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**BANDING WITH BROTHERS: AUTHORIZING
FORCE THROUGH A CONCERT OF
DEMOCRACIES**

Alexander Benard*

I. INTRODUCTION

The United Nations Security Council (U.N.S.C.) is the sole international body explicitly empowered to authorize the use of force. The United Nations Charter (U.N. Charter) gives the U.N.S.C. the responsibility to “determine the existence of any threat to the peace” and to “decide what measures shall be taken” to address that threat.¹ These measures range from the severance of diplomatic relations to military action, which, for purposes of this Article, will be collectively referred to as “punitive measures.” Alongside the option of presenting a compelling argument that its use of force constitutes self-defense under Article 51 of the U.N. Charter, a U.N.S.C. resolution presently is the only way for a country to render its use of force lawful under international law.²

It is undoubtedly valuable to have an international institution that serves this function. From the U.S. point of view, authorization of the use of force by the U.N.S.C. has given the United States much-needed credibility for its expulsion of Iraqi troops from Kuwait, its punitive measures against Serbia during the Bosnia conflict, and its protection of

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¹ U.N. Charter art. 39, para. 1.

² Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 422 (2007).

civilian populations in Somalia, among others. This credibility, in turn, has often helped American presidents gain support for the use of force domestically as well as from allies abroad. From the international point of view, meanwhile, the U.N.S.C. provides what is viewed by many as a check on the arbitrary use of force that for centuries placed weaker states entirely at the mercy of stronger ones.

The current system, however, suffers from a number of important deficiencies. The conflicting priorities of the U.N.S.C.'s membership frequently result in gridlock, even in situations when action by the U.N.S.C. would clearly advance the interests of international peace and security—to oppose genocide, for example, or to prevent the proliferation of weapons of mass destruction. The U.N.S.C. also suffers from a democracy deficit in two respects. First, the U.N.S.C. gives more power to some members than to others, affording certain members the power to veto U.N.S.C. resolutions.³ Second, some of the members of the U.N.S.C. themselves do not have democratic political systems, raising questions about the extent to which their governments can credibly speak on behalf of their peoples in voting for or against punitive measures in a particular situation.

These shortcomings compel us to reevaluate the present international security architecture and to consider alternative institutions that might better address the threats and challenges of the 21st century. This Article posits that the most appealing alternative institution is a Concert of Democracies, an organization that would consist only of countries that are democracies, as determined by objective criteria.⁴ This organization would be better positioned to determine when to authorize the use of force, because its members would agree on certain core values—the importance of protecting human rights, eliminating terrorism, and preventing the spread of weapons of mass destruction—and they would speak with the moral weight that results from being a country's popularly elected representative. A Concert of Democracies, then, would be a more appropriate venue through which to take collective action in response to modern threats.

Part II of this Article provides background information about the U.N.S.C.'s role within the current international

³ U.N. Charter art. 27, para. 3.

⁴ Other scholars have alternately referred to the Concert of Democracies as a League of Democracies or an Organization of Democratic States.

security architecture and describes the failure of the U.N.S.C. to respond to threats to international peace and security. This Part also sets forth the proposals for reform of the U.N.S.C. and discusses why these reforms do not address the underlying flaws of the existing system. Part III describes how a Concert of Democracies would operate and explains the advantages of a Concert of Democracies vis-à-vis the U.N.S.C. Finally, Part IV offers ideas for how to attract support for a system in which a Concert of Democracies, rather than the U.N.S.C., authorizes the use of force. Part IV also discusses how to establish a Concert of Democracies without violating existing international law.

II. THE EXISTING INTERNATIONAL SECURITY ARCHITECTURE

The United Nations was founded in 1946, in the shadow of World War II.⁵ At the end of that war, the United States and the Soviet Union were the two preeminent powers. France and Great Britain, though less powerful than the United States or the Soviet Union, ultimately found themselves on the winning side of the war, and subsequently—together with the United States and the Soviet Union—set about determining the structure of the post-war international framework, including the United Nations, the nascent institution around which that framework would coalesce. The losing powers, on the other hand, most notably Germany and Japan, had virtually no say in how to structure the United Nations.⁶

As a result, the U.N.S.C. reflects the power dynamics that existed at that time. At the outset, the United States, the Soviet Union, France, Great Britain, and China were given permanent seats on the U.N.S.C., the United Nations' most important and powerful organ—the only branch of the United Nations capable of compelling a country to take, or refrain from taking, a particular action.⁷ What is more, these permanent members of the U.N.S.C. were also given veto power over substantive decisions of the U.N.S.C., a matter of particular importance to the Soviet Union, which insisted on the veto power and advocated for the scope of that power to be as expansive as possible.⁸ In accordance with Article 27, decisions of the U.N.S.C. on any matters other than those that

⁵ See, e.g., STANLEY MEISLER, UNITED NATIONS: THE FIRST FIFTY YEARS (1997).

⁶ *Id.*

⁷ U.N. Charter art. 23, para. 1.

⁸ MEISLER, *supra* note 5, at 11.

are purely procedural “shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”⁹ Any one of the victors of World War II was thereby empowered to simply block a substantive decision by the U.N.S.C., such as the authorization of the use of force, if it so chose.

