is a condition of absence of force in the relations among states."); *see also* Nico Krisch, *Article 39*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 717, 720 (Bruno Simma et al. eds., 2d ed. 2002) ("[T]he task of the Security Council was originally identified mainly, though not exclusively, with the prevention of inter-state war.").

[118] For an introduction to Clausewitz, see HEW STRACHAN, CLAUSEWITZ'S ON WAR (2007).

[119] PETER PARET, CLAUSEWITZ AND THE STATE: THE MAN, HIS THEORIES, AND HIS TIMES 383–87 (1985).

[120] *See generally* K.J. HOLSTI, THE STATE, WAR, AND THE STATE OF WAR 1–6 (1996).

[121] James Sutterlin, *The Past as Prologue*, *in* THE ONCE AND FUTURE OF THE SECURITY COUNCIL 3 (Bruce Russet ed. 1997) (As Edward Stettinius

victorious Allies prioritized the "minimization of violent conflict among the great powers over other values."[122] In other words, above all else, the UN was founded to prevent the outbreak of World War III.[123] This was the principal purpose of the UN security regime, and it was with this objective in mind that the Security Council—the principal institution of the UN security regime—was designed.

B. The Institutional Design of the UN Security Regime

Like the Big Four that constructed the post-Napoleonic European order, the Big Three (then Four, and eventually Five)[124] that conceived the post-World War II order sought to transform their wartime alliance into a partnership to manage international security affairs. [125] Underlying this planned partnership were two assumptions relating to the foundations of the post-war order, which, at least partially, reflected the painful lessons learnt from the failure of the League of Nations. [126] These assumptions

affirmed, "the cornerstone for world security is the unity of those nations which formed the core of the grand alliance against the Axis.").

[122] Bart Szewczyk, *Variable Multipolarity and U.N. Security Council Reform*, 53 HARV. INT'L L. J. 449, 472 (2012).

[123] EDWARD LUCK, *supra* note 98, at 34–35.

[124] The organization was conceived by the United States, the Soviet Union, and Great Britain. China was included at a later stage, and France was incorporated after its liberation from Nazi occupation. *See* STEPHEN SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS 33–53 (2003).

[125] Lauri Mälksoo, *Great Powers Then and Now: Security Council Reform and Responses to Threats to Peace and Security*, *in* UNITED NATIONS REFORM AND THE NEW COLLECTIVE SECURITY, *supra* note 53, at 109 (Noting that "the Security Council is not that different from previous Holy Alliances and other Great Power 'directorates of European/world affairs'"). The term "United Nations" was the name of the alliance against the axis powers during World War II. This name of the alliance and the future organization was suggested by President Roosevelt who obtained Britain's approval of it by bursting into Winston Churchill's bathroom in the White House while the latter was bathing during a visit to the United States. *See* ROBERT DIVINE, SECOND CHANCE: THE TRIUMPH OF INTERNATIONALISM IN AMERICA DURING WORLD WAR II 48 (1967).

[126] Charles Webster, *The Making of the Charter of the United Nations*, 32 HISTORY 16, 17 (1947) ("[T]he twenty years' experience of the League of Nations had by far the most important influence on the making of the Charter.").

ultimately shaped the institutional structure and procedural mechanisms of the UN security regime.

First, because of their unmatched military prowess, it was assumed that the principal threat to world peace would be armed conflict between the great powers. It was, therefore, decided that the new security regime should strive to prevent confrontations between these powers.[127] Second, the Allies concluded that the success of the future security regime depended on ensuring that the great powers joined the UN and actively participated in its work.[128] This was predicated on the belief that the influence and resources of these great powers made them the only states capable of effectively protecting peace and confronting aggression.[129] It also reflected a lesson drawn from the experience of the League of Nations, which failed chiefly due to the absence of leading powers from its ranks, especially the United States and the Soviet Union. Therefore, it was agreed that the Security Council should be granted broad powers, including the right to use force, and that its decisions should be binding. It was also understood that, by virtue of their vast capabilities and unique responsibilities, the great powers should enjoy considerable authority on the Council.[130] However, it remained that "each of the Big Four nations had interests and ambitions it considered too important to entrust to a world body; their individual commitments to enforce decisions of the world body were therefore inherently conditional."[131] None of the great powers would join the UN without

---

[127] RUTH RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 960 (1958) (It was assumed "from the start that if the great powers were basically agreed, the peace could be kept; if they were not, it could not.").

[128] Vaughan Lowe et. al., *Introduction*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR 12 (Vaughan Lowe et. al eds., 2008) ("The Charter as a whole was drawn with the central aim of ensuring that the major powers would be willing to join, and remain in, the organization.").

[129] *See* Georg Schild, *The Roosevelt Administration and the United Nations: Recreation or Rejection of the League Experience?* 158 WORLD AFFAIRS 26, 29 (1995) (explaining Roosevelt's idea of the Four Policemen responsible for the security of all states and for confronting aggression everywhere).

[130] ROBERT HILDERBRAND, DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY 2 (1990).

[131] TOWNSEND HOOPES & DOUGLAS BRINKLEY, FDR AND THE CREATION OF THE UN 114 (1997).

assurances that the organization would neither take action against them nor threaten their interests. This veto was to be that assurance. It enables the great powers to block any Security Council action considered inconsistent with their national security or vital interests.

These assumptions found their first full expression in the "Proposals for the Establishment of a General International Organization."[132] This document was prepared at a conference held in the Dumbarton Oaks mansion in Washington D.C. Just as Austria, Britain, Prussia, and Russia molded the Concert of Europe at the Congress of Vienna, the United States, Russia, Britain, and later China,[133] designed the UN system at Dumbarton Oaks.[134] Although important issues, including the operation of the veto power, were not settled at Dumbarton Oaks,[135] the blueprint of the U.N.

---

[132] Reproduced in RUTH RUSSELL, *supra* note 127, at 1019.

[133] The Dumbarton Oaks conference was divided in two phases. In the first, from 21 August until 28 September, the United States, USSR, and UK agreed on most matters relating to the establishment of the UN. In the second phase, from 29 September until 9 October, the United States and UK secured Chinese consent to the agreements reached with the Soviet Union. The conference was divided this way was because Soviet leader Josef Stalin did not accept full Chinese participation in discussions on post-war planning due to the geostrategic implications of recognizing a fourth great power on the Soviet Union's southern and eastern borders. *See* ROBERT HILDERBRAND, *supra* 130, at 61.

[134] For an overview of the Dumbarton Oaks Proposals, *see* Hans Kelsen, *The Old and the New League: The Covenant and the Dumbarton Oaks Proposals*, 39 AM. J. INT'L L 45 (1945).

[135] The two areas of disagreement remaining after the Dumbarton Oaks conference related to the operation of the veto and the number of seats allotted to the Soviet Union. On the latter issue, Stalin demanded sixteen seats in the General Assembly; one for each of the constituent republics of the USSR. On the veto, the Soviet Union insisted on granting an absolute unanimity rule that would allow the great powers to block any action or vote in the Security Council, including on purely procedural matters. Both of these issues were resolved during the last summit held between President Roosevelt, Premier Stalin, and Prime Minister Churchill in Yalta on 4–11 February 1945. On the question of the Soviet seats, Stalin accepted three seats for the USSR, Ukraine, and Belarus. On the veto, the Soviets agreed to limit the great power veto to non-procedural matters. *See*: DAVID BOSCO, FIVE TO RULE THEM ALL 22–23, 30–31 (2009).

security regime agreed on by the great powers was ultimately incorporated into the U.N. Charter.[136]

As aforementioned, the institutional component of the UN security regime is the Security Council. Unlike its predecessor at the League of Nations, which was encumbered with expansive duties,[137] the Security Council was charged with the relatively limited yet profound "primary responsibility for the maintenance of international peace and security."[138] To fulfill this mandate—the *raison d'être* of the organization—Chapter VI of the Charter allowed the Security Council to contribute to the peaceful settlement of disputes, while Chapter VII empowered the Council to take enforcement action—including the use of force—in situations amounting to a "threat to the peace, breach of the peace, or act of aggression."[139] This right to use force was historically unprecedented. For the first time, a prohibition on the use of force, except in self-defense, was enacted in international law, and simultaneously, an interstate organization was endowed with a monopoly on the right to wage war to protect peace and security.[140] To further ensure the Council's primacy and enable it to fulfill its responsibilities, the Charter made the Council's decisions binding on the member states,[141] and even required non-member states to cooperate with the

---

[136] Webster, *supra* note 126, at 33 ("Yet in the end, though some important additions were made, the Dumbarton Oaks Proposals were in all essentials accepted, and not one of the fifty states represented, refused to sign or ratify the Charter without reservations.").

[137] Leland M. Goodrich, *From League of Nations to United Nations*, 1 INT'L ORG. 3, 12 (1947) ("The League Council had general responsibilities and functions, whereas the Security Council is a highly specialized organ. Instead of having one council with broad powers as did the League, the United Nations has three, among which the various functions and powers of the League Council are divided.").

[138] UN Charter, art. 24, para. 1.

[139] UN Charter, art. 39.

[140] Niels Blokker, *The Security Council and the Use of Force: On Recent Practice, in* THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY AND REALITY—A NEED FOR CHANGE? 1, 8 (Niels Blokker & Nico Schrijver eds., 2005) (highlighting that "a use-of-force monopoly was given to a newly created institution with powers of its own, as part of a new world organization, through a multilateral treaty. This is a fundamental difference").

[141] UN Charter, art. 25.

organization in executing measures deemed necessary to protect international peace and security.[142]

The powers granted to the Security Council may, *prima facie*, suggest it was intended to function as a collective security organization. That, however, is a misimpression. Collective security, as discussed above, entails a commitment to confront aggression everywhere. In other words, an attack against one is an attack against all. Never, however, did the great powers assembled at Dumbarton Oaks envision such a commitment when designing the UN security regime. Furthermore, throughout the United Nations Conference on International Organization,[143] during which the fifty founding members of the UN finalized the Charter, the great powers ensured that the Security Council would not emerge as a collective security system.

The great powers resisted a barrage of amendments submitted by smaller nations seeking to transform the Security Council into a genuine collective security apparatus. "Having suffered so much over the course of the war, many smaller states were looking for security assurances, if not guarantees, by urging definitions and guidelines that would push the major powers to act when their smaller neighbors were threatened."[144] The great powers, however, were not prepared to offer any such assurances or guarantees. The Security Council was to remain as designed at Dumbarton

---

[142] UN Charter, art. 2, para. 6. The fact that virtually all states have joined the UN makes the question of whether the Charter generates obligations for non-members moot. However, this provision remains theoretically interesting because it illustrates the unprecedented power vested in the Security Council. Generally, states are only bound to obligations to which they have consented. Article 2(6), however, authorizes the Security Council to impose obligations on non-members where this is necessary to maintain peace and security, despite being non-parties to the Charter. *See* Wolfgang Graf Vitzthum, *Article 2(6)*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 140 (Bruno Simma et al. eds., 2d ed. 2002).

[143] The conference was held during the period 25 April–26 June 1945 in San Francisco.

[144] Edward C. Luck, *A Council for All Seasons: The Creation of the Security Council and Its Relevance Today*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 69 (Vaughan Lowe et. al eds., 2008).

Oaks: a "condominium of the victorious major Allies, who would jointly keep the rest in order,"[145] and not a mechanism to guarantee the safety, security, and survival of all states.

A single theme runs through the amendments tabled by the smaller powers. Hoping to write into the Charter a firm commitment to protect their security, these amendments aimed at "limiting the very great freedom which, in the Dumbarton Oaks Proposals, is left to the Council in determining what action, if any, to take" against threats to or breaches of the peace, or acts of aggression. [146] One amendment, which was advanced by Bolivia and "evoked considerable support," suggested writing into the Charter "a list of eventualities in which intervention by the Council would be automatic."[147] This proposal, which would have injected a central element of collective security—namely, automaticity of intervention—into the UN security regime, was rejected. The great powers argued that identifying specific situations requiring intervention could detract attention from other contingencies not explicitly mentioned in the Charter. They also opined that requiring automatic intervention might lead to the premature use of force.[148] A similar proposal that promised to transform the Security Council into a global law enforcement agency would have required the Council to implement decisions of international judicial bodies, especially the International Court of Justice

---

[145] Michael Howard, *The Historical Development of the UN's Role in International Security*, *in* UNITED NATIONS, DIVIDED WORLD 65 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993).

[146] United Nations Conference on International Organization, *Verbatim Minutes of the First Meeting of Commission III*, at 16, Doc. 943, III/5 (June 12, 1945) [hereinafter UNCIO Doc. 943].

[147] *Id.* at 17. The Bolivian amendment listed the following situations as requiring Security Council intervention: (1) Invasion of another state's territory by armed forces, (2) Declaration of war, (3) Attack by land, sea, or air forces, with or without declaration of war, on another state's territory, shipping or aircraft, (4) Support given to armed bands for the purpose of invasion, (5) Intervention in another state's internal or foreign affairs, (6) Refusal to submit the matter which has caused a dispute to the peaceful means provided for its settlement, and (7) Refusal to comply with a judicial decision lawfully pronounced by an international court. *See* RUSSELL, *supra* note 127, at 670.

[148] UNCIO Doc. 943, *supra* note 146, at 17.

(ICJ). [149] This proposal was rejected because it was considered overly restrictive of "the Council's freedom of action." [150] Instead, it was decided that in cases of non-compliance with an ICJ decision, the aggrieved party may refer the matter to the Security Council, which was granted discretion to decide whether and how to react to the situation. [151]

Having failed to secure an assurance of intervention in a wide range of situations, including non-compliance with judicial decisions, some states proposed obliging the Security Council to take action against what they believed to be *the* most serious threat to peace and security: acts of aggression. To do this, it was proposed to define aggression in the Charter. This suggestion, which was widely supported, "was advocated as a means of making sure that, at least in certain defined circumstances, the 'finding' of aggression would be automatic and the Council would be required to apply sanctions." [152] Other states avoided attempting to define aggression and instead sought to write into the Charter a general obligation to collectively resist aggression and guarantee the political independence and territorial integrity of states. [153] All of these ideas ultimately failed to garner the requisite support. Comprehensively defining aggression was considered futile. No definition could be formulated that would include all existing and potential forms of aggression. Meanwhile, guaranteeing collective action against aggression or to protect the independence and territory of states was deemed impractical because, as the British delegate observed, the entire UN security regime was founded on granting the

---

[149] United Nations Conference on International Organization, *Verbatim Minutes of the Fourth Meeting of Commission III*, at 113, Doc. 1149, III/11 (June 22, 1945) [hereinafter UNCIO Doc. 1149].

[150] UNCIO Doc. 943, *supra* note 146, at 16.

[151] UN Charter, art. 94, para 2.

[152] RUSSELL, *supra* note 127, at 670.