A. Cold War Gridlock

During the Cold War, this configuration resulted in near-constant gridlock.¹⁰ At a theoretical level, it is not difficult to see why this would be the case: with the United States and the Soviet Union increasingly taking a hostile position towards one another, the use of force by one of the two would inevitably be viewed with suspicion and skepticism by the other—and would be met with resistance in the U.N.S.C. The record bore out this dynamic. As one scholar put it, “unless one side was napping, like the Russians at the start of the Korean War, the [U.N.S.C.] could do very little” during the Cold War.¹¹

B. Post-Cold War

When the Cold War ended, there was widespread optimism that the U.N.S.C. could finally become a more effective body. No longer locked in a zero-sum struggle, many believed the United States and Russia would agree upon what constituted threats to international peace and security, and the powers would cooperate in formulating responses to those threats. As one scholar argued following the end of the Cold War, “the interests of the major powers in seeking to counter the new security threats are essentially in alignment.”¹² In light of the fact that modern threats no longer involve direct clashes between the major powers, “the international security architecture is actually *better* suited to addressing these threats than it was to countering the conventional state-versus-state conflicts for which it was created.”¹³ These optimists envisioned a post-Cold War world in which the U.N.S.C. could at long last effectively serve its original purpose.

Unfortunately, that optimism has not been met with concrete improvements in the U.N.S.C.’s ability to tackle threats to international peace and security. The U.N.S.C. failed

⁹ U.N. Charter art. 27, para. 3.

¹⁰ See, e.g., MEISLER, *supra* note 5.

¹¹ *Id.* at 35.

¹² Weiner, *supra* note 2, at 420.

¹³ *Id.*

to authorize the use of force in response to the ethnic cleansing of Muslim populations in Kosovo, ultimately requiring the North Atlantic Treaty Organization (NATO) to take action without explicit U.N.S.C. approval.¹⁴ More recently, the U.N.S.C. has dithered on the issue of the proliferation of nuclear weapons in Iran and North Korea, in both cases preventing the imposition of tough sanctions despite concerted efforts by the United States and its allies to do just that.¹⁵ Finally, the U.N.S.C. has been largely silent on the ongoing genocide in Sudan due to the strong opposition from China and Russia to punitive measures directed against the Sudanese government.¹⁶

1. Conflicting Interests

The principal reason that the U.N.S.C. has not become more effective since the end of the Cold War is that the interests of the U.N.S.C. members have not, in fact, aligned to the extent that some had expected. To be sure, there is no doubt that China and Russia care about issues like terrorism and the spread of weapons of mass destruction, but they have other concerns that are of even greater importance to them. For example, China and Russia continue to view the world through the prism of “spheres of influence,” and jealously guard areas within their sphere from perceived foreign encroachment. This concern recently motivated China and Russia to advocate for the expulsion of U.S. troops from Uzbekistan and Kyrgyzstan, despite the fact that access to bases in both these countries has been critical to America’s and NATO’s efforts against al Qaeda in Afghanistan—efforts which manifestly benefit the entire international community.¹⁷ But China and Russia’s desire to keep the U.S. and NATO outside their sphere of influence trumped their interest in combating the threat of terrorism in Afghanistan.

¹⁴ See Javier Solana, *NATO’s Success in Kosovo*, FOREIGN AFF., Nov.-Dec. 1999.

¹⁵ Alexander Benard & Paul Leaf, Note, *Modern Threats and the United Nations Security Council: No Time for Complacency*, 62 STAN. L. REV. (forthcoming 2010).

¹⁶ *Id.*

¹⁷ See Council on Foreign Relations, *Russia’s Wrong Direction: What the United States Can and Should Do*, Independent Task Force Report No. 57 (2005), available at http://www.cfr.org/content/publications/attachments/Russia_TaskForce.pdf. See also Richard Weitz, *U.S. Military Strives to Maintain Presence in Central Asia*, CENT. ASIA-CAUCASUS INST., July 2007, available at <http://www.cacianalyst.org/?q=node/4665>; Council on Foreign Relations, *Asia: U.S. Military Bases in Central Asia* (2005), available at <http://www.cfr.org/publication/8440/#3>.

China and Russia also have applied the logic of balance of power, often shielding governments like Iran, North Korea, and the Sudan from U.N.S.C. resolutions.¹⁸ China and Russia do this because rogue nations such as North Korea remain a thorn in the side of the United States and its allies by preventing the spread of U.S. influence in important regions like the Middle East and Africa. On top of this, China and Russia have become economically intertwined with many of these rogue regimes—China is investing roughly \$100 billion to develop oil and gas fields in Iran, and has also invested substantial amounts of money in the Sudanese oil industry—making them reluctant to authorize sanctions or other measures that could damage their economic interests.¹⁹ These considerations have tended to preclude China, Russia, and other like-minded countries from joining the United States and its allies in tackling issues such as genocide, terrorism, and the proliferation of weapons of mass destruction.

2. Conflicting Values

More fundamentally, however, there is an irreconcilable tension between the purported goals of the U.N. Charter, on the one hand, and the U.N.S.C.'s structure and membership, on the other. The Preamble to the U.N. Charter states that the organization is determined, among other things, to “reaffirm faith in fundamental human rights” and in the “equal rights of men and women.”²⁰ It also articulates a determination to promote “social progress and better standards of life in larger freedom.”²¹ Elsewhere, in Article 1, the U.N. Charter goes on to state among its purposes the promotion and encouragement of “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”²²

These goals are noble and appropriate, but it is difficult to see how the United Nations can effectively advance these goals when non-democratic countries wield a veto power in the U.N.S.C., and when other non-democratic countries regularly

¹⁸ Benard & Leaf, *supra* note 15.

¹⁹ See Peter S. Goodman, *China Invests Heavily in Sudan's Oil Industry*, WASH. POST, Dec. 23, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A21143-2004Dec22.html>. See also Peter S. Goodman, *China Rushes to Complete \$100B Deal with Iran*, WASH. POST, Feb. 17, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/17/AR2006021701117.html>.

²⁰ U.N. Charter pmb1.

²¹ *Id.*

²² U.N. Charter art. 1, para. 3.

hold rotating seats on the U.N.S.C. China and Russia have little incentive to authorize punitive measures in response to genocide, ethnic cleansing, or other gross violations of human rights when China and Russia themselves are often guilty of engaging in human rights violations. Indeed, China and Russia recognize that the very logic underlying the punitive measures in these situations might one day justify action in response to their own human rights abuses. Two scholars recently summarized the point:

. . . Russia and especially China have become the foremost defenders of the principle that states are the exclusive masters of their own internal affairs. They have resisted—from Kosovo to Darfur to Burma—every action proposed by the United States and the European Union that would interfere in the domestic circumstances of other states.²³

The same applies to rotating members like Libya, Burkina Faso, and Uganda, all three of which currently hold seats on the U.N.S.C. The composition of the U.N.S.C.'s membership, therefore, presents a direct and inherent impediment to advancing human rights and promoting international peace and security.

This issue is certain to remain a source of tension in the years ahead. Democracies will continue to seek authorization from the U.N.S.C. to take action in defense of the values enshrined in the U.N. Charter—values which democratic countries deem universal. Non-democracies, meanwhile, will continue their pattern of intransigence and obstruction. Former United Nations Secretary-General Kofi Annan summarized the dilemma as a question of whether, in these situations, democracies should act without U.N.S.C. authorization and thereby violate international law, or whether they should respect international law and sit idly by as atrocities occur on their watch.²⁴ The more often democracies are forced to make this choice, the more frustrated they will grow with the present international security architecture.

²³ Ivo Daalder & James Lindsay, *Democracies of the World, Unite*, AM. INT., Jan.-Feb. 2007, available at <http://www.the-american-interest.com/article.cfm?piece=220>.

²⁴ Kofi Annan, *Intervention by the UN Security Council in the Internal Affairs of States*, UN CHRON., Fall 1998, available at http://findarticles.com/p/articles/mi_m1309/is_3_35/ai_54259305/?tag=content;coll.

C. Proposals to Reform the Existing System

Many have argued that reforming the existing policies and structure of the United Nations could address these deficiencies. Reforming the United Nations is appealing because, among other reasons, it would avoid the controversy and conflict that would inevitably accompany an overhaul of the entire international security architecture.²⁵ The reforms which have attracted the most attention are (1) adjusting the U.N.S.C.'s membership, (2) stripping veto power in certain situations, (3) imposing a "responsibility to protect", (4) revising the text of Article 51, and (5) establishing a Democracy Caucus at the United Nations.

1. Security Council Reform

For over a decade, there have been continuous calls to reform the membership structure of the U.N.S.C.²⁶ The most frequently mentioned reform proposal is to expand the permanent membership of the U.N.S.C. to make the U.N.S.C. reflect the global distribution of power that exists today, rather than the distribution of power that existed in 1945. Indeed, as far back as 1998, one scholar noted the following:

Most governments, interested non-governmental organizations and academic observers agree that in the last decades the international state system and, more generally, conditions of international relations have experienced a change so profound that the *status quo* established in 1945 cannot be maintained without running the risk of relegating the [United Nations] to the backseats of international life.²⁷

²⁵ In evaluating the various proposals for reforming the United Nations, however, it is important to keep in mind that any amendment to the U.N. Charter requires the following:

- (1) A vote of two thirds of the members of the General Assembly;
- (2) Ratification in accordance with their respective constitutional processes by two thirds of the members of the United Nations; and
- (3) Ratification by all the permanent members of the U.N.S.C.

U.N. Charter art. 108.

²⁶ See, e.g., BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE (1998).

²⁷ *Id.* at 6.

That consensus has only strengthened in recent years, and today there is little doubt that the U.N.S.C. does in fact need to expand its membership to avoid alienating increasingly important members of the international community. The discussion now centers more on the question of which countries should be admitted to the U.N.S.C. Most agree that Brazil, Germany, India, and Japan are the top contenders for a non-veto holding permanent seat on the U.N.S.C.²⁸ Other scholars have also suggested adding one or two African countries to ensure that the continent's views are represented in important U.N.S.C. deliberations.²⁹

While U.N.S.C. expansion addresses the problem of preserving the U.N.S.C.'s legitimacy, it does not deal with the U.N.S.C.'s present inability to tackle important threats to international peace and security.³⁰ Since the end of the Cold War, China and Russia have used their veto power to prevent the U.N.S.C. from taking meaningful action in response to gross human rights violations, the proliferation of weapons of mass destruction, and other modern threats.³¹ Giving Brazil or Germany a permanent seat on the U.N.S.C. is necessary to prevent the U.N.S.C. from becoming irrelevant, but it will not help the U.N.S.C. grapple more effectively with modern threats, because it leaves untouched China and Russia's power to veto any action with which they disagree.