[153] *Id*. at 673. It is noteworthy that Article 10 of the Covenant of the League of Nations had provided such a guarantee. It stated: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." It appears, therefore, that some elements of the League of Nations regime come closer to collective security than the UN security regime.

Security Council maximum flexibility in determining both whether a situation indeed threatened the peace and whether it warranted intervention.[154]

Another attack waged by the participants at the San Francisco Conference against the breadth of the Security Council's discretion related to the absence of any rules or criteria to guide the Council when responding to threats to or breaches of the peace or acts of aggression. As Norway's representative observed, as envisioned by the great powers, the Council was free to intervene in any conflict, dispute, or situation, and to impose any solution or settlement on the parties, even if it undermined the interests, security, and welfare of any state. This required "establishing rules of conduct for the Security Council," to protect smaller states against the possible excesses of the Council.[155] This proposal was rejected because, as the British delegate explained, it was "inadvisable to limit the Council in its actions, as was in effect proposed, when it was dealing with a lawbreaker."[156] In other words, even when faced with a violation of

---

[154] RUSSELL, *supra* note 127, at 674.

[155] United Nations Conference on International Organization, *Summary Report of the Thirteenth Meeting of Committee III/1*, at 378, Doc. 555, III/1/27 (May 24, 1945) [hereinafter UNCIO Doc. 555]. Another amendment that sought to limit the Council's discretion but that also failed stated:

> "[T]he Security Council should refrain from making decisions that might affect the territorial integrity and political independence of state members of the Organization. Controversies on matters of this nature should be referred to the General Assembly, either by the initiative of the Security Council or at the request of any party to the dispute."

United Nations Conference on International Organization, *Summary Report of the Twentieth Meeting of Committee III/1*, at 557, Doc. 967, III/1/48 (June 14, 1945) [hereinafter UNCIO Doc. 967]. Another failed amendment proposed limiting the power of the Security Council to adopt binding decisions to resolutions taken under Chapter VII. The Soviet Union warned that this would limit the Council's powers, while Britain "reiterated the view that it might be dangerous so to limit the Security Council." United Nations Conference on International Organization, *Summary Report of the Fourteenth Meeting of Committee III/1*, at 393–94, Doc. 597, III/1/30 (May 26, 1945) [hereinafter UNCIO Doc. 597].

[156] UNCIO Doc. 555, *supra* note 155, at 378.

international law, the Council retained discretion regarding the appropriate response, including a right not to take action against the lawbreaker.

As a result of their insistence on protecting its freedom of action, the great powers secured a limitless margin of appreciation for the Security Council. First, the Council enjoys boundless authority to decide whether a situation constitutes a threat to or breach of the peace or an act of aggression.[157] This is reflected in the phrasing of the relevant provisions of the Charter, especially Article 39.[158] By rejecting proposals to define "aggression," "threats to the peace," or "breaches of the peace," the Charter granted the Council the right to conclude that any conduct or situation— even if not amounting to a breach of international law—fit into any of these categories.[159] Similarly, the Council is under no obligation to determine that a violation of international law—including acts of aggression or threats to use force that are patently prohibited by the Charter—constitutes a threat to or breach of the peace.[160] In addition, by distinguishing between "threats to the peace" and "breaches of the peace," the Charter allowed the Council to consider situations not

---

[157] UNCIO Doc. 943, *supra* note 146, at 17 (after considering amendments to the Charter, it was "decided to adhere to the text drawn up at Dumbarton Oaks and to leave to the Council the *entire* decision, and also the *entire* responsibility for that decision, as to what constitutes a threat to peace, a breach of the peace, or an act of aggression.") (emphasis added).

[158] UN Charter, art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

[159] BENEDETTO CONFORTI & CARLO FOCARELLI, THE LAW AND PRACTICE OF THE UNITED NATIONS 226 (4th ed. 2010) (noting that "in fact the Security Council may duly take account of *any* conduct of a State, considering it to be a threat to the peace a breach of the peace or an act of aggression . . . regardless of whether it might be lawful or not") (emphasis in original). Furthermore, through Article 2(7), the Security Council was exempted from the prohibition on the intervention in the domestic affairs of states to maintain peace and security.

[160] KELSEN, *supra* note 117, at 730 (although threats or uses of force are a violation of international law, "the Security Council may decide that such conduct is neither a threat to the peace nor a breach of the peace, and consequently the Council is not entitled to take enforcement measures").

rising to the level of open hostilities, significant tensions, or serious disputes to constitute a "threat" to international peace and security. Therefore, unlike UN member states that may resort to force only in self-defense against an actual armed attack, the Security Council may intervene preventively against latent threats to international peace and security.[161] Furthermore, nothing in the Charter impels the Council to act consistently. Situations, crises, or behavior previously threatening to peace and security may not be labeled as such in future settings.[162] In other words, unlike a court of law or a collective security arrangement, the Council is free to treat like cases differently.[163]

The Security Council's discretion to determine whether a situation constitutes a threat to or breach of the peace or an act of aggression is matched by an equally expansive margin of appreciation to decide whether and how to intervene in these situations.[164] By refusing to include any guarantee of intervention against aggression or threats to the peace, the great powers ensured that the Council would not be obliged to take measures even if it determines that such a situation has indeed arisen.[165] If, however, the Council

---

[161] Peter H. Kooijmans, *The Enlargement of the Concept of "Threat to the Peace", in* THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL 117 (P.M. Dupuy ed., 1993) (the Security Council may find a threat in situations where "the threat to the peace is not actual either but latent at the most.").

[162] However, some scholars argue that the Security Council's discretion to find threats to or breaches of the peace or acts of aggression is not limitless. *See* Nigel D. White, *On the Brink of Lawlessness: The State of Collective Security Law*, 13 IND. INT'L & COMP. L. REV. 237, 238 (2002–2003) ("The amount of discretion, however, is hotly debated, with there being strong contentions that even determination of threats to the peace by the Security Council are subject to law.").

[163] CONFORTI & FOCARELLI, *supra* note 159, at 205. ("[T]he present wording of Article 39 was preferred, with the stated purpose of allowing the Council to decide how to act on a case-by-case basis.").

[164] MICHAEL BYERS, WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT 16 (2005) ("The Council has an equally broad authority to decide which measures shall be taken to 'maintain or restore international peace and security.'").

[165] KELSEN, *supra* note 117, at 734 (arguing that "it is not possible to maintain that [the Council] is under an obligation to take enforcement measures after it has determined the existence of a threat to, or breach of, the peace").

decides that maintaining peace and security requires resorting to enforcement measures, the Charter places little restraint on the Council's liberty to employ whatever means it deems appropriate. The options that the Charter provides to the Council in Article 41, which outlines non-forceful measures, and Article 42, which includes forceful measures, are merely illustrative.[166] Indeed, since its earliest days, the Council arrogated to itself the authority to implement measures never envisioned by the framers of the Charter.[167] The Council may even order member states to take measures that would ordinarily constitute violations of international law.[168] This was made patently clear when the great powers refused a suggestion to require the Security Council to exercise its powers in accordance with "the principles of justice and international law."[169]

This omnipotence bestowed on the Security Council caused considerable apprehension among many delegations. Therefore, delegations from smaller nations proposed more amendments intended to involve other UN organs in efforts to maintain international peace and security. One amendment proposed establishing a right to appeal Security Council decisions before the General Assembly, while another gave

---

[166] RUSSELL, *supra* note 127, at 466 (noting the use of "permissive terms" in phrasing Articles 41 and 42, which were written so as "not to exclude the use of other measures").

[167] Clyde Eagleton, *The Case of Hyderabad Before the Security Council*, 44 AM. J. INT'L L. 277, 302 (1950) (commenting that during the Hyderabad crisis that broke out after India's independence, the Council overrode "the restrictions set by the Charter where it has desired to take an action, and has disregarded both its obligations under, and the principles of, the Charter when it did not desire to take action").

[168] ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 182 (2004) (the Council has "a wide discretion to deviate from customary international law or treaty law when resorting to enforcement measures.").

[169] RUSSELL, *supra* note 127, at 656. Indeed, Article 1(1) of the UN Charter was crafted in a way that indicates that in discharging its responsibilities to maintain international peace and security, the Security Council is *not* required to act in conformity with international law. In other words, the Council may pass resolutions that violate international law and that oblige the member states to disregard their international legal obligations. *See* Rudiger Wolfrum, *Article 1*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 39, 43 (Bruno Simma et al. eds., 2d ed. 2002).

the latter a right to review and overturn Council decisions.[170]
A third amendment suggested limiting the Security Council's
primary responsibility to maintain international peace and
security to eight years.[171] Meanwhile, France, led by a De
Gaulle determined to protect French autonomy in an
emerging American-led order in Western Europe, [172]
suggested adding a provision allowing individual states to
resort to force "as they may consider necessary in the interest
of peace, right, and justice."[173] Needless to say, all of these
proposals were rejected. [174] Because the unchallenged
primacy of the Security Council was a fundamental aspect of
their plan for the post-war security regime, the founding
fathers of the UN system that met at Dumbarton Oaks "were
not prepared to accept any substantive alterations in the
primary role of the Council."[175]

Although the institutional prerogatives of the Security
Council attracted considerable attention at the San Francisco
conference, it was the voting rights of the permanent
members that caused the greatest controversy during the
negotiations.[176] According to Article 27 of the Charter,
Security Council resolutions on "procedural matters" are

---

[170] United Nations Conference on International Organization,
*Continuation of the Report of the Activities of Committee III/1
Concerning Sections A,B,C, and D of Chapter VI of the Dumbarton Oaks
Proposals*, at 556–57, Doc. WD 313, III/1/51 (June 14, 1945) [hereinafter
UNCIO Doc. WD 313].

[171] *Id.* at 559.

[172] *See* PHILIP G. CERNY, THE POLITICS OF GRANDEUR: IDEOLOGICAL
ASPECTS OF DE GAULLE'S FOREIGN POLICY (1980).

[173] United Nations Conference on International Organization, *Annex I
Chapter VI, Section C – Proposed Amendments*, at 696, Doc. 1102 Annex
to Doc. 1050, III/1/62 (June 19, 1945).

[174] One amendment that was accepted and which became Article 24(3) of
the Charter required the Council to submit periodic reports to the General
Assembly for its consideration. *See* UNCIO Doc. 1149, *supra* note 149, at
113.

[175] RUSSELL, *supra* note 127, at 647.

[176] Dwight E. Lee, *The Genesis of the Veto*, 1 INT'L ORG. 33, 37 (1947)
("[T]he most serious crisis of the Conference on International
Organization arose over the so-called veto power of the permanent
members.").

adopted by nine votes.[177] Resolutions on non-procedural matters, however, can only be adopted with nine votes including the "concurring votes of the permanent members."[178] As an exception to this veto power, the Charter requires parties to a dispute—including permanent members—to abstain from voting on resolutions adopted under Chapter VI. In other words, permanent members may veto resolutions proposed under Chapter VII, thereby preventing the Council from determining that a situation constitutes a threat to or breach of the peace or act of aggression and preventing the Council from taking enforcement measures in such situations.

Of all its features, it is the veto that takes the Security Council farthest from being a collective security mechanism and brings it closer to a great power concert.[179] Haunted by the collapse of the League of Nations, the great powers realized that the success of the new organization depended on ensuring that all the great powers joined the UN and actively supported its operation.[180] For each of the great powers, however, the veto was a *sine qua non* for joining the UN.[181] Despite expressions of allied unity and affirmations of commitment to the success of the UN, the United States, Russia, Britain, China, and France were not prepared to

---

[177] Originally, the Charter required seven votes for the adoption of Security Council resolutions. However, when the Council's membership was expanded in 1965, the required majority was raised to nine votes.

[178] After the beginning of the Council's work, the words "concurring votes of the permanent members" became understood as either an affirmative vote or an abstention. *See* ICJ, *Certain Expenses*, *supra* note 110, at 22 (finding that "the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions.").

[179] Peter Danchin, *supra* note 54, at 50 (the veto "renders collective security impossible.").

[180] Kirk, *supra* note 100, at 1094 (the advantage of the UN over the League of Nations is that "all the great powers are members . . . . This is an enormous asset . . . . In an organization like the League or the United Nations, effectiveness in enforcement demands active support by all major states.").

[181] United Nations Conference on International Organization, *Verbatim Minutes of the Fifth Meeting of Commission III*, at 170, Doc. 1150, III/12 (June 22, 1945) [hereinafter UNCIO, Doc. 1150] (the veto was presented to delegations at the San Francisco conference as "an imperative and immovable condition.").

"place the interests of the peacekeeping body above its own, which meant that it would accede or not in the decisions of the council depending upon whether and how its vital interests were affected."[182] The veto provided the guarantee that the UN would never threaten the vital interests of these great powers.[183] Otherwise, as the British delegate in San Francisco warned, if the UN turned against a great power or threatened its vital interests, "[s]urely then the World Organization has broken down and that very war which it is designed to prevent, if possible, takes place."[184]

To justify this unprecedented privilege, the future permanent members argued that the proposed voting scheme was an improvement over the League of Nations. Unlike the League Council where resolutions were adopted by unanimity, Security Council action depended on unanimity among five of its nine (later, eleven)[185] members.[186] This, it was contended, would reduce obstructionism and enable the

---

[182] HILDERBRAND, *supra* note 130, at 219.

[183] The veto was imperative for the U.S. and the U.S.S.R. Roosevelt realized that securing the Senate's approval of the Charter required ensuring that U.S. forces would be deployed upon American approval and under American command. *See* Michael Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 76 (1991). For Stalin, the veto was nonnegotiable. First, due to the numerical superiority of western nations in the United Nations, and second because Stalin sought to avoid a repeat of the expulsion of the Soviet Union from the League of Nations following its invasion of Finland. *See* Lee, *supra* note 176, at 37. On the Soviet expulsion from the League, *see* Louis B. Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381, 1387 (1964).

[184] United Nations Conference on International Organization, *Summary Report of Ninth Meeting of Committee III/1*, at 322, Doc. 417, III/1/19 (May 18, 1945) [hereinafter UNCIO Doc. 417].

[185] In the original design, the Security Council was composed of nine members. As the UN membership expanded however during the era of decolonization, the Council was expanded to fifteen members. *See* Egon Schwelb, *Amendments to Articles 23, 27, and 61 of the Charter of the United Nations*, 59 AM. J. INT'L L. 834 (1965).

[186] As the American and British delegates in San Francisco noted, "[s]ince in the League of Nations every member of the Council and not a minority in it could exercise a veto, the Yalta formula was a distinct advance." *Quoted in* United Nations Conference on International Organization, *Summary Report of Tenth Meeting of Committee III/1*, at 335, Doc. 459, III/1/22 (May 21, 1945) [hereinafter UNCIO Doc. 459].