²⁸ See, e.g., *Japan, India, Germany, Brazil Push for UN Security Council Enlargement*, VOICE AM., Jul. 7, 2005, available at <http://www.voanews.com/english/archive/2005-07/2005-07-07-voa1.cfm?moddate=2005-07-07> [hereinafter *UN Security Council Enlargement*].

²⁹ G. John Ikenberry & Anne-Marie Slaughter, *Forging a World of Liberty Under Law*, PRINCETON PROJECT ON NATL. SEC. (2006).

³⁰ Some scholars have argued that expansion of the U.N.S.C. is also unrealistic. See, e.g., JOHN BOLTON, *SURRENDER IS NOT AN OPTION* 251 (2007):

Unfortunately for Japan, China has no particular enthusiasm, to say the least, for Japan's candidacy. India has a claim of sorts, given its population size and rising economic importance, but it is bitterly opposed by Pakistan, which does not want its rival since birth to gain an upper hand in so important a body. Brazil wants a permanent seat, as the largest country in the Western Hemisphere after the United States, a yearning not shared by its Spanish-speaking fellow Latins such as Mexico or Argentina, which have their own ideas about who should represent Latin America. *Id.*

³¹ See, e.g., Robert Kagan, *End of Dreams, Return of History*, POL'Y REV., Aug.-Sept. 2007.

2. Veto Power Reform

At various points in time, different groups have argued in favor of abolishing the veto power on the grounds that it is at odds with one of the foundational principles of the United Nations, namely, the “equal rights . . . of nations large and small.”³² At a meeting of developing countries that took place in 1992, for example, a group representing two-thirds of the United Nations’ membership released a statement calling for an end to the veto power and arguing that the “exclusive and dominant” role it affords the permanent members of the U.N.S.C. is “contrary to the aim of democratizing the United Nations.”³³

The goal of eliminating altogether the veto power of the permanent members of the U.N.S.C. has been largely abandoned, given that it would be impossible to obtain the necessary support of the existing veto-holders.³⁴ But a new version of this initiative has now been conceived. Under this new version, the veto power would be eliminated only in certain limited contexts, for example if a country is proposing to take direct action in response to an acute threat.³⁵ Anne-Marie Slaughter and John Ikenberry are the most prominent scholars to give voice to this idea, arguing the following in a recent report:

The veto should be abolished for U.N.S.C. resolutions authorizing direct action in response to a crisis. It makes no sense, in 2006, for five countries that represent the distribution of power at the end of World War II to have individual vetoes over what constitutes legitimate action. The current veto process does not serve the interests of the United States. America does not need to block action of which we do not approve; we are almost always pushing the U.N.S.C. to take action rather than not, and in

³² U.N. Charter pmb1.

³³ UNITED NATIONS, GENERAL ASSEMBLY SECURITY COUNCIL, TENTH CONFERENCE OF HEADS OF STATE OR GOVERNMENT OF NON-ALIGNED COUNTRIES, Sept. 1-6, 1992, Jakarta, THE JAKARTA MESSAGE: A CALL FOR COLLECTIVE ACTION AND DEMOCRATIZATION OF INTERNATIONAL RELATIONS, U.N. Doc. A/47/675 (1992).

³⁴ See Louis Charbonneau, *Nations Line Up to Slam Big Powers’ UN Veto Rights*, PORTFOLIO, Mar. 17, 2009 (reporting that Germany’s permanent representative to the United Nations said the veto power was “an anachronism and should be abolished,” but acknowledged that hopes of eliminating the veto power were “unrealistic”).

³⁵ Ikenberry, *supra* note 29, at 24.

those cases where we are unpersuaded of the wisdom of a particular course, we prefer to use diplomacy rather than the veto. Instead, the veto is a license for prevarication, obstructionism, and disillusionment. The veto should be replaced by a supermajority vote—of perhaps three-quarters of voting members—in an enlarged Security Council.³⁶

This proposal has the potential to enhance the effectiveness of the U.N.S.C. It would streamline decision-making within the U.N.S.C., by making it more difficult for a single country to stymie collective action. Unfortunately, however, the proposal remains impracticable—much like the original idea of abolishing the veto altogether. Stripping the power to veto resolutions that authorize responses to acute threats would significantly dilute the power of the five current veto-wielding members of the U.N.S.C. It is thus extremely unlikely that this reform proposal would garner the necessary support of the permanent members of the U.N.S.C., including the United States.

3. Responsibility to Protect

In a recent report commissioned by the Secretary General of the United Nations, a panel of experts recommended that all U.N. members accept the “responsibility to protect.”³⁷ The responsibility to protect has two main pillars: First, it requires that states do everything in their power to protect their citizens from “avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.”³⁸ Second, it recognizes that when states are unwilling or unable to fulfill this requirement, the international community has an obligation to act in protection of those citizens—even if this means setting aside some traditional concerns surrounding national sovereignty.³⁹

But it is unclear how the responsibility to protect would work in practice. As previously discussed, the U.N. Charter allows punitive measures or the use of force only in self-defense

³⁶ *Id.* at 25.

³⁷ See generally GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL (2008).

³⁸ A More Secure World: Our Shared Responsibility, G.A. Res. 59/565, at 201, U.N. Doc. A/59/565 (Dec. 2, 2004).

³⁹ *Id.*

or with explicit authorization from the U.N.S.C. In order to have a significant impact, then, the U.N. Charter would have to be amended to provide for the responsibility to protect as a third and separate scenario. Few scholars, however, are proposing the responsibility to protect as an explicit amendment to the U.N. Charter, and in any event such an amendment would have very little chance of being approved. Rather, scholars generally suggest that states individually accept the responsibility to protect as a separate obligation. The hope, presumably, is that once countries have accepted the responsibility to protect, they will feel obligated in the U.N.S.C. to vote in favor of action to enforce that responsibility.

Such a conception of how the responsibility to protect would work is problematic in two respects. First, for the very reason that China and Russia oppose these types of enforcement actions in the first place, both nations are extremely unlikely to accept the responsibility to protect – especially because they have signaled their opposition in the past. China, for example, knows that human rights groups will use the logic of the responsibility to protect to chastise the Chinese regime for its treatment of Tibetans and other minorities in China. Equally important is the fact that China and Russia know that the responsibility to protect would require them to vote in the U.N.S.C. against the interests of many of their allies and trading partners.

Second, even if China and Russia do accept the responsibility to protect, it would be unreasonable to expect them to change their U.N.S.C. voting patterns accordingly. The Universal Declaration of Human Rights and the Covenant on Civil and Political Rights already impose non-binding obligations on states in the areas of human, civil, and political rights.⁴⁰ These non-binding obligations, however, have had little impact on state behavior, and appear to have had no impact whatsoever on the behavior and voting patterns of China and Russia.⁴¹ Hence, there is no evidence that a responsibility to protect would result in any tangible improvements in the decision-making of the U.N.S.C.

4. Article 51 Reform

⁴⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (Dec. 10, 1948).

⁴¹ Benard & Leaf, *supra* note 15.

At present, Article 51 imposes strict limits on a country's right to resort to self-defense. Article 51 affirms a country's "inherent right of individual or collective self-defense" in situations when an armed attack "occurs" against a member of the United Nations.⁴² A literal reading of this provision would allow the exercise of self-defense only in circumstances where an armed attack has already occurred. Most, however, believe that Article 51 allows a state to take action in response to an imminent threat, so long as the action in response to that threat is both necessary (i.e., the underlying threat is "instant, overwhelming, and leaving no choice of means and no moment of deliberation") and proportional (i.e., the response is "not unreasonable" and kept clearly within the bounds of the original necessity that justified the use of force).⁴³ Even under this more expansive interpretation, then, Article 51 imposes clear constraints.

Several scholars have argued that the scope of Article 51 should be broadened. These scholars point out that Article 51 presently would not allow a country to take preventive action against, for example, a rogue regime that is in the process of developing weapons of mass destruction. John Yoo has been one of the most vocal proponents of reforming Article 51, arguing that innovations in technology have allowed for attacks that are "more devastating and occur with less warning," presenting a potentially decisive advantage to the side that strikes first.⁴⁴ Yoo thus believes that the current law on self-defense leaves nations "ill-equipped" to handle modern threats, and proposes that Article 51 also take into account two additional factors: first, the magnitude of the harm of a possible attack; and second, the probability that the attack will occur.⁴⁵ This approach would provide states with "greater flexibility to use force as the likelihood of an attack increases" and would, in the words of Yoo, move the law away from a rule and "closer to a standard."⁴⁶

Yoo's remedy, however, would not address the problem of humanitarian interventions. At present, one of the chief

⁴² U.N. Charter art. 51.

⁴³ Daniel Webster, Letter to Henry Fox, British Minister in Washington (Apr. 24, 1841), in 1 BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE CONFIDENTIAL PRINT pt. I, ser. C, at 153, 159 (Kenneth Bourne & D. Cameron Watt eds., 1986).

⁴⁴ John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 742 (2004).

⁴⁵ *Id.* at 751.

⁴⁶ *Id.* at 760.

problems with the U.N.S.C. is the reluctance of some veto-wielding members to authorize interventions in response to humanitarian catastrophes such as human rights abuses, genocide, or ethnic cleansing. Russia, for example, made clear that it would veto the proposed use of force against Serbia in response to that country's campaign against the Muslim populations in Kosovo.⁴⁷ The intervention in that case by the United States and several European countries, however, could not have been justified under Article 51, even under the more expansive definition of self-defense. Article 51 reform thus leaves open the question of how to deal with this large and important category of interventions that most consider to be in the interests of international peace and security but that often cannot secure the U.N.S.C. approval required to render the intervention lawful.

Furthermore, some have argued that expanding the definition of self-defense as proposed by Yoo would allow countries to become, for all intents and purposes, their own arbiters on the question of the legitimacy of the use of force.⁴⁸ Yoo admits that under his framework, Article 51 would become more of a standard than a rule.⁴⁹ In domestic law, standards pose no inherent threat to the rule of law because an impartial third party, a court, is charged with administering that standard—however loose. In international law, by contrast, there is no impartial third party.⁵⁰ If rules are converted to standards in the international context—where nation-states are themselves tasked with applying the rules and standards to their conduct—the impact could be to lessen the constraints placed on individual states and render those areas of international law virtually meaningless.