Council to operate more effectively.[187] The exceptional powers of the permanent members were also argued to be commensurate to their responsibilities.[188] Given their military capabilities, it was understood that they would be responsible for leading enforcement action authorized by the UN.[189] The great powers were not, however, prepared to place their armed forces at the disposal of the Security Council. The veto was, therefore, necessary to provide the permanent members with ultimate control over when and where their militaries would be deployed at the behest of the Council.[190] As they announced in San Francisco, "[i]n view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred."[191] In other words, the great powers pledged to act as their brother's keepers—but only at their discretion.

Unsurprisingly, the smaller states deeply resented the veto.[192] For New Zealand's Prime Minister, the veto was "a

---

[187] Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 HARV. L. REV. 1087, 1119 (1946) (the voting scheme "makes the operation of the Council less subject to obstruction than was the case under the Covenant's rule of complete unanimity").

[188] UNCIO Doc. 1149, *supra* note 149, at 131–32 (Senator Tom Connally—a member of the U.S. delegation—described the responsibilities of the permanent members as "momentous; it is tremendous. It may have the effect of shaking the very foundations of the earth.").

[189] United Nations Conference on International Organization, *Report of the Rapporteur of Commission III*, at 235, Doc. 1170, III/13 (June 23, 1945) [hereinafter UNCIO Doc. 1170] ("To summarize this general scheme for future world security, it may be pointed out that it is based on the unanimity of the great powers, which will bear the brunt of future enforcement action.").

[190] RUSSELL, *supra* note 127, at 723.

[191] United Nations Conference on International Organization, *Statement by Mr. John Sofianopoulos, Chairman of Technical Committee III/1 on the Structure and Procedures of the Security Council*, at 713, Doc. 852, Annex to Doc. 1050, III/1/58 (June 8, 1945) [hereinafter UNCIO Doc. 852].

[192] As the Egyptian representative noted: "The great powers had made it plain that the veto was essential; the smaller powers, perhaps 40 out of the 50 delegations, were opposed to it." *Quoted in* United Nations

vicious principle and a wrong principle,"[193] while the Dutch delegate warned that the veto may lead the UN to "lose every vestige of authority and prestige it ever had."[194] Throughout the lengthy, and frequently heated, discussions on the voting rules of the Security Council, various delegations sought to limit the purview of the veto. The most prominent proposal to alter the voting scheme devised by the great powers was presented by Australia. This amendment sought to limit the ambit of the veto by expanding the definition of "procedural matters." As Herbert Evatt, Australia's Foreign Minister and a leading protagonist in the drama of the San Francisco conference, explained, "if this phrase 'procedural matters' is defined narrowly, the veto power of each permanent member is correspondingly widened. If 'procedural matters' is given a wider and more liberal definition, the veto power of each permanent member is correspondingly narrowed." [195] Therefore, this amendment proposed categorizing the Security Council's mandate to settle disputes peacefully as a procedural matter, thereby denying the permanent members the right to veto resolutions prepared under Chapter VI of the Charter.[196] To many delegations, this amendment lessened the possibility of deadlock on the Council and protected it against being held hostage by a single permanent member.[197] Furthermore, it was feared that an impasse on the Council due to the veto could impel the great powers to unilaterally impose solutions to disputes on smaller countries. This fear was especially poignant given the still recent memory of the

---

Conference on International Organization, *Summary Report of Nineteenth Meeting of Committee III/1*, at 491, Doc. 956, III/1/47 (June 13, 1945) [hereinafter UNCIO Doc. 956].

[193] UNCIO, Doc. 1150, *supra* note 181, at 172.

[194] United Nations Conference on International Organization, *Statement of the Delegate of the Netherlands at Ninth Meeting of Committee III/1*, at 328, WD. 215, III/1/36 (May 17, 1945) [hereinafter UNCIO Doc. WD. 215, III/1/36].

[195] UNCIO Doc. 1149, *supra* note 149, at 122.

[196] For the text of the amendment, see UNCIO Doc. 956, *supra* note 192, at 492.

[197] As New Zealand noted, the Australian amendment would "help the great powers to unite because it meant that one of the five could not dictate to the other ten members of the Council with respect to peaceful settlement." *Quoted* UNCIO Doc. 956, *supra* note 192, at 493.

1938 Munich Agreement in which Europe's appeasers accepted Hitler's annexation of the Sudetenland.[198]

The great powers, however, were implacable. No limitations on the veto were acceptable.[199] As the U.S. delegate explained, "[t]he vice in the Australian amendment was that at the very beginning of the consideration of a dispute when unity among the great powers was essential, division might occur. Unanimity was necessary all along the line in order to prevent disputants from sowing the seeds of discord."[200] As discussions on the Australian amendment proceeded, the permanent members issued a statement outlining their views on the operation of the veto.[201] On the critical question of defining "procedural matters," the statement provided an illustrative list of those matters to which the veto would not apply. It included: adopting the Council's rules of procedure, selecting the times and places of the Council's meetings, inviting states to attend Council sessions, and inviting parties to a dispute to participate in Council discussions. The statement also indicated that the permanent members would not use the veto to deny any state the right to bring a dispute to the Council's attention or to prevent a matter from being discussed or considered by the Council.

---

[198] UNCIO Doc. 956, *supra* note 192, at 492.

[199] HOOPES & BRINKLEY, *supra* note 131, at 202 ("Despite the acute differences between and among the Big Five, they recognized the unacceptable disorder that would flow from efforts of the smaller nations to relax the requirement for Great Power unanimity in decisions of the Security Council.").

[200] UNCIO Doc. 956, *supra* note 192, at 491.

[201] UNCIO Doc. 852, *supra* note 191, at 710. This statement was prepared in response to a questionnaire submitted to the permanent members by other delegations to clarify how the veto would operate. For example, it asked whether resolutions recommending terms for settling a dispute could be vetoed, or whether the veto applied to the Council's power to investigate a dispute likely to threaten the peace. It also asked whether a finding that a dispute is likely to endanger the peace is subject to the veto, and inquired whether a veto applied to resolutions determining the existence of a threat to or breach of the peace. For the full questionnaire, *see* United Nations Conference on International Organization, *Questionnaire on Exercise of Veto in Security Council*, at 699, Doc. 855 Annex to Doc. 1050, III/1/58 (June 8, 1945).

The statement then drew the critical dividing line between procedural and non-procedural matters. In a paragraph which, more than any other element of the UN security regime, reveals the reality of the Security Council as a great power concert, the statement read:

"Beyond this point [of bringing a dispute to the Council's attention], decisions and actions by the Security Council may well have major political consequences and may even initiate a chain of events which might, in the end, require the Council under its responsibilities to invoke measures of enforcement . . . . This chain of events begins when the Council decides to make an investigation, or determines that the time has come to call upon states to settle their differences, or makes recommendations to the parties. It is to such decisions and actions that unanimity of the permanent members applies, with the important proviso, referred to above, for abstention from voting by parties to a dispute."[202]

This meant that the only Security Council decision not subject to the veto would be "whether a dispute ought to be fully discussed. It can only investigate whether a dispute ought to be fully investigated."[203] Beyond that, the permanent members were free to consider any Council action, even the faintest diplomatic censure, to constitute a threat to their interests necessitating the exercise of the veto. It also became immediately apparent to the nations gathered in San Francisco that if a permanent member waged war, the UN would be powerless. This voting scheme made it "impossible for the Security Council to determine the existence of a threat to the peace or act of aggression by one of the Permanent Members."[204] Moreover, because the great powers would enjoy discretion to define the scope and nature of their vital interests, it was recognized that they could freely extend their immunity from Security Council action to their allies.[205]

---

[202] *Id.* at 712.
[203] UNCIO Doc. 1149, *supra* note 149, at 125.
[204] UNCIO Doc. WD. 215, III/1/36, *supra* note 194, at 329.
[205] Kirk, *supra* note 100, at 1095 ("No great power can be the object of enforcement action, and it is likely that a great power would use its veto to prevent action from being taken against one of its satellites.").

Facing this reality, which, as the Dutch representative noted, "legalizes the mastery of might,"[206] many delegations sought assurance that the veto would not be used "unthinkingly or unjustly or tyrannically."[207] Although the future permanent members vowed not to "use their 'veto' power willfully to obstruct the operation of the Council,"[208] they refused to explain in any detail how the veto would operate. Addressing those delegations demanding further clarity on the matter, the U.S. representative stated: "it was impossible to give an exact interpretation which would foresee all future contingencies. The final responsibility as to the interpretation would rest with each individual delegate when he cast his vote on the basis of his own judgment and all available information."[209] *Nemo iudex in sua causa*, it appeared, would be inapplicable to the permanent members. The great powers would judge their own cases and exercise the veto as they alone saw fit. The architects-in-chief of the UN system had thus achieved their objective. They created a security regime that, instead of providing a guarantee of protection against aggression, established a great power oligarchy to oversee global security.

Despite widespread displeasure with the Security Council voting scheme,[210] the smaller nations ultimately conceded. The great powers made it abundantly clear that without the veto, there would be no UN. As the U.S. representative announced, if the smaller powers killed the veto, they would also kill the Charter.[211]

***

---

[206] UNCIO, Doc. 1150, *supra* note 181, at 164.

[207] *Id.* at 171.

[208] UNCIO Doc. 852, *supra* note 191, at 713.

[209] United Nations Conference on International Organization, *Summary Report of Sixteenth Meeting of Committee III/1*, at 433, Doc. 897, III/1/42 (June 10, 1945).

[210] UNCIO Doc. 459, *supra* note 186, at 335 (Colombia asserted that "sentiment was running deep in many countries throughout the world against any provision for a 'veto'.").

[211] UNCIO Doc. 956, *supra* note 192, at 493.

This overview of the *travaux préparatoires* of the Charter brings to mind Mark Twain's remark that "[h]istory does not repeat itself, but it rhymes."[212] The Security Council is not a mirror image of the Concert of Europe; but it does rhyme with many of its features. As Friedrich von Gentz observed at the Congress of Vienna, "the states of the second, third and fourth rank have placed themselves, tacitly and without any stipulation on this point, under the decisions taken jointly by the preponderant Powers."[213] And so it was with the United Nations; only with the Charter, nothing was tacit or without stipulation. For all its rhetoric about the sovereign equality of states, the Charter recognized and institutionalized the hierarchy of power among states.[214] The smaller nations ceded to the great powers the right "to define the conscience of the world."[215] This was the price of establishing the UN. Without a guarantee that their vital interests would never be threatened, the great powers would neither have joined the UN nor participated in its operation.[216]

The preeminence of the permanent members is not the only aspect of the Security Council that recreates the features of a great power concert. The authors of the Charter purposely avoided including in the UN system any of the prerequisite elements of a collective security system. Nowhere in the Charter does the UN guarantee the security, survival, and safety of states. And never did the Charter oblige states to collectively oppose aggression. The UN Charter did not, as John Yoo maintains, offer "nations a

---

[212] *Quoted in* HUGH RAWSON & MARGARET MINER, THE OXFORD DICTIONARY OF AMERICAN QUOTATIONS 316 (2006).

[213] *Quoted in* HINSLEY, *supra* note 25, at 197.

[214] W. Michael Reisman, *The Constitutional Crisis in the United Nations*, *in* THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL 399 (P.M. Dupuy ed. 1993) ("Its rhetoric of State equality notwithstanding, the United Nations Charter confirms and endorses a highly differentiated international society.").

[215] UNCIO, Doc. 1150, *supra* note 181, at 169.

[216] Adam Roberts & Benedict Kingsbury, *Introduction: The UN's Roles in International Society Since 1945*, UNITED NATIONS, DIVIDED WORLD 1, 41 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993) (the veto "helped to get and keep the major powers within a UN framework when they would otherwise have either not joined it in the first place or else deserted it.").

bargain. If they give up war as a tool of international politics, a supranational government will prevent threats to their security." [217] And neither is the "key shortcoming of collective security UN style," as John Ruggie suggests, "that the UN has no means of its own to implement a military response to aggression."[218] Indeed, the absence of forces to repress aggression is not a shortcoming at all once it is accepted that the UN was never envisioned as a collective security scheme. Collective security functions on the basis of a non-discriminatory commitment of intervention against aggression. It assumes that an attack against one is an attack against all. The UN Charter entails nothing of the sort. It instituted a discriminatory system of ad hoc responses in which decisions are taken on a case-by-case basis and where each situation is judged on its own merits. This is the reality of the so-called UN collective security system.

At a deeper level, the Charter reflects the views and normative commitments of its authors about the role of law and international institutions in world politics. World order, the fathers of the UN believed, was predicated on maintaining peaceful relations among the greatest powers of the international system. This approach to the pursuit of peace expressed a cognizance of the politically pluralist nature of the society of states. In this world, cooperation was possible but never guaranteed, and political accommodation was attainable but unlikely to evolve into consensus on strategic objectives. This was a world where, as in Metternich's time over a century earlier, the allies kept an eye on each other as much as on the enemy. Therefore, the legal and institutional architecture of the post-war world was designed to contribute to managing a politically fragmented world by preventing great power conflict and facilitating cooperation between these states.

III. The Tragedy of Collective Security

As the UN came to life on October 24, 1945, the alliance that defeated the axis quickly devolved into a rivalry

---

[217] JOHN YOO, POINT OF ATTACK 133 (2014).
[218] John Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT'L ORG. 561, 570 (1992).

pitting America and its western allies against the Soviet Union and its communist satellites. This competition for global hegemony defined the first forty years of the UN's history.[219] The end of the Cold War, however, fundamentally transformed the international political landscape and engendered optimism that the UN might effectively execute its mandate to maintain international peace and security. Hopes also emerged that UN practice would evolve to reflect the newfound preeminence of human rights in international affairs.[220] The emphasis on state security, sovereignty, and political independence, which was the dominant definition of security at the founding of the UN, was challenged by calls to prioritize the security, safety, and wellbeing of human beings in the work of the Security Council.

Ultimately, however, as this Part argues, the drive to identify human beings as the primary beneficiaries of the UN security regime failed. Although significant advances were achieved toward protecting civilians against atrocities, safeguarding the security and interests of states – primarily the great powers – remains the dominant purpose of the UN security regime. This is the tragedy of collective security. Despite the heralding of the "age of rights,"[221] it appears that the interests of the great powers still take precedence over protecting human lives in the practice of the Security Council.

A. The Humanization of Security

Words, Justice Holmes wrote, are the "skin of living thought," and meanings "vary greatly in color and content according to the circumstances and the time."[222] As strategic

---

[219] *See* JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY 158–161 (2005).

[220] Jack Donnelly, *Human Rights, Humanitarian Crises, and Humanitarian Intervention*, 48 INT'L JOURNAL 607 (1993) (observing that "in fact, human rights issues and humanitarian politics more generally, have achieved an international prominence at least as great as at any other time in modern history.").

[221] LOUIS HENKIN, THE AGE OF RIGHTS 43 (1990) ("In our age, the age of rights, the idea of rights has leaped from society to society, disregarded state boundaries and eroding the separateness and independence of states in significant respects.").

[222] Towne v. Eisner, 245 U.S. 418, 425 (1918).

circumstances evolved and as the political times changed, so did the meanings of the Charter and the practices of the organization. The demise of the Soviet empire was celebrated as a triumph for democracy,[223] and as an opportunity to establish a "new world order" predicated on "the universal aspirations of mankind: peace and security, freedom, and the rule of law."[224] Freed from the paralysis of the superpower standoff, hopes were now pinned on the UN to perform a central role in this new world order.[225] Optimism reached euphoric levels after the Security Council's successful intervention to end Iraq's occupation of Kuwait in 1990.[226] After an almost 50-year hiatus, it was hoped that the Council would spearhead a comprehensive security system to protect "peace, security, and stability around the world, seek peaceful solutions, mediate disputes, preempt or prevent conflict, assure the protection of the weak, and deal authoritatively with aggressors or would-be aggressors."[227]

In addition to the transformation of the topography of global politics, the post-Cold War era was a time of profound normative change. Human rights became the *lingua franca* of international relations. [228] This "undeniable, irresistible,

---

[223] John Lewis Gaddis, *Toward the Post-Cold War World*, 70 FOREIGN AFF. 102, 103 (1991) ("The end of the Cold War was too sweeping a defeat for totalitarianism—and too sweeping a victory for democracy.").

[224] President George H.W. Bush, *State of the Union* (Jan. 29, 1991), http://perma.cc/6HPD-FY8F.

[225] "The machinery of the United Nations, which had often been rendered inoperative by the dynamics of the Cold war, is suddenly at the center of international efforts to deal with unresolved problems of the past decades as well as an emerging array of present and future problems." Boutros Boutros-Ghali, *Empowering the United Nations*, 71 FOREIGN AFF. 89 (1992).

[226] Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452 (1991) (the intervention against Iraq was "hailed as a vindication of international law and collective security.").

[227] Brian Urquhart, *The UN and International Security After the Cold War*, *in* UNITED NATIONS, DIVIDED WORLD: THE UN'S ROLE IN INTERNATIONAL RELATIONS 95, 81–103 (Adam Roberts & Benedict Kingsbury eds., 1993).

[228] Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2049 (2002–2003) ("Human rights have, in short, become the *lingua franca* of request.").

irreversible"[229] rise to preeminence of human rights was argued to have altered the values and purposes of international law. Instead of its traditional focus on the sovereign state as the primary subject and beneficiary, international law was said to be experiencing a process of "humanization" that prioritizes the rights, interests, and dignity of human beings.[230] As a result of this transformation, the content of international law was said to be evolving to reflect this emphasis on human beings, [231] and more profoundly, the political project of international law was being reimagined into a mission to transform the anarchical society of states into a global community of humankind predicated on the rule of law.[232]

Two notable policy implications flow from the humanization of international law. First, state sovereignty, long considered the cornerstone of international law, [233] becomes contingent on a government's human rights

---

[229] Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 35 (1995–1996).

[230] Ruti Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L. J. 355, 357 (2002) (speaking of a "paradigm shift now occurring in international law" that contributed to "a shift away from the previously prevailing state-centric system"). *See also* Menno Kamminga, *Final Report on the Impact of Human Rights Law on General International Law*, *in* THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 1, 22 (Menno Kamminga & Martin Scheinin eds., 2009) (the "permeation of international human rights law through general international law constitutes a quiet revolution which invariably targets international law's most statist features.").

[231] Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 873 (1990) ("Precisely because human rights norms are constitutive, other norms must be reinterpreted in their light, lest anachronisms be produced.").

[232] Martti Koskenniemi, *Law, Teleology, and International Relations: An Essay in Counterdisciplinarity*, 26 INT'L RELATIONS 3, 14 (2012) (the teleological project of international law is to establish an "international community ruled by law"). *See also* Antonio Trinidade, *International Law for Humankind: Towards a New Jus Gentium*, 316 RECUEIL DES COURS 84 (2005) ("Contemporary International Law is expected to reflect the fundamental values shared by the inter-national community and to respond to the needs and aspirations of humankind as a whole.").

[233] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 447 (8th ed. 2012) ("The sovereignty of states represents the basic constitutional doctrine of the law of nations.").

record.[234] Failure to protect human rights and fundamental freedoms neutralizes the principle of non-intervention in the internal affairs of states and potentially justifies the use of force to prevent abuses against individuals.[235] Second, as members of a global community, governments gradually redefine their national interests, and perhaps even their national identity, to reflect their membership in this broader community of humankind.[236] Instead of the *raison d'état* mentality that prioritized the welfare of nation-states,[237] in a humanized global order, self-interest is expanded to include a commitment to the interests and needs of the transnational human community.[238] To some scholars, the spirit of the UN Charter invites states to expand their understanding of individual interests to include the promotion and pursuit of global interests.[239] The most prominent figure of international diplomatic officialdom, the UN Secretary-General, endorsed this image of the Charter and contended that a "widely conceived definition of national interest in the new century would . . . induce States to find far greater unity in the pursuit

---

[234] Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EURO. J. INT'L L. 513, 514 (2009) (stating that sovereignty "is from the outset determined and qualified by humanity, and has a legal value only to the extent that it respects human rights, interests, and needs. It has thus been humanized.").

[235] Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS REV. INT'L AFF. 11, 17 (2006).

[236] CHRISTOPHER HILL, THE CHANGING POLITICS OF FOREIGN POLICY 302 (2003) (globalization and interdependence "have drawn foreign-policy makers in many states to reconfigure their approaches, given that the sense of identity of themselves and their fellow citizens is no longer uncomplicatedly confined within the paradigm of the nation-state").

[237] I Jack Donnelly, *The Ethics of Realism*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS 154 (Christian Reus-Smit & Duncan Snidal eds. 2008) ("*Raison d'état* (reason(s) of state) holds that where international relations are concerned, the interests of the state predominate over all other interests and values.").

[238] Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 221, 244 (1994) (community interests "go far beyond interests held by States as such; rather, they correspond to the needs, hopes and fears of all human beings.").

[239] THOMAS WEISS, WHAT'S WRONG WITH THE UNITED NATIONS AND HOW TO FIX IT 127 (2008) ("The UN Charter clearly enumerates the need for calculations of common interests rather than narrower and purely self-centered mathematics that stop at national borders.") [hereinafter WEISS, WHAT'S WRONG WITH THE UNITED NATIONS].

of such basic Charter values as democracy, pluralism, human rights, and the rule of law."[240]

The echoes of this putative humanization of international law are said to have resonated in the area of security. As discussed above, at the founding of the UN, states were understood as the primary beneficiaries of security—states were the entities to be secured against threats emanating from external sources. [241] Numerous factors contributed to the emergence of misgivings regarding this understanding of security. The easing of military threats to global security after the Cold War, combined with the humanitarian disasters caused by the implosion of various states and the outbreak of numerous internal conflicts,[242] provided the impetus for questioning state-centric definitions of security.[243] Ultimately, however, the chief challenge to traditional understandings of security came from the ideational move toward a people-centric global legal system. [244] As one scholar argues, "[t]he normative foundations of the international legal order have shifted from an emphasis on state security—that is security as defined by borders, statehood, territory, and so on—to a focus on human security: the security of persons and peoples."[245]

Although the contours of human security are contested,[246] its defining feature is that it displaces the state as the object of security, and expands the notion of threats to

---

[240] Kofi Annan, *Address to the United Nations General Assembly*, UN Doc. SG/SM/7136 (Sept. 20, 1999), http://perma.cc/EQY9-55AT.

[241] Sadako Ogata, *State Security—Human Security, The Fridtjof Nansen Memorial Lecture* (Dec. 17, 2001), http://perma.cc/XB9P-7CXB.

[242] On internal conflicts in the post-Cold War years, *see* Bethany Lacina, *From Side Show to Centre Stage: Civil Conflict After the Cold War*, 35 SECURITY DIALOGUE 191 (2004).

[243] Hisashi Owada, *Human Security and International Law*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOR OF JUDGE BRUNO SIMMA 505, 506 (Ulrich Fastenrath, et al. ed., 2011).

[244] Andrew Mack, *A Signifier of Shared Values*, 35 SECURITY DIALOGUE 366 (2004) (highlighting that the foundation of human security is found in the Universal Declaration of Human Rights, the UN Charter, and the Geneva Conventions).

[245] RUTI TEITEL, HUMANITY'S LAW 4 (2011).

[246] Sabina Alkire, *A Vital Core Must Be Treated with the Same Gravitas as Traditional Security Threats*, 35 SECURITY DIALOGUE 359 (2004).

security beyond military threats.[247] Instead, human beings are identified as the beneficiaries of security,[248] and security is threatened when the survival, physical security, or fundamental socio-economic needs of human beings are undermined.[249] This represents nothing less than a "fundamental revision of the way in which we look at the problem of security."[250] Like a centrifugal force, the process of humanization pushes the concept of security beyond its traditional statist limits in multiple directions. Security is pulled downward from nations to individuals, pushed upward from the society of states to a global supranational community, and expanded horizontally to ensure the political, social, economic, and environmental wellbeing of individuals.[251]

Because security is the most fundamental commodity states provide,[252] reframing security in humanitarian terms has a profound impact on government policy and the practice of international organizations. Primarily, resources are rechanneled to issues that previously attracted lesser interest.[253] Instead of investing in military hardware, armaments, intelligence capabilities, and other traditional tools of statecraft, human security encourages governments to redirect attention to satisfying basic human needs through measures like crime control, disease prevention, hunger alleviation, and minimizing environmental hazards.[254]

---

[247] WEISS, WHAT'S WRONG WITH THE UNITED NATIONS, *supra* note 239, at 157.

[248] Fen Osler Hampson, *A Concept in Need of a Global Policy Response*, 35 SECURITY DIALOGUE 350 (2004) (by "placing the individual as the key point of reference, the human security paradigm assumes that the safety of the individual is the key to global security.").

[249] J. Paul Martin and Benedicto Sanchez, *Collective Security: A Village-Eye View*, *in* UNITED NATIONS REFORM AND THE NEW COLLECTIVE SECURITY, *supra* note 53, at 365, 371.

[250] S. NEIL MACFARLANE & YUEN FOONG KHONG, HUMAN SECURITY & THE UN 3 (2006).

[251] Emma Rothschild, *What is Security*? 124 DAEDALUS 53, 55 (2001).

[252] Richard Ullman, *Redefining Security*, 8 INTERNATIONAL SECURITY 129, 130 (1981) (recalling that "of all the 'goods' a state can provide, none is more fundamental than security.").

[253] MACFARLANE & KHONG, *supra* note 250, at 230.

[254] Ramesh Thakur, *A Political World View*, 35 SECURITY DIALOGUE 347–48 (2004).

Second, with sovereignty desanctified and non-intervention neutralized,[255] the relationship between governments and the governed becomes a matter of international concern and a ground for outside interference to ensure that the security and wellbeing of individuals are protected.[256] This is predicated on a presumption that human security is indivisible. Like collective security where all every state's national security is intrinsically intertwined with the security of the collectivity, human security assumes that "our own security is indivisible from that of our neighbors."[257]

This leads to a third implication that upends a fundamental feature of international law. Traditionally, international law was agnostic towards the system of government adopted by states.[258] Under a humanized global legal order, however, the domestic policy latitude available to governments is relatively constricted. Protecting human security and promoting human dignity requires, according to most views, establishing liberal democratic governments that guarantee basic human rights and ensure the rule of law.[259] Accordingly, the objectives of foreign intervention to protect human security change to reflect these prerequisites for the enjoyment of human security. In a world of humanized security, wars should be waged to reorganize political systems, reform legal systems, and embed the rule of law, all of which contribute to guaranteeing human rights. In other

---

[255] Alex Bellamy and Matt McDonald, *The Utility of Human Security: Which Humans? What Security? A Reply to Thomas & Tow*, 33 SECURITY DIALOGUE 373, 375 (2002). ("A discourse of human security that does not delegitimize states when they act as agents of human insecurity, does not devalue sovereignty when it protects perpetrators of human wrongs . . . has, at best, very limited utility.").

[256] MACFARLANE & KHONG, *supra* note 250, at 229 (concluding that human security "erodes the robustness of the principle of non-intervention.").

[257] Lloyd Axworthy, *A New Scientific Field and Policy Lens*, 35 SECURITY DIALOGUE 348 (2004).

[258] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J 14, para. 205 (June 27) (states are free to chose "a political, economic, social, and cultural system, and the formulation of foreign policy.").

[259] WEISS, FORSYTHE, & COATE, *supra* note 57, at 292 ("Both sustainable human security and sustainable human development require democracy and the protection of fundamental human rights.").

words, winning wars in the age of human security entails engaging in nation-building.[260]

As the global political climate changed and as the humanization of international law progressed, so did the policies and practices of the UN. Liberated from the East-West impasse, the Council embarked on a flurry of activity far beyond anything imagined by the UN's founding fathers.[261] The Council appeared to be shedding the antiquated image of a concert subservient to the vicissitudes of great power politics and evolving into an effective tool of global governance.[262] In a post-Cold War environment of transnational "problems without passports," the great powers were invited to conceive of themselves not as strategic competitors, but as the leaders of a global community united by common interests, vulnerabilities, and values.[263] And concurrently, the Security Council was to be reimagined "not just another stage on which to act out national interests," but as a "management committee" to jointly confront global challenges.[264]

The most striking feature of the Council's changing ways was the expansion of the meaning of the phrase "threats to the peace," which unlocks its vast enforcement powers.[265] Gradually, it became recognized that a broad array of phenomena, including mass atrocities, refugee flows, humanitarian crises, epidemics, poverty, and HIV/AIDS, constituted threats to the peace warranting international

---

[260] For example, U.S. interventions in Afghanistan, Iraq, Kosovo, and Bosnia were to "convert these societies to self-functioning, rule-abiding, human-rights-respecting states that do not fall back into violence." PHILIP BOBBITT, TERROR AND CONSENT 206 (2008).

[261] This is best demonstrated by the increase in the number of resolutions adopted by the Council. *See* Peter Wallensteen and Patrik Johansson, *Security Council Decisions in Perspective, in* THE UN SECURITY COUNCIL: FROM COLD WAR TO THE 21ST CENTURY 17, 18–19 (David Malone ed., 2004).

[262] DAVID BOSCO, *supra* note 135, at 170 (the Council shifted from "a limited political concert toward an expansive governance role.").

[263] Kofi Annan, *Problems Without Passports*, FOREIGN POLICY (Nov. 9, 2009).

[264] Kofi Annan, *Address at the Truman Presidential Library*, (Dec. 11, 2006), http://perma.cc/RB5M-JEKN.