5. Democracy Caucus at the United Nations

Finally, another emergent idea is for the United States to take a more active role in coordinating its efforts with the other democratic members of the United Nations by spearheading a “Democracy Caucus.”⁵¹ This idea developed in response to a

⁴⁷ IVO DAALDER & MICHAEL O'HANLAN, WINNING UGLY: NATO'S WAR TO SAVE KOSOVO 26 (2001).

⁴⁸ Weiner, *supra* note 2.

⁴⁹ Yoo, *supra* note 44.

⁵⁰ Some have argued that even in the international context, there is an impartial forum for evaluating whether standards are being appropriately applied: the “court” of public opinion. See Thomas Franck, *The Use of Force in International Law*, 11 TUL. J. INT'L & COMP. L. 7 (2003).

⁵¹ See, e.g., Human Rights First, *Democracy Caucus Urged to Lead Efforts to Strengthen UN Actions on Democracy and Human Rights*, Sept.

successful movement among developing countries to increase their overall power by forming a bloc that acts in concert on critical votes that come before the United Nations General Assembly. In forming this bloc, referred to as the “Group of 77,” developing countries have had tremendous success in advancing their interests.⁵² Democracies, perhaps, could do the same if they, too, banded together and voted as a bloc on certain critical issues.

Two fatal flaws prevent this proposal from having a significant impact. First, democratic countries do not presently have the numbers necessary to form a sufficiently powerful voting bloc. According to the *Economist Intelligence Unit*, which every year tracks the number of democracies in the world, only 30 countries are presently “full democracies.”⁵³ Another 50 countries are considered “flawed democracies.”⁵⁴ A large proportion of those flawed democracies are developing countries which are also members of the Group of 77. At best, their commitment to the Democracy Caucus will be unreliable—sometimes they will caucus with the democracies, but sometimes they will remain in the developing world’s camp. This manner of intermittent commitment by many members would make it impossible for the Democracy Caucus to wield substantial influence.

Second, and far more important, a Democracy Caucus could never affect the truly important decisions of the United Nations—the decisions of war and peace—since those decisions are made by the U.N.S.C. Even if the Democracy Caucus were able to attract large numbers and enforce strict loyalty among its members, the veto-wielding autocracies in the U.N.S.C. could still block any meaningful action. A Democracy Caucus within the United Nations, therefore, would fail to address the central flaw of the present system for authorizing the use of force.

11, 2006, at 2, <http://www.humanrightsfirst.info/pdf/06912-hrd-undc-signatures.pdf> (last visited Nov. 14, 2009), for letters signed by over forty human rights and democracy leaders urging the establishment of an effective democracy caucus.

⁵² See generally The Group of 77 Fact Sheet, <http://www.g77.org> (last visited Nov. 14, 2009).

⁵³ *The Economist Intelligence Unit’s Index of Democracy 2008*, ECONOMIST, 2008, at 2, <http://a330.g.akamai.net/7/330/25828/20081021185552/graphics.eiu.com/PDF/Democracy%20Index%202008.pdf> (last visited Dec. 30, 2009).

⁵⁴ *Id.*

III. CONCERT OF DEMOCRACIES

The United States, under the leadership of the Truman administration, was instrumental in shaping the institutions—the United Nations, NATO, and others—that together formed the international security architecture of the 20th century. Now it might consider taking the lead in crafting a new institution suited for the demands of the 21st century: a Concert of Democracies, an organization comprised of the world’s democratic countries.

A. Role

A Concert of Democracies would provide democratic countries an alternative venue in which to coordinate activities and advance their interests. This would allow democratic countries to better address security challenges like terrorism and the spread of weapons of mass destruction to rogue regimes like Iran and North Korea. It would also help democratic countries promote civil, political, and human rights—both by solidifying those rights among existing and aspiring members, and by applying more focused pressure than the U.N.S.C. on non-democracies that violate those rights.

Although the Concert of Democracies could theoretically replace the United Nations altogether, most advocate beginning with an organization that, at least nominally, is situated within the United Nations framework.⁵⁵ Nonetheless, for the Concert of Democracies to be effective, it will need to have the power to authorize punitive measures. Otherwise, democracies will continue to require a U.N.S.C. resolution to use force, and will thus remain at the mercy of Chinese and Russian vetoes—the Concert of Democracies, then, will have accomplished nothing.⁵⁶

⁵⁵ See, e.g., Daalder, *supra* note 16 (noting that “[t]he Concert of Democracies is not a substitute for all other forms of multilateral and bilateral cooperation, but a complement to them.”); Tod Lindberg, *The Treaty of the Democratic Peace*, WKLY. STANDARD, Feb. 12, 2007 (arguing that the actions of the Concert of Democracies’ membership should remain “consistent with their other international obligations, including under the U.N. Charter.”); and Ikenberry, *supra* note 29, at 25 (arguing that the Concert of Democracies should function “ideally within existing regional and global institutions . . .”).