[265] OLIVIER CORTEN, THE LAW AGAINST WAR 319 (2012).

intervention. As a President of the Security Council noted, "[t]he absence of war and military conflicts among States does not itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."[266] Recognizing these non-military issues as threats to the peace contributed to introducing human security into UN parlance and promoting it as an alternative or, at least, a supplement to traditional statist understandings of security.[267]

In addition, UN involvement in a series of internal armed conflicts contributed to further advancing the human security agenda.[268] By intervening in places such as Somalia, the former Yugoslavia, Rwanda, Sierra Leone, Haiti, and East Timor,[269] the Security Council firmly established that human suffering was a legitimate cause for intervention, even forceful intervention, in the affairs of states.[270] True, Article 2(7) of the Charter granted the Security Council an exceptional right to intervene in matters "essentially within the domestic jurisdiction of any state," and the Council occasionally exercised that authority during the Cold War.[271] After 1990, however, this exception became the norm.

---

[266] Note by the President of the Security Council, UN SCOR, 47th Session, 3046th meeting, at 3, UN Doc. s/23500 (1992).

[267] Secretary General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, p. 23, U.N. Doc. A/59/565 (Dec. 2, 2004) (discussing the danger to human security caused by poverty, disease, and environmental degradation, and recognizing these issues as matters of legitimate concern for the UN security apparatus).

[268] For an overview of Security Council practice in the field of human rights, *see* Jared Genser and Bruno Ugarte, *Evolution of Security Council Engagement on Human Rights*, *in* THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS 3 (Jared Genser & Bruno Ugarte eds., 2014).

[269] For an overview of UN interventions in these crises, see SEAN MURPHY, HUMANITARIAN INTERVENTIONS: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 145–281 (1996).

[270] Thomas Weiss, *The Humanitarian Impulse*, *in* THE UN SECURITY COUNCIL: FROM COLD WAR TO 21ST CENTURY 37, 39 (David Malone ed., 2004).

[271] *See* Paul Szasz, *Role of the United Nations in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 345 (1983). The most serious Security Council intervention in an internal conflict during the Cold War was during the

Furthermore, in a subtle but consequential shift that further contributed to humanizing security, the Security Council recognized human rights abuses *per se* as threats to the peace, regardless of their political repercussions or regional ramifications. Initially, human rights violations were condemned due to their impact on international stability.[272] Gradually, however, the Council acknowledged that humanitarian crises constituted threats to the peace, independent of their transboundary effects. The first evidence of this appeared in the Council's response to the crises in the former Yugoslavia and Somalia. In dealing with these situations, the Council began to single out the humanitarian consequences of these conflicts as threats to peace and security and authorized enforcement action to confront these situations.[273]

The Security Council's growing concern for the plight of human beings and its repeated interventions in internal conflicts altered one of the most significant aspects of it's, and indeed the entire United Nations organization's, work: peacekeeping operations. With the exception of the 1960 Congo operation,[274] peacekeeping missions during the Cold War were composed of lightly armed troops acting as a neutral buffer between warring nations. This physical separation of belligerents, it was hoped, would offer an

---

civil war in the Congo. *See* Stanley Hoffman, *In Search of a Thread: The UN in the Congo Labyrinth*, 16 INT'L ORG. 331, 343–50 (1962).

[272] For example, in Resolution 688 the Security Council condemned the repression of the Iraqi Kurds "the consequences of which threaten international peace and security in the region." UN Security Council Resolution 688, S/Res/688 (1991) 5 April 1991. *See* Judy Gallant, *Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order*, 7 AM. U. J. INT'L L. & POL'Y 881 (1992).

[273] Security Council Resolution 794 is considered groundbreaking in this regard. It labeled the situation in Somalia as a "human tragedy" and ordered the expansion of the existing peacekeeping mission to provide humanitarian aid. UN Security Council Resolution 794, S/Res/794 (1992) 3 December 1992. *See* Mark Hutchinson, *Restoring Hope: UN Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 HARV. J. INT'L L. 624 (1993).

[274] *See* DEREK BOWETT & G.P. BARTON, UNITED NATIONS FORCES: A LEGAL STUDY 153 (1964).

opportunity for diplomacy to settle the dispute peacefully.[275] In the post-Cold War years, however, UN peacekeeping operations grew quantitatively and qualitatively.[276] Faced with a dramatic rise of internal armed conflicts, the UN deployed peacekeepers in contexts that demanded much more than merely separating the regular armies of sovereign states.[277] Peacekeepers were mandated, often with tragic results,[278] to intervene in conflicts without clear frontlines, where the lines dividing combatants and non-combatants were blurred, and most importantly, where victims were mostly civilian. This drove the UN to radically broaden the mandates of peacekeeping operations to forcefully protect civilian populations, deliver humanitarian aid, disarm belligerents, and deter attacks by rebel groups.[279] Furthermore, faced with multiple cases of state failure,[280] the mandates of some operations expanded to include providing civilian administration, and in some situations, to virtually govern entire territories.[281] In these post-conflict societies, where law and order had broken down, the UN essentially engaged in nation-building. This was not, however, a normatively-neutral process of nation-building. In line with the ongoing humanization of international law, the UN assumed that the surest guarantee of the safety, security, and prosperity of post-conflict societies was to lay the

---

[275] Brian Urquhart, *International Peace and Security: Thoughts on the Twentieth Anniversary of Dag Hammarskjold's Death*, 60 FOREIGN AFF. 1, 6 (1981) (explaining that UN forces were not intended to execute combat roles, "but interposed as a mechanism to bring an end to hostilities and as a buffer between hostile forces.").

[276] Ramesh Thakur and Albrecht Schnabel, *Cascading Generations of Peacekeeping: Across the Mogadishu Line to Kosovo and Timor*, *in* UNITED NATIONS OPERATIONS 3, 11 (Ramesh Thakur and Albrecht Schnabel eds., 2001) ("UN operations expanded not just in numbers, but also in the nature and scope of their missions.").

[277] John Ruggie, *Wandering in the Void: Charting the UN's New Strategic Role*, 72 FOREIGN AFF. 26 (1993).

[278] *See* LISE HOWARD, UN PEACEKEEPING IN CIVIL WARS 21–52 (2008).

[279] *See* JAMES SLOAN, THE MILITARIZATION OF PEACEKEEPING IN THE TWENTY-FIRST CENTURY (2011).

[280] Gerald Helman and Steven Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 3 (1992–1993).

[281] Examples of these operations include missions in Cambodia, Kosovo, and East Timor. *See* Simon Chesterman, *Virtual Trusteeship*, *in* THE UN SECURITY COUNCIL: FROM COLD WAR TO THE 21ST CENTURY (David Malone ed., 2004).

foundations of liberal democratic government in these countries.[282]

It appeared, therefore, that after over four decades of superpower competition, the old-fashioned tools of balances-of-power, spheres-of-influence, and strategic competition were being renounced. The UN Charter, a document originally authored with the relatively limited ambition of contributing to the peaceful coexistence of states in a politically pluralist world, was being reinterpreted as the constitution of a global community predicated on universal humanitarian values.[283] Indeed, it slowly became an article of faith that "the promotion and defense of human rights," not maintaining international peace and security or preventing great power conflict, "is at the heart of every aspect of our work and every article of the Charter."[284]

In this changed world, it was no longer adequate for the Security Council to act as a political organ that prized the necessities of order over the requirements of justice. As the world moved beyond the society of coequal sovereigns to a transnational community of nations, the Security Council also had to evolve from a concert of powers into a global law enforcer and protector of a humanitarian public morality.[285] The Council became "the heart of the international law-

---

[282] ALEX BELLAMY ET AL., UNDERSTANDING PEACEKEEPING 75 (2006) (describing how peacekeeping missions sought "the promotion of the post-Westphalian conception of liberal democratic peace"); *see also* GREGORY FOX, HUMANITARIAN OCCUPATION (2008).

[283] Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUMB. J. TRANSNAT'L L. 529 (1998); Michael Doyle, *The UN Charter—A Global Constitution? in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 113, 113 (Jeffrey Dunoff & Joel Trachman eds., 2009).

[284] Kofi Annan, *Statement by the Secretary General before the Fifty-Fifth Session of the Commission on Human Rights*, UN Doc. SG/SM/99/91 (Apr. 7, 1999).

[285] Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455, (1995–1996) (the activity of the Security Council was "justified through a redefinition of 'security' by reference to a background concept of an international law, or of a public morality that has become the Council's business to enforce.").

enforcement system" [286] and the organ responsible for protecting an emergent international public order based on a "universal moral and ethical foundation—such as human rights law or humanitarian law."[287]

B. The Responsibility to Protect (RtoP) and the Limits of Humanitarianism

Despite these developments in the Security Council's practice, the rise of the RtoP represents the most significant attempt to humanize the UN security regime and displace its traditional state-centrism. [288] RtoP emerged against the backdrop of two episodes of UN failure to prevent humanitarian crises. In 1994, an apathetic Security Council failed to prevent a Rwandan genocide that claimed over 800,000 lives. [289] Five years later, a deadlocked Security Council failed to prevent Serbian atrocities against the Kosovar Albanians, prompting NATO to launch an air campaign to protect civilians in that region. [290] As a result of these two crises, which demonstrated the Security Council's ineffectiveness when faced with humanitarian crises, the UN Secretary-General called for the development of a mechanism to ensure that in the future, the UN would avoid the complacency of Rwanda and political paralysis of

---

[286] INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, 49 (2002) [hereinafter ICISS REPORT].

[287] Vera Gowlland-Debbas, *The Security Council as Enforcer of Human Rights*, *in* SECURING HUMAN RIGHTS? ACHIEVEMENTS & CHALLENGES OF THE UN SECURITY COUNCIL 36, 38 (Bardo Fassbender ed., 2011).

[288] Jared Genser and Bruno Ugarte, *supra* note 268, at 28 (calling RtoP a "most poignant recent example" of attempts to impel the Security Council to recognize "normative or substantive developments with an explicit human-rights dimension.").

[289] *See* ROMEO DALLAIRE, SHAKE HANDS WITH THE DEVIL (2004).

[290] The intervention was considered illegal because it was executed without Security Council approval, but was held by many to be legitimate because it sought to prevent mass atrocities. *See* INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 164 (2000).

Kosovo.[291] RtoP was the response to the Secretary-General's plea.[292]

The story of the coining of RtoP has been told elsewhere and need not be recounted here.[293] What deserves discussion, however, is how the content of RtoP was originally conceived and then purposely diluted to minimize its impact on both the policy purposes and institutional structure of the UN security regime. RtoP was first proposed in a report prepared by the International Commission on Intervention and State Sovereignty (ICISS). [294] If the recommendations of the ICISS had been implemented, RtoP would have had a "transformative impact in international law and politics."[295] RtoP as proposed by the ICISS would have established the pursuit of human security as the principal objective of the UN security regime. It also entailed entering significant adjustments to the *modus operandi* of this regime that would have brought it closer to a collective security organization dedicated to preventing the worst human rights abuses.

Three elements of the ICISS report constitute the normative foundation of RtoP. First, sovereignty, long understood as an exclusive right of governments to rule their countries, [296] was reframed into a responsibility of

---

[291] UN Doc. SG/SM/7136, *supra* note 240.

[292] William Burke-White, *Adoption of the Responsibility to Protect*, *in* THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME 17, 18 (Jared Genser & Irwin Cotler eds., 2012).

[293] For an authoritative account, see GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL 38–50 (2008).

[294] ICISS REPORT, *supra* note 286. The ICISS was established by the Canadian government and was co-chaired by Gareth Evans and Mohamed Sahnoun. It published its report, titled The Responsibility to Protect, in 2001 to provide a framework for mobilizing international intervention to prevent mass atrocities against civilians. *See* Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L. J. 703 (2006).

[295] Jutta Brunnee and Stephen Toope, *Norms, Institutions and UN Reform: The Responsibility to Protect*, 2 J. INT'L L. & INT'L REL. 121, 122 (2005–2006).

[296] This is what Stephen Krasner calls "Westphalian Sovereignty." *See* STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3–4 (1999).

governments to promote the welfare of their citizens and to protect their fundamental rights and freedoms.[297] Second, the report argued that the international community bore a residual responsibility to protect civilians against mass atrocities if national governments failed in fulfilling this responsibility.[298] Third, this internationalized responsibility to protect was justified on the basis of the emergence of human security, which had rendered state-centric conceptions of security obsolete. The rise to preeminence of human rights in the international legal system made "respect for human rights a central subject and responsibility of international relations."[299] This meant that in today's world, human security had become indivisible,[300] which required reconceptualizing and expanding "national" interests to include the promotion of the wellbeing of the broader community of humankind.[301]

To operationalize RtoP, the ICISS proposed criteria to guide intervention to prevent mass atrocities.[302] First, intervention was considered necessary to halt or avert "large scale loss of life, actual or apprehended."[303] Situations satisfying this criterion included actual or threatened acts of genocide, large scale loss of life, ethnic cleansing, crimes against humanity, violations of the laws of war, cases of state collapse exposing civilians to civil war or starvation, and natural disasters threatening large scale loss of life.[304] Second,

---

[297] ICISS REPORT, *supra* note 286, at 13.

[298] *Id.* at 11.

[299] *Id.*

[300] *Id.* at 5.

[301] *Id.* at 36 (the ICISS argued that "these days, good international citizenship is a matter of national self-interest. With the world as close and interdependent as it now is . . . it is strongly arguable that it is in every country's interest to contribute cooperatively to the resolution of such problems, quite apart from the humanitarian imperative to do so.").

[302] The report noted, however, that armed intervention was one of many tools available to protect civilians facing the threat of mass atrocities. Indeed, the ICISS couched armed intervention between the responsibilities to prevent atrocities before they occur and a post-conflict responsibility to rebuild war-torn societies to prevent a relapse to conflict.

[303] ICISS REPORT, *supra* note 286, at 32.

[304] *Id.* at 33. It is noteworthy, however, that the ICISS decided to exclude intervention to prevent less egregious forms of human rights violations or

the purpose of intervention was to prevent or halt human suffering. Territorial aggrandizement or regime changes were deemed illegitimate grounds for resorting to force. Third, force was to be contemplated as a last resort after peaceful efforts to resolve the humanitarian crisis had been found inadequate.[305] The fourth criterion required force to be deployed proportionately to the objectives of the operation, while the fifth criterion warned against embarking on a military intervention unless it stood a reasonable chance of success.[306]

Finally, the ICISS proposed altering vital aspects of the Security Council's structure and procedures. These proposals would have infused many of the features of collective security into the Security Council. First, in a frontal assault on the security regime designed at Dumbarton Oaks and ratified in San Francisco, the ICISS posited that the UN Charter *required* Security Council intervention in situations where mass abuses of human security threatened international peace and security.[307] Second, the report invited the permanent members to adopt a "code of conduct" committing them not to veto resolutions proposing intervention to prevent mass atrocities.[308] Third, in light of the Council's repeated failure to effectively intervene during humanitarian crises, two institutions were presented as alternatives for authorizing the use of force. One was for the General Assembly to invoke the Uniting For Peace resolution [309] to authorize intervention to prevent mass

---

to restore democracy after a military take-over of government. *See id.* at 34.

[305] *Id*. at 36.

[306] *Id.* at 37.

[307] *Id.* at 52. (the report argued that "Article 24 of the Charter *requires*, prompt and effective engagement by the Council when matters of international peace and security are directly at issue. And it means clear and responsible leadership by the Council especially when significant loss of human life is occurring or is threatened") (emphasis added).

[308] *Id.* at 51.

[309] UN General Assembly Resolution 337/1950, otherwise known as the Uniting for Peace Resolution, allows the General Assembly to be involved in the maintenance of international peace and security, including through authorizing the use of force, in situations where the Security Council is deadlocked due to permanent member disagreement. *See* N.D.

atrocities, while the other was for regional organizations to act within their geographical areas and seek *ex post facto* UN approval for their intervention.[310]

If adopted, this blueprint for RtoP would have significantly altered both the policy purposes and institutional structure of the UN security regime. This regime had been designed to uphold peace and maintain order, not to pursue justice or promote universal values.[311] Under RtoP, however, the global security architecture was to become an instrument to uphold justice and protect human security and human dignity, even if doing so was the expense of the sovereignty and independence of states.[312] RtoP also proposed injecting elements of collective security into the institutional structure of the UN security regime. Like a collective security system, RtoP was conceptually based on the indivisibility of security—in this case, *human* security. Also as in collective security, under RtoP the Security Council was *obliged* to intervene to prevent mass human suffering.[313] By listing the situations that necessitated intervention, RtoP diminished the Council's discretion to determine whether a situation represented a threat to or breach of the peace. It also decreased its margin of appreciation to decide on the appropriate measures—if any—to take if these situations occurred. In addition, requiring the Council to comply with, or at least consider, concepts like "proportionality," "last resort," and "reasonable chance of success," would shape Council debates, exclude some policy options, and dictate

---

WHITE, KEEPING THE PEACE: THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 120, 129 (1990).

[310] ICISS REPORT, *supra* note 286, at 54.

[311] Gabriella Blum, *The Fog of Victory*, 24 EURO. J. INT'L L. 391, 399 (2013) (The system was "preoccupied with peace more than justice; it thus sought to protect the former to the fullest extent by anchoring the international order as it had been left following World War II").

[312] George Andreopoulos, *Collective Security and the Responsibility to Protect*, *in* UNITED NATIONS REFORM AND THE NEW COLLECTIVE SECURITY, *supra* note 53, at 167 (RtoP is "part and parcel of the effort to shift the focus from state-centered security to human security.").

[313] Mälksoo, *supra* note 125, at 107 (RtoP sought to "establish a norm that in such cases the Security Council *was obliged* to act.") (emphasis in original).

certain courses of action. [314] Finally, by inviting the permanent members to adopt a code of conduct limiting their freedom to exercise their veto, RtoP diminished the traditionally untrammeled discretion enjoyed by the great powers. RtoP, it appeared, promised to transform the great power concert of 1945 into a body dedicated to exercising "humanitarian collective security." [315]

In effect, RtoP as imagined by the ICISS would have sown the seeds of an *Alliance Solidaire* not unlike that proposed by Tsar Alexander at Aix-la-Chapelle. [316] The difference, however, was that while the latter envisioned a collective security mechanism to protect Europe's absolute monarchies against revolution, RtoP would have instituted a humanitarian *Alliance Solidaire* to prevent mass atrocities. Ultimately, however, just as the Tsar's proposal was torpedoed in 1818, in 2005 the great powers ensured that RtoP did not significantly alter the nature or structure of the UN security regime.

In 2005, the UN hosted the World Summit, which was celebrated as "the largest gathering of world leaders in history." [317] At its conclusion, the World Summit Outcome Document (WSOD) was unanimously adopted by the General Assembly. [318] Although the WSOD included matters spanning the entire breadth of the UN's work, it was the adoption of RtoP that attracted the most attention and was

---

[314] Evans, *From Humanitarian Intervention to the Responsibility to Protect*, *supra* note 294, at 711 (these criteria promised to "change the nature of Security Council debate: Maximize the possibility of achieving council consensus around when it was appropriate or not to go to war; maximize international support for whatever it decides; and minimize the possibility that individual member states bypassing or ignoring it.").

[315] James Goodman, *Humanitarian Collective Security: Restoring Order?* 13 GLOB. NETWORKS 345, 345 (2013).

[316] As Robert Jackson argues, instituting a requirement of action to protect human beings would transform the UN system into a "latter-day secular equivalent of the medieval *republica Christiana*; the universal duty to protect human rights would take the place of Christian duties . . ." JACKSON, *supra* note 116, at 212.

[317] *The 2005 World Summit: An Overview*, THE UN DEP'T OF PUB. INFORMATION (JUL. 2005), https://perma.cc/K6MB-PJHK.

[318] G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

hailed as a "millennial change" in international relations,[319] and celebrated by some scholars as marking a constitutional moment in which the principle of "civilian inviolability" became a foundational norm in international law.[320]

A close reading of the WSOD, however, reveals that it reaffirmed the policy purposes and institutional features of the UN security regime.[321] Far from revolutionizing "the consciousness of international relations,"[322] RtoP achieved the modest goal of expressing global acceptance of the Security Council's interventionist practice of the 1990's. Beyond that affirmation of the Council's right—but not its obligation—to confront mass human rights abuses, RtoP reconfirmed the policy purposes and operating procedures of the Security Council as imagined in 1945.[323]

This conclusion becomes apparent when the contents of the WSOD are unpacked. Unlike the ICISS report, the version of RtoP adopted by the UN listed four situations that could potentially warrant intervention. These are: genocide, crimes against humanity, war crimes, and ethnic cleansing. The expansive language of the ICISS report calling for intervention to prevent any "large scale loss of life" and the illustrative list of situations causing mass human suffering was dropped in favor of exhaustively stipulating four crimes. The nature of state involvement in the perpetration of these crimes was also considerably narrowed by the WSOD. The ICISS report had required intervention in situations of direct state involvement, negligence, or inability to protect civilians. The WSOD, however, raised that threshold to a finding of manifest state failure to protect civilians. Moreover, while the

---

[319] Ian Williams, *Annan Has Paid his Dues*, THE GUARDIAN (Sept. 19, 2005), http://perma.cc/UY7L-N6S6.

[320] Jean Cohen, *Constitutionalism Beyond the State: Myth or Necessity? (A Pluralist Approach)*, 2 HUMANITY 127, 132 (2011).

[321] Christine Gray, *supra* note 113, at 91 ("The UN World Summit came to the very striking conclusion that no reform of the Charter provisions on collective security was needed.").

[322] Christopher Joyner, *"The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693, 720 (2007).

[323] Mohamed Helal, *Justifying War and the Limits of Humanitarianism*, 37 FORDHAM INT'L L. J. 551, 625–40 (2014).

ICISS advised that diplomatic means should be fully explored before resorting to force, the WSOD used less restrictive language that retained the Security Council's freedom of action in determining the appropriate moment for intervention.[324] In addition, unlike the ICISS report, the WSOD avoided including a requirement to ensure the proportionality of armed intervention to protect civilians and neglected to specify the nature of the proper political intentions driving intervention.[325]

Three further elements of the WSOD completed the evisceration of those aspects of RtoP that challenged the structure of the UN security regime. First, the WSOD version of RtoP did not generate an obligation to prevent or halt the perpetration of genocide, war crimes, crimes against humanity, or ethnic cleansing. The terms used in the ICISS report intimated a sense of obligation and expressed a duty incumbent on the international community to prevent mass atrocities. The WSOD, however, maintained the Security Council's policy discretion.[326] Instead of requiring action to prevent or halt genocide, war crimes, crimes against humanity, or ethnic cleansing, world leaders merely expressed a preparedness to consider these situations "on a case-by-case basis."[327] By using these terms, the WSOD

---

[324] The WSOD stated that intervention could be undertaken "should peaceful means be inadequate." G.A. Res. 60/1, para. 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005). The ICISS report, however, stated that "[e]very diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored. The responsibility to react—with military coercion—can only be justified when the responsibility to prevent has been fully discharged." ICISS REPORT, *supra* note 286, at 36.

[325] None of the permanent members exhibited enthusiasm to adopt criteria to guide Security Council deliberations and decisions. As Alex Bellamy observed, "the US, China, and Russia opposed them—although for very different reasons: the US, because it believed that criteria would limit its freedom of action; the others, because they feared that criteria might be abused . . . " ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES 84 (2009).

[326] Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99, 109 (2007) (the WSOD "points toward a voluntary, rather than a mandatory, engagement . . . [which] again stands in contrast to the assumption of a systematic duty.").

[327] G.A. Res. 60/1, para. 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005). (The exact language is: "we are prepared to take collective action, in a

reaffirmed the Council's preexisting authority—but not its duty—to act if these crimes occurred. Second, no mention was made of the veto in the WSOD. The permanent members were not exhorted to avoid exercising their veto in matters relating to the prevention of these crimes.[328] Third, "all the eggs of the responsibility to protect have been thrown into the Security Council basket."[329] Unlike the ICISS report, which pointed to the possibility of authorizing intervention to protect civilians through either the General Assembly or regional organizations, the WSOD reaffirmed the Council's monopoly over the right to authorize force in international relations.

It appeared, therefore, that little had been learned from the tragedies of Rwanda and Kosovo. The UN had decided that mass human suffering, while deplorable and potentially threatening to world peace, was tolerable and may, due to political expediency and strategic realities, be allowed to continue.[330]

This should not be read, however, as suggesting that the rise of RtoP and its adoption by the World Summit were wholly insignificant. RtoP codified and normalized what had initially been exceptional practice by the Security Council during the 1990's. It is today undisputed that mass human suffering is a legitimate matter of global concern, and could warrant Security Council intervention, including through the use of force.[331] Nonetheless, the tragedy of collective security, which RtoP embodies, is that protecting human lives remains a subsidiary objective of the UN security regime. In 2005, the World Summit elected to retain the policy purposes and institutional structure of this regime. The Security Council remains a concert of great powers, and protecting whatever

---

timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis . . .").

[328] The permanent members refused any restrictions on their veto powers. Also, some non-permanent members felt that the veto held by their great power allies afforded them a measure of protection against UN intervention in their affairs. *See* BELLAMY, *supra* note 325, at 83.

[329] Brunnee & Toope, *supra* note 295, at 136.

[330] Peter Danchin, *supra* note 54, at 68–69.

[331] Ian Johnstone, *Security Deliberations: The Power of the Better Argument*, 14 EURO. J. INT'L L. 437, 458–59 (2003).

these great powers consider to be their vital interests continues to take precedence over all other policy purposes. Victims of mass human rights abuses, much like states that fall prey to aggression, are guaranteed nothing except having their case considered by the Security Council. Nothing requires the Council to determine that a situation, even if it involves crimes that shock the conscience of humankind, constitutes a threat to the peace, and nothing obliges the Council to confront such a situation. In short, exasperation at the Council's inaction or ineffectiveness in places like Syria or Darfur is unfounded because in these and other situations, the Council functioned exactly as intended. The geopolitical interests of the great powers trumped other considerations, including protecting human beings, and intervention to prevent mass atrocities remained an exceptional measure contingent on the acquiescence of the great powers.

IV. The Future of Collective Security

In law, as in life, nothing is permanent. As moral sensibilities evolve and political perceptions change, so will the law. After all, "the law is the witness and external deposit of our moral life."[332] Therefore, nothing in *jus ad bellum* or in the structure of the UN security regime is either permanent or preordained. RtoP may not embody the tragedy of collective security, as I just argued. It may very well constitute a milestone in an ongoing process that is gradually eroding statist conceptions of security and humanizing global law and politics. Furthermore, as the content of RtoP continues to evolve and as lessons are learnt from its implementation in specific contexts, it is not inconceivable for reform proposals calling for bringing the Security Council closer to a collective security system dedicated to protecting human security to gain greater political momentum.[333]

---

[332] Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 992 (1997).

[333] For essays examining efforts to further develop the content of RtoP and evaluating its track record, see RESPONSIBILITY TO PROTECT AND SOVEREIGNTY (Charles Sampford & Ramesh Thakur eds., 2013); RESPONSIBILITY TO PROTECT (Gentian Zyberi ed., 2013).

In this final Part of this Article, I argue that this is not what the future holds for the UN security regime. I predict that the purposes and structure of the UN security regime will remain unchanged. Although the reasons underlying this prediction are manifold, a principal basis for this expectation is the rise to preeminence of powers that are skeptical of the humanization of security and its resultant attenuation of sovereignty and the principle of non-intervention. As these powers gain influence in international affairs, the trend to displace the state from its privileged position in international law will lose momentum. Even in its mitigated form adopted by the UN in 2005, RtoP might turn out to be a high-water mark in the quest to enshrine human security as the dominant understanding of security after which the tide reverted back to a greater emphasis on the security, safety, and political independence of states.

The end of the Cold War and the forces of globalization it unleashed coupled with the commencement of an era of American unipolarity led some observers to announce the end of ideological confrontation.[334] The demise of the Soviet Union and the Eastern bloc seemed to signify a permanent triumph of democratic values. Moreover, economic interdependence was argued to be neutralizing strategic competition, and transnational forces were said to be overcoming loyalty to the nation-state. These forces led many to predict that as the twenty-first century proceeded under western leadership, more states would become market economies and liberal democracies. This transformation in global politics was expected to fundamentally shift the nature of international law towards promoting the rights, needs, and opportunities of individuals.[335]

---

[334] *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (arguing that the end of the Cold War marked the end of ideological conflict and demonstrated that liberal democracy was the superior form of government).

[335] BOBBITT, *supra* note 260, at 463 (arguing that the spread of market economies and liberal democracy would drive a shift in international law towards "enhancing the rights of conscience of the individual, on protecting the diversity of the environment, on maximizing global opportunity.").

History, however, is taking a different path. The world is undergoing a "tectonic power shift."[336] Global power,[337] as the National Intelligence Center reports, is gradually shifting from the American-led western world towards a multiplicity of states and a variety of actors.[338] For many commentators, the rise ("reemergence" is historically more accurate)[339] of China is the most notable, and potentially most destabilizing,[340] feature of this power shift.[341] China's economic success and its expanding military capabilities, coupled with the financial crisis besetting western markets since 2007 and American misfortunes in Iraq and Afghanistan, are cited as marking the demise of "the post-World War II *Pax Americana*."[342]

The emerging landscape of global power, however, is more complex than the simple substitution of U.S. with Chinese hegemony.[343] "The principal characteristic of

---

[336] Fareed Zakaria, *The Future of American Power*, 87 FOREIGN. AFF. 18, 42 (2008).

[337] Power is a central to international relations theory. Traditionally, power was understood as the ability to control the actions of others. *See* MORGENTHAU, *supra* note 55, at 28 ("When we speak of power, we mean man's control over the minds and actions of other men."). Today, broader understandings of power have been suggested. *See* David Baldwin, *Power and International Relations*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 273 (Walter Carlsnaes et al. eds., 2002).