⁵⁶ Two scholars have proposed that the Concert of Democracies should be allowed to authorize the use of force “to enforce the purposes of

B. Structure

Under one structure, which would resemble the United Nations, the Concert of Democracies would consist of two main organs—a larger one, comprising the organization’s full membership, and a smaller one that would only contain a select portion. For purposes of efficient decision-making, the smaller organ would have responsibility over urgent matters that require swift, decisive responses. Seats in the smaller organ of the Concert of Democracies would be allotted on a rotating schedule and based on regional representation. Each region of the world would be allotted a certain number of seats. Members from that region would rotate the seats in the smaller organ at one-year or two-year intervals and would be tasked, of course, with taking into consideration not merely their own interests, but the interests of the region they represent. This system would be very much like the rotation system that governs the presidency of the European Union.⁵⁷

Under a similar proposal, inspired largely by NATO, the Concert of Democracies would consist of multiple regional councils, which would form the bedrock of the organization. The bulk of the organization’s deliberations would occur within these regional councils, which would also to a large extent oversee implementation of the Concert of Democracies’ decisions. The regional councils would be connected to each other via a steering committee, which would coordinate between and among the regional councils and make strategic decisions on behalf of the Concert of Democracies. Each regional council would be represented on the steering committee by an elected representative of that region.

Both of these proposals have advantages and disadvantages. Through the smaller organ in the one case and the Steering Committee in the other, a Concert of Democracies would be able to make certain decisions efficiently—without having to consult the entire membership. But this strength is also a weakness. Members holding rotating seats on the smaller organ or the Steering Committee may fail to take seriously their responsibility to represent not just their own views, but those of their regions as well. This could lead to friction among the

the United Nations in the wake of a threat to the peace, breach of the peace, or act of aggression” or in other ways that are “consistent with the purposes of the United Nations.” Ikenberry *supra* note 29, at 61.

⁵⁷ See Fact Sheet on the Presidency of the Council of the European Union, http://europa.eu/scadplus/glossary/union_presidency_en.htm (last visited Nov. 15, 2009).

members in a particular regional group. This also means that the decisions made by the smaller organ or the Steering Committee would carry less weight, since they would contain the input of only a portion of those countries that comprise the organization.

A third structure would create a Concert of Democracies that consisted of only one chamber. This would have the advantage of allowing all members to participate in critical decisions, which would give the organization's decisions more weight. It could, however, result in a degree of chaos, with matters large and small having to be subjected to debate among a large number of representatives. To mitigate the chaotic dimension of this plan, members might form committees empowered to make recommendations to the full membership. Members might also adopt rules governing the amount of time that can be spent on a given issue.

C. Membership and Voting

Under any proposed structure, the nature of the membership and the Concert of Democracies' decision-making procedures would differ significantly from those of the United Nations. The membership will consist of democratic regimes, meaning those that (a) uphold majority rule through regularly scheduled free and fair elections, and (b) protect basic rights such as freedom of speech, freedom of conscience, the right to assembly, and property rights.⁵⁸ Numerous independent organizations measure these factors, including Freedom House,

⁵⁸ Countries potentially eligible for membership at present include: United States of America and Canada (North America); Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Brazil, Chile, Costa Rica, Dominican Republic, El Salvador, Grenada, Guyana, Jamaica, Mexico, Panama, Peru, St. Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, Suriname, Trinidad and Tobago, Uruguay (Central/South America); Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Greenland, Hungary, Iceland, Ireland, Italy, Kosovo, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom (Europe); Benin, Botswana, Cape Verde, Ghana, Lesotho, Mali, Mauritius, Namibia, Sao Tome & Principe, Senegal, South Africa (Africa); Israel, Turkey (Near East/Southeast Asia); Australia, India, Indonesia, Japan, Kiribati, Micronesia, Marshall Islands, Mongolia, Nauru, New Zealand, Palau, Samoa, South Korea, Taiwan, Tuvalu, Vanuatu (East Asia/Pacific). This list is adapted from a Memorandum by Pratik Chougule on a League of Democracies Policy Report (Jan. 5, 2009) (on file with author).

the Economist Intelligence Unit, the World Bank, and others.⁵⁹ One could easily envision a composite index that takes all of these factors into account in determining eligibility for membership in the Concert of Democracies.

With respect to voting, the drastic change is that a Concert of Democracies will replace the veto with a majority vote. To be sure, for some decisions—to authorize the use of force, for example—the requirement would be for a supermajority vote of two-thirds or three-quarters, but no country will have the power to unilaterally prevent the use of punitive measures, the deployment of peacekeeping troops, or other actions that are vital to maintaining international peace and security.

D. Advantages of a Concert of Democracies

1. Greater Legitimacy

Building upon the work of international law theorists and political philosophers, Thomas Franck has identified two factors that confer legitimacy on the decisions made by international institutions.⁶⁰ First, the decisions must be made in accordance with a decision-making process that is widely accepted.⁶¹ Second, the various actors participating in that decision-making process must, at a basic level, have respect for each other, meaning there must be some sense of community among the various members that make up the organization.⁶² Put simply, there has to be a general degree of comfort with how decisions are made, and who is making the decisions.

A Concert of Democracies, much more so than the U.N.S.C., would meet these criteria of legitimacy. Democracies universally accept the notion that a popular vote is the most legitimate process for making a decision—the whole concept of democratic governance relies on that very premise. This, incidentally, stands in contradistinction to non-democracies, which do not accept the premise that a majority vote is the most legitimate process for making decisions. As a result, there was

⁵⁹ See, e.g., *Freedom in the World Index*, Report by Freedom House (2008), <http://www.freedomhouse.org/template.cfm?page=15> (last visited Dec. 30, 2009); *Worldwide Governance Indicators*, Report by the World Bank (2008) available at <http://info.worldbank.org/governance/wgi/index.asp>.