[338] NATIONAL INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025: A TRANSFORMED WORLD x–xi (2008).

[339] For centuries while Europe was emerging from the Dark Ages, China was the hegemonic Asian empire. *See* CHRISTOPHER FORD, THE MIND OF EMPIRE 8–9 (2010).

[340] JOHN MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 400–01 (2001).

[341] David A. Beitelman, *America's Pacific Pivot*, 67 INT'L J. 1073, 1073 (2012) (describing the rise of China as the dominating theme of contemporary international relations discourse).

[342] Christopher Layne, *This Time It's Real: The End of Unipolarity and the* Pax Americana, 56 INT'L STUDIES QUARTERLY 203, 204 (2012).

[343] *See* Thomas Christensen, *Posing Problems Without Catching Up: China's Rise and Challenges for US Security Policy*, 25 INT'L SECURITY 5, 5 (2001). This is the case given the reality that it is far from certain that the "rise of China" will continue unchecked and unchallenged. China will undoubtedly face regional and international resistance to its continued growth, in addition to the daunting domestic challenges it faces. *See, e.g.*, SUSAN L. SHIRK, CHINA: FRAGILE SUPERPOWER (2008). Therefore, I agree with Joseph Nye that: "The real problem is not that [the United

twenty-first century international relations is turning out to be nonpolarity: a world dominated not by one or two or even several states but rather by dozens of actors possessing and exercising various kinds of power."[344] In this non-polar system, America will remain the leading political player due to its unmatched, although no longer omnipotent military,[345] its economic and innovative prowess, in addition to the attractiveness of its soft power. However, "no longer the CEO of Free World Inc., the United States now holds a position akin to that of the largest minority shareholder in Global Order LLC."[346] Other stakeholders will exercise increasing influence in international affairs and will protect their geostrategic interests more assertively, including through challenging the United States and its European allies.[347] Among these rising nations, attention is being paid to the BRICs, which is a group of states that is exercising greater international clout, especially that it includes two great powers: China and Russia, in addition to the rapidly rising India, Brazil, and South Africa.[348] A host of other

---

States] will be overtaken by China or another contender but rather that it faces a rise in the power resources of many others — both states and non-state actors." Joseph Nye, *The American Century Will Survive the Rise of China*, FINANCIAL TIMES, 25 MAR. 2015.

[344] Richard Haass, *The Age of Nonpolarity*, 87 FOREIGN AFF. 44, 44 (2008).

[345] Speaking before the introduction of the FY2015 defense budget, Secretary of Defense Chuck Hagel stated: "we are entering an era where American dominance on the seas, in the skies, and in space can no longer be taken for granted." Sec. of Def. Chuck Hagel and Gen. Martin E. Dempsey, Remarks on the Fiscal Year 2015 Budget Preview in the Pentagon Briefing Room (Feb. 24, 2014), http://perma.cc/KN23-RD87.

[346] BRUCE JONES, LARGEST MINORITY SHAREHOLDER IN GLOBAL ORDER LLC: THE CHANGING BALANCE OF INFLUENCE AND US STRATEGY 2 (2011), http://perma.cc/AN7P-ZA7C. *See also* Kenneth Anderson, *United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of Nations*, 10 CHI. J. INT'L L. 55, 56–57 (2009).

[347] ROBERT KAGAN, THE RETURN OF HISTORY AND THE END OF DREAMS 3–4 (2008) ("Struggles for status and influence in the world have returned as central features of the international scene.").

[348] In its original incarnation, BRICs was conceived of, as BRIC, as in Brazil, Russia, India, and China, by Jim O'Neill of Goldman Sachs as a grouping of nations expected to lead the world economy by the mid-twenty-first century. *See* Gillian Tent, *The Story of BRICs*, FINANCIAL TIMES (Jan. 15, 2010). Opinion is not unanimous, however, about the BRICs and their ability to compete with the U.S.-led western economic

regional players and pivotal states are also expected to have a notable impact on the course of international politics.[349] In short, the emerging global order will most likely be populated by one superpower; namely the United States, and a number of great powers; most prominently China, Russia, and the European Union in addition to many influential regional players.[350]

Although the repercussions of this seismic power shift will be felt across both domestic and international politics, one critical question is how these developments will impact the international legal order.[351] As rising and reemerging states accrue power and gain confidence, it is inevitable that they will seek to revisit those normative and institutional aspects of the existing legal order that do not reflect their values or serve their interests.[352] Just as in the decades following World War II, but especially after the Cold War, the United States shaped the norms governing international politics to reflect American values and interests,[353] the rising

order. *See* Ruchir Sharma, *Broken BRICs: Why the Rest Stop Rising*, 91 FOREIGN AFF. 2 (2012).

[349] On the notion of pivotal states and a discussion of the most important countries falling in this category, see ROBERT CHASE ET AL., THE PIVOTAL STATES: A NEW FRAMEWORK FOR US POLICY IN THE DEVELOPING WORLD (1999). On the increasing importance of a whole range of mid-size nations that have achieved high rates of economic growth, see PARAG KHANNA, THE SECOND WORLD: HOW EMERGING POWERS ARE REDEFINING GLOBAL COMPETITION IN THE TWENTY-FIRST CENTURY (2009).

[350] Yan Xuetong, *The Rise of China and its Power Status*, 1 CHINESE J. INT'L POL. 5, 14 (2006) (arguing that the future configuration of global power will be "one superpower against several major powers.").

[351] Michael Cox, *Power Shifts, Economic Change, and the Decline of the West?* 26 INT'L RELATIONS 369, 371 (2012) (noting that it is no longer disputed that a power shift is occurring, but that "[t]he big question now . . . [is] what kind of global political order would emerge as a consequence.").

[352] G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive*, 87 FOREIGN AFF. 23, 26 (2008).

[353] Shirley V. Scott, *Looking Back to Anticipate the Future: International Law in the Era of the United States*, *in* SHIFTING GLOBAL POWERS AND INTERNATIONAL LAW 22–23 (Rowena Maguire et al. eds., 2013) (the United States was instrumental in humanizing international law, which reflects American values of liberty and democracy); *see also* John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT'L ORG. 561, 568 (1992) (arguing that "when we look more closely at the post-

powers, such as the BRICs, will strive to remold certain rules and institutions of international law.

Generally, the BRICs and other nations from the global south, harbor misgivings regarding American hegemony and are signaling their preference for a multipolar world order. [354] Furthermore, despite their differing governmental systems and the disagreements dividing them on many issues,[355] the BRICs are united by disillusionment with important aspects of the existing western-devised global legal order. These countries "share significant historical baggage, which includes their struggles against colonialism, and as their roles as rule-takers in the postwar international system . . . the new powers have continued to espouse visions of global order that often challenge the established norms championed by the United States and the European Union."[356]

One position that unites the BRICs and most developing nations is apprehension regarding attempts to relax the prohibition on the use of force and attenuate the principle of non-intervention in the internal affairs of states. [357] This invariably shapes the attitudes of these

---

World War II situation, for example, we find that it was less the fact of American *hegemony* that accounts for the explosion of multilateral arrangements than that it was the fact of *American* hegemony.").

[354] Harsh V. Pant, *The BRICs Fallacy*, 36 WASHINGTON QUARTERLY 91, 94 (2013) ("The BRICs states favor a multipolar world where U.S. unipolarity remains constrained by the other poles in the system.").

[355] Michael A. Glosny, *China and the BRICs: A Real (but Limited) Partnership in a Unipolar World*, 42 POLITY 100, 126 (2010) (speaking of "fundamental differences among the BRICs, including diverse political systems, varied economies, and dissimilar views on key policy issues such as free trade, energy pricing, and how to reform existing institutions.").

[356] Amrita Narlikar, *Making Room for Rising Powers*, CURRENT HIST., Jan. 2014, at 33.

[357] Andrew Garwood-Gowers, *The BRICs and the Responsibility to Protect in Libya and Syria*, in SHIFTING GLOBAL POWERS AND INTERNATIONAL LAW 81 (Rowena Maguire et al. eds., 2013) (BRICs adhere to a "Westphalian interpretation of state sovereignty which emphasizes the principle of non-intervention in domestic affairs). This is shared by other states. "For small states, the risk of being invaded has always been greater than the potential benefits of using force—an institutional restraint on the use of force is therefore generally desirable

countries toward the humanization of international law and calls to establish the protection of human security as the leading policy purpose of the UN security regime. This became apparent during UN debates on the appropriateness of waging war for humanitarian purposes in the aftermath of the Kosovo War.[358] These misgivings harbored by BRICs and many developing countries regarding the ongoing humanization of security continued during consultations that were held by ICISS on RtoP,[359] and were reiterated in the run-up to the World Summit.[360] What is noteworthy is that, contrary to a widespread misconception,[361] non-democratic regimes, such as China and Russia, were not the sole opponents of an expansive right to use force to prevent mass atrocities.[362] India—the world's largest democracy—is a standard-bearer for opposition to RtoP and has persistently resisted attempts to intervene in the domestic affairs of states to protect civilian populations.[363] Indeed, India's practice on the Security Council reveals that its "position was that a state ought to be the sole arbiter of domestic conflict; intervention, if at all necessary, must only be undertaken multilaterally,

---

for them." Nico Krisch, *The Security Council and the Great Powers*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 133, 148–49 (Vaughan Lowe et al. eds., 2008).

[358] Olivier Corten, *Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?*, *in* HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 119 (Philip Alston & Euan Macdonald eds., 2008) (concluding that "for many states—in particular the Third World—any idea of 'humanitarian intervention' departing from the precepts of the UN Charter, is unacceptable.").

[359] Ramesh Thakur, *R2P After Libya and Syria: Engaging Emerging Powers*, 36 WASHINGTON QUARTERLY 61, 65 (2013) (observing that the ICISS "discovered a visceral hostility across the developing world to any so-called 'right of humanitarian intervention.'").

[360] *See* BELLAMY, RESPONSIBILITY TO PROTECT, *supra* note 325, at 88.

[361] *See* Robert Kagan, *End of Dreams, Return of History*, 144 POL'Y REV., Aug.–Sep. 2007 (arguing that Russia, China, and other autocracies have been the leading opponents of American and European attempts to erode sovereignty through proposals such as RtoP).

[362] Jonathan E. Davis, *From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era*, 44 VAND. J. TRANSNAT'L L. 217, 275 (2011) ("If anything, China's opposition to claims of a right of unilateral intervention reflects the sentiment of much of the international community.").

[363] Alex Bellamy, *Realizing the Responsibility to Protect*, 10 INT'L STUDIES PERSPECTIVES 111, 112 (2009).

with the consent of the target state and only after other avenues of conflict resolution have been exhausted."[364] Although less vociferous than India, Brazil was also reluctant to endorse RtoP and has repeatedly questioned the efficacy of the use of armed force to protect civilians against mass atrocities.[365]

The civil wars in Libya and Syria exposed these differences between western powers and BRICs and other developing nations regarding implementing RtoP and the appropriateness of resorting to war to protect civilians. While Sino-Russian obstruction of attempts to censure the Syrian regime has received the bulk of western opprobrium,[366] the voting records and debates in the Security Council on these conflicts reveal a more complex reality. First, in keeping with their long-held position, the BRICs have preferred non-coercive means to military measures to protect civilians. Along with Russia and China, India, Brazil, and even Germany, abstained from voting on Security Council Resolution 1973 that authorized intervention in Libya.[367] Second, the BRICs, and other nations, strongly opposed the approach adopted by NATO in executing Resolution 1973, which included targeting the Libyan leadership, calling for regime change, and arming rebel forces. The BRICs were unanimous in rejecting "the shift from the politically neutral posture of civilian protection to the partial goal of assisting the rebels and pursuing regime change."[368] For those countries, forceful intervention under RtoP was to be employed as a temporary measure to prevent further human

---

[364] David M. Malone and Rohan Mukherjee, *Dilemmas of Sovereignty and Order: India and the Security Council*, *in* SHAPING THE EMERGING WORLD 157, 165 (Bruce Jones et al. eds., 2013).

[365] Kai Michael Kenkel, *South America's Emerging Power: Brazil as Peacekeeper*, 17 INT'L PEACEKEEPING 644, 654 (2010).

[366] *See, e.g.*, Ian Black, *Russia and China Veto UN Move to Refer Syria to the International Criminal Court*, THE GUARDIAN (May 22, 2014), http://perma.cc/QR2E-XALT.

[367] For the voting records on Security Council resolutions on Libya, see *Voting Records on Resolutions 1970, 1973, 2009, 2095 Relating to an Arms Embargo on Libya*, STOCKHOLM INT'L PEACE INST. (Aug. 29, 2014), http://perma.cc/U8QH-VKVM. Although it voted for the resolution, South Africa expressed concerns over the decision to use force against Libya. *See* Garwood-Gowers, *supra* note 357, at 89.

[368] Ramesh Thakur, *supra* note 359 , at 70.

suffering while a political settlement was reached by the relevant parties. RtoP was not intended to either remove tyrannical regimes or impose a transition to democracy.[369]

The Libyan intervention "stoked the embers of long-held suspicions over the trustworthiness of western powers with neo-imperial proclivities not to use force to violate the sovereignty of weaker states, igniting overt opposition to western interventionary agendas which may well burn for the foreseeable future."[370] In response to this perceived misuse of RtoP, Brazil, a prospering democracy, presented a paper to the Security Council titled "Responsibility While Protecting," that proposed revising RtoP.[371] The paper, which was ill-received by western states, required the UN to exhaust preventive measures and diplomatic means before contemplating armed intervention and suggested monitoring the execution of Security Council resolutions authorizing the use of force to ensure compliance with the mandate.[372]

These disagreements over the execution of the intervention contributed to shaping the positions of the BRICs regarding the appropriate response to the Syrian civil war. The BRICs, reeling from NATO's overstepping the bounds of Resolution 1973, were unsupportive of proposals to condemn the Assad regime or to impose sanctions on Syria.[373] As the crisis deteriorated, however, Syria's Assad

---

[369] *See* Andrew Garwood-Gowers, *China and the "Responsibility to Protect": The Implications of the Libya Intervention*, 2 ASIAN J. INT'L L, 375, 391–92 (2012) (observing that "[r]eassuring BRIC states that R2P is about protecting civilians from mass atrocity crimes, as opposed to removing unfriendly governments, will be a key step in bolstering R2P's legitimacy.").

[370] Justin Morris, *Libya and Syria: R2P and the Specter of The Swinging Pendulum*, 89 INT'L AFF. 1265, 1280 (2013).

[371] U.N. G.A. of S.C., Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General, UN Doc. A/66/551-S/2011/701 (Nov. 11, 2011).

[372] For a review of the Brazilian paper and western reactions, see generally Thorsten Benner, *Brazil as a Norm Entrepreneur: The "Responsibility While Protecting" Initiative*, Global Pub. Pol'y Inst. Working Paper (Mar. 2013).

[373] Philippe Kirsch & Mohamed Helal, *Case Studies: Libya*, *in* THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS 396, 430 (Jared Genser & Bruno Stagno Ugarte eds., 2014).

regime was left with the isolated support of Russia and China. Viewed from Moscow and Beijing, the process that led to the toppling of Libya's Muammar Gaddafi commenced with lesser measures including condemnation of violence, demands for a ceasefire, and a referral of the situation to the International Criminal Court.[374] Therefore, for Russia and China, a censure of the Assad regime by the Security Council could have initiated a chain of events, leading to imposing harsher measures that would threaten their vital interests.[375] For U.S. Permanent Representative Samantha Power, Russia and China were denying "justice to people living in hell on earth."[376] While the carnage in Syria has wrought untold suffering onto Syrian civilians, the reality is that Russia and China acted in accordance with the privileges granted to them, and the other great powers, by the UN Charter. As discussed above in Part II, in San Francisco, the great powers designed a security regime that guaranteed nothing except a right to be heard by the Security Council. Beyond that, it was decided that any Council action could unleash a chain of events that impinges on great power interests. To avoid this eventuality, which was considered the principal threat to world peace, the permanent members were adorned with an unfettered power to block any Council action deemed inconsistent with their interests. That was the bargain struck in 1945 and reaffirmed in 2005, and which remains the tragedy of collective security today.

These positions espoused by BRICs and other emerging powers regarding the use of force in international relations and intervention to prevent mass atrocities reflect deeper normative commitments. These influential states adhere to "a far more state-centric version of international law that is, at times, incompatible with the expanding role of the individual" that has been promoted by the United States and Europe since World War II.[377] For these nations, the

---

[374] *See* S.C. Res. 1970, paras. 4, 6. UN Doc. S/Res/1970 (Feb. 26, 2011).

[375] Ramesh Thakur, *R2P After Libya and Syria*, *supra* note 359, at 71.

[376] Michelle Nichols and Louis Charbonneau, *Russia, China Veto UN Bid to Refer Syria to International Court*, REUTERS (May 23, 2014) (quoting U.S. Ambassador Samantha Power), http://perma.cc/LN2P-97PV.

[377] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, Univ. of Penn. Pub.

world remains a Westphalian society of coequal sovereigns, in which the purpose of international law is to contribute to the peaceful coexistence of states and facilitate cooperation between them. Under this approach, states are free to choose their political and economic systems, and the inviolability of sovereignty and non-intervention in the affairs of states remain cornerstones of the international legal order.[378] Although these positions have been associated with non-democratic regimes, such as China,[379] rising democracies, including India and Brazil,[380] and indeed, the majority of the UN membership, share this view of international law and its foundational rules.[381]

This commitment to a classical Westphalian image of international relations in which states are the primary subjects and beneficiaries of the international legal order affects the attitudes of these rising powers towards the drive to humanize security and establish individuals as beneficiaries of the global security system. These states, whether for strategic reasons or due to the internalization of human rights

---

Law and Legal Theory Research Paper Series, Research Paper No. 14-2, (2014), http://perma.cc/SBN3-PVBN.

[378] *See* Andrew Hurrell, *Hegemony, Liberalism, and Global Order: What Space for Would-be Great Powers?* 82 INT'L AFFAIRS 1, 4 (2006) (the changes in the international legal order since the Cold War "challenged the strong, albeit varying, preference of these states [the BRIC] for the older pluralist norms of sovereignty and non-intervention").

[379] *See* Jeffrey W. Legro, *What China Will Want: The Future Intentions of a Rising Power*, 5 PERSPECTIVES ON POLITICS 515, 518 (2007) (noting that "Beijing emphasizes that principles of sovereignty, stability, and territorial integrity should trump such considerations.").

[380] On Brazil, see Carlos Santiso, *The Gordian Knot of Brazilian Foreign Policy: Promoting Democracy While Respecting Sovereignty*, 16 CAMBR. REV. INT'L AFF. 343, 343 (2003) ("[T]he principles of sovereignty and non-interference in domestic affairs [are] cornerstones of Brazilian foreign policy."). On India, see Christophe Jaffrelot and Waheguru Pal Singh Sindu, *From Plurilateralism to Multilateralism? G20, IBSA, BRICs, and BASIC*, *in* SHAPING THE EMERGING WORLD: INDIA AND THE MULTILATERAL ORDER 319, 330 (Bruce Jones et al. eds., 2013) (India prizes "a concept that has been dear to the country since its independence in 1947: state sovereignty.").

[381] Christopher Clapham, *Sovereignty and the Third World State*, 47 POL. STUD. 522, 522 (1999) (post-colonial states are "the most strident defenders of Westphalian sovereignty in the international order.").

norms,[382] have accepted that "the promotion and protection of all human rights is a legitimate concern of the international community."[383] This acceptance, however, has always been qualified. Protecting human rights and fundamental freedoms was to remain within the purview of national governments, and international efforts to promote human rights were to be limited to non-coercive and recommendatory measures. The foreign policies of the rising powers reflect these ideas. China is deeply suspicious of western efforts to promote human rights and disseminate liberal democratic values globally. Beijing is committed to an ideologically and culturally pluralist vision of the world in which states may adopt any political-economic systems, and where international law protects against foreign interference in the domestic affairs of states.[384] "That sentiment, however, is hardly unusual and might be shared by many if not all the major powers."[385] For other rising powers, including the democracies among them, protecting human rights and advancing democratic values does not figure prominently on their foreign policy agendas.[386]

This does not augur well for human security. The reemerging and rising powers advocate a conception of security that privileges the survival, political independence, and territorial integrity of states. With differing levels of

---

[382] For some scholars, human rights compliance results from processes of internalization, socialization, and acculturation. *See generally* Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621 (2004). States may, however, accede to human rights treaties for instrumental or strategic reasons. *See* ANN KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE 232–250 (1999) (China accepted certain human rights obligations as part of a *quid pro quo* to limit international condemnation of its human rights record).

[383] World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, para. 4 UN Doc. A/CONF.157/23 (July 12, 1993).

[384] Lai-Ha Chan et al., *Rethinking Global Governance: A China Model in the Making?*, 14 CONTEMPORARY POL. 3, 14 (2008) (China advocates "a world composed of sovereign nation-states that respect a plurality and diversity of cultures, ideologies and political-economic systems [as well as] respect for sovereignty and territorial integrity.").

[385] JEFFREY W. LEGRO, RETHINKING THE WORLD 174 (2005).

[386] Ramesh Thakur, *R2P After Libya and Syria, supra* note 359, at 62.

enthusiasm, these countries recognize promoting human rights as a legitimate objective to be pursued by the UN and other international organizations. To varying degrees, they also accept that preventing mass atrocities is a justifiable ground for intervention through the Security Council. These policy objectives remain, however, subordinate to the overarching purposes of the international legal order; namely, the protection of sovereignty, the promotion of peaceful coexistence between states, and maintaining the pluralist nature of the world order.[387]

It is impossible to predict precisely the future topography of global power. It is equally difficult to foretell the impact that the changing distribution of world power will have on international law. Nonetheless, as Joseph Nye observes, "it would be ahistorical to believe that the United States will have a preponderant share of power resources forever."[388] As power shifts away from its current North Atlantic epicenter, the new power holders will work to recalibrate international law to coincide with their interests and values. Given the normative commitments of the rising and reemerging powers, it appears that protecting the rights, security and dignity of individuals will not gradually evolve into the principal policy purposes of the UN security regime. Punishing aggression, enforcing international law, and preventing mass atrocities will remain important, but ultimately subsidiary and dispensable, objectives of the UN security regime. In the non-polar world, the future of collective security, it seems, will look much like its past and present.

Conclusion

In 1945, the victorious allies established an organization to maintain international peace and security. The peace to be maintained was a peace among states, and the

---

[387] Sung Won Kim, *Human Security with an Asian Face*, 17 IND. J. GLOB. LEGAL STUD. 83, 95 (2010) (among Asian states, "the common theme is clear subordination of human security advocacy to the principles of sovereignty and noninterference.").

[388] Joseph S. Nye Jr., *The Twenty-First Century Will Not Be a "Post-American" World*, 56 INT'L STUD. QUART. 215, 215 (2012).

security to be protected was the security of the borders, territory, and ultimately, the sovereignty of states. First and foremost, however, the foundation of peace was believed to be the prevention of conflict between the great powers. With their superior militaries and political influence, it was assumed that only these states could seriously undermine international security. Therefore, the architects of the UN system established a great power concert, in the form of the Security Council, to oversee international security relations. The negotiations over the prerogatives of the Security Council and the powers of its permanent members demonstrated that the Council was indeed designed as a great power concert and not, as many assume, a collective security system. Under collective security, an attack against one is an attack against all. Nowhere in the Charter, however, does the UN make such a pledge to its members. Nowhere is the security, territorial integrity, and political independence of states guaranteed. Never was it promised that the Security Council would vigilantly subdue all aggressors and indiscriminately protect all victims. Once this reality of UN "collective security" is understood, it becomes apparent that the Security Council's record of selectivity, politicization, and double standards are neither defects nor failures, but inherent features of the system.[389]

The political winds changed, however, with the end of the Cold War. Superpower competition subsided and a normative transformation unfolded. The supremacy of states in international law was challenged, and the individual was promoted as the primary subject and ultimate beneficiary of the international legal system. Human security was advanced as an alternate paradigm to understand security in a people-centric order. Concurrently, the Security Council expanded its definition of threats to peace and security to include mass human suffering. The humanization of international law coupled with the practice of the Security Council were interpreted as signifying the demise of absolutist definitions of sovereignty and the strict prohibition on intervention in the

---

[389] Peter Opitz, *Collective Security*, *in* A CONCISE ENCYCLOPEDIA OF THE UNITED NATIONS 38 (Helmut Volger eds., 2d ed. 2009) (the "tendency of the permanent members toward selective action" is a deficit of UN collective security).

domestic affairs of states. These developments set the stage for the most significant assault on the purposes and structure of the UN security regime: RtoP. Proposed as a policy framework to guide intervention to prevent large-scale loss of human life, RtoP, as originally envisioned, would have brought the UN security regime closer to a collective security arrangement dedicated to upholding human security. However, this bid to alter the nature of the UN security regime failed. In 2005, a version of RtoP was adopted that retained the Security Council's discretion to determine that a situation threatened international peace and security and also retained its expansive discretion to decide on whether and how to intervene in such situations. In other words, non-intervention in conflicts such as in Syria, Darfur, or elsewhere, is not a failure of the Security Council. Nothing requires the Council to prevent mass atrocities or halt large-scale loss of human life. Victims of the gravest crimes, like victims of aggression, enjoy nothing but a right to bring their case before the Security Council for consideration.

The future of the UN security regime is unlikely to differ from its past and present. American unipolarity and western preeminence are giving way to a non-polar world in which power is dispersed among a few great powers and many major players. As rising powers gain influence, they will reshape the norms of international politics to reflect their values and interests. Whether these emerging powers are liberal democracies or one-party autocracies, they are united by skepticism regarding the humanization of international law and rejection of the attenuation of sovereignty. It is, therefore, probable that state-centric understandings of security will continue to dominate thinking about security affairs, and upholding the security of states, as opposed to individuals, will remain the principle policy purpose of the UN security regime.

Dame Rosalyn Higgins, an ICJ President and leading scholar, observed that "if we step back from the specific rules of international law, the UN Charter is permeated with a

certain spirit and ethos."[390] For Kofi Annan, underlying the labyrinthine councils and commissions, rules and procedures of the UN is a commitment to the rights, freedoms, and wellbeing of human beings.[391] This echoes a perception held by many scholars of the nature and objectives of international law. As Martti Koskenniemi writes, many international lawyers are animated in their work by an "oceanic feeling" of altruistic affection towards their fellow humans:

"Generations of religious, political, scientific, and legal thinkers, politicians, and diplomats from Western Antiquity to the founding fathers of the United Nations and the modern technicians of global governance have translated the oceanic feeling in themselves into theories of human unity, interdependence, world economy, the global environment, and so on in order to propose legal-institutional architectures for the government of the whole world."[392]

The ambition of our discipline, it appears, is to alter the nature of world politics. It is to employ the language of law and deploy the structures of institutions in an effort to overcome the fragmentation of humankind into the artificiality of states. This is a project to displace the proclivities of power with the certitude of law, to mitigate the vagaries of politics with the processes of institutions, and to ameliorate the perils of anarchy through the structure of law.[393] The aim of this Article was not to refute or

---

[390] Rosalyn Higgins, *Grotius and the Development of International Law in the United Nations Period*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 267, 268 (Hedley Bull et al. eds., 1990).

[391] Kofi Annan, *Human Rights and Humanitarian Intervention in the Twenty-First Century*, *in* REALIZING HUMAN RIGHTS 309, 310–11 (Samantha Power & Graham Allison eds., 2000) ("Even though we are an organization of member states, the rights and ideals the United Nations exists to protect are those of peoples.").

[392] Martti Koskenniemi, *The Subjective Dangers of Projects of World Community*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 3, 5 (Antonio Cassese ed., 2012).

[393] Richard Collins, *The Rule of Law and the Quest for Constitutional Substitutes in International Law*, 83 NORDIC J. INT'L L. 87, 88 (2014) ("Public international law has always been as much a project as a discipline. To 'do' international law is in many respects to seek out some form of order or justice in international affairs . . . the *raison d'être* of

comprehensively challenge this image of the role of law and the operation of institutions in world politics. Rather, the objective was to identify the spirit and ethos of the doctrinal and institutional architecture of the UN security regime and to investigate the extent to which it is indeed driven by an oceanic humanitarian feeling. In a sense, this was an attempt to inject the "necessary corrective" voice of realism into an academic debate occasionally overtaken by "the exuberance of utopianism."[394] What emerges from this Article is an image of ambivalence; a tension between state egotism and human solidarity; a struggle of political particularism and moral universalism. The tide of oceanic human solidarity has achieved significant inroads in recent decades. It has challenged the supremacy of the state, eroded the legitimacy of autocratic government, and justified waging war to save human beings. Ultimately, however, the reality of egotism appears to have drawn the limits of humanitarianism. At least in the area of security, the International Criminal Tribunal for the former Yugoslavia overstated the reality of international law when it declared that "[a] state-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach." [395] The UN security regime was envisioned and continues to operate as an instrument to contribute to peaceful coexistence among states inhabiting an anarchic world. It seeks to manage, not to eliminate, the diverging—and at times conflicting—strategic objectives of the great powers. And above all, despite the rhetoric of universal humanitarianism, it continues to embody the political and moral pluralism of our world.

---

international law is to bring power under law.") (internal quotations omitted).

[394] EDWARD HALLETT CARR, THE TWENTY YEARS CRISIS 10 (1964).

[395] Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 97 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).