⁶⁰ THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 38 (1990).

⁶¹ *Id.*

⁶² *Id.*

always a certain degree of incoherence to the U.N.S.C., where non-democratic governments participated in the quintessentially democratic process of making decisions by a popular vote. That incoherence would no longer exist in a Concert of Democracies. All members of a Concert of Democracies would be fully committed, as a matter of principle, to the organization's democratic decision-making process, which, in turn, would result in more deeply-felt respect for the outcomes of that process.

A Concert of Democracies would also be a more cohesive community in which the views of other members would be widely respected. Democracies, on a fundamental level, are somewhat skeptical of non-democratic regimes because it is never clear whether those regimes can truly “claim to be speaking for the people of their countries.”⁶³ Countless democratic documents express a clear sense that democratic government is morally superior to other forms of government and that democratic governments enjoy greater legitimacy, having been endowed with certain powers directly by their own people.⁶⁴ Their opinions carry the force of majority sentiment in their countries, while the decisions of an autocrat may represent little more than the autocrat's own personal whim. All of this means that for purposes of legitimacy, democratic governments care more about what their fellow democracies—their jury of peers, as it were—think than what monarchic or autocratic governments think. An explicit repudiation by a purely democratic body such as the Concert of Democracies would, therefore, carry significantly greater weight for democracies than repudiation by an international organization consisting of various different types of governments.

Of course, these arguments leave unaddressed the question of how countries that are not members of the Concert of Democracies will view the organization's decisions. As one vocal critic of the Concert of Democracies has argued, even if

⁶³ Lindberg, *supra* note 55, at 21.

⁶⁴ The U.S. Declaration of Independence holds certain truths to be “self-evident,” including that rights to life and liberty are inalienable, and that “to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.” More recently, the Conference on Security and Co-operation in Europe affirmed in a statement that “the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government.” Conference on Security and Co-operation in Europe [CSCE], Copenhagen, Den., June 5-July 29, 1990, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, ¶ 6 (June 29, 1990).

many in the United States and some other parts of the world believe that a Concert of Democracies could engage in more legitimate decision-making than the U.N.S.C., many in the rest of the world do not:

Consider [the Concert of Democracies'] potential engagement in the Middle East, a region that would probably have two members in the global body—Israel and Turkey—but no Arab representatives. Were the [Concert of Democracies] to carry out a military intervention in the region, the Arab world would see it as the West against the rest—and react with even more hostility than it did to the 2003 invasion of Iraq.⁶⁵

This raises a valid concern, but upon scrutiny the concern is more theoretical than actual. In practice, members of a Concert of Democracies would still engage in vigorous diplomacy to marshal support among non-members for any punitive measures. To stay with the above example, the views of Arab governments would be an important part of the Concert of Democracies' decision-making process, in spite of their absence from the organization itself. In that sense, the Concert of Democracies would slightly differ from the United Nations. In the United Nations, of course, it is the U.N.S.C., and not the General Assembly, which makes decisions on the use of force. The U.N.S.C., which frequently makes decisions that impact the Arab world, does not have permanent Arab representation—since no Arab country is a permanent member of the U.N.S.C. and the system for rotating members does not assign a seat specifically to the Arab world. Indeed, when the U.N.S.C. authorized the Gulf War in 1990, the Arab world had no meaningful representation at the U.N.S.C. and in subsequent years, when the United States took various different punitive measures against Iraq, which included sanctions and no-fly zones, the Arab world had no representation whatsoever at the U.N.S.C.⁶⁶

⁶⁵ Charles Kupchan, *Minor League, Major Problems*, FOREIGN AFF., Nov.-Dec. 2008.

⁶⁶ See S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing the use of force against Iraq, at which point the only Arab representation on the U.N.S.C. was Yemen); S.C. Res 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999) (establishing new verification procedures for Iraq, at which point there was no Arab representation on the U.N.S.C.).

Moreover, non-members will likely judge the Concert of Democracies' actions on the basis of the perceived rightness or wrongness of the actions themselves or, put differently, on whether non-members agree with the Concert of Democracies' decisions. If there is general agreement, for example, that the Concert of Democracies is doing the right thing in response to human rights violations, there will be little outcry simply because it was the Concert of Democracies, and not some other international body, that authorized the action.⁶⁷ Conversely, if there is widespread opposition to the substance of the Concert of Democracies' actions, then there will be a popular backlash—just as there would be a backlash today if the U.N.S.C. approves a controversial action. The difference, however, is that under the present system a small minority that opposes a particular set of punitive measures can prevent those measures altogether through a U.N.S.C. veto. This means of delay will no longer be possible in a Concert of Democracies.

Finally, even setting aside the question of substantive agreement with the decisions of the Concert of Democracies, it is entirely possible that non-member countries will in fact view the decisions of the Concert of Democracies as more legitimate than those of the U.N.S.C. As noted above, it is the U.N.S.C., not the General Assembly, which currently makes all the important decisions on matters of war and peace. Though many countries will not have representation in the U.N.S.C. or the Concert of Democracies, the Concert of Democracies will at least ensure that each region will at all times have equal representation in the smaller organ, and no country will have disproportionate power through a veto right. It is likely, then, that countries will prefer the decisions of the Concert of Democracies, given the organization's vastly more defensible structure and procedures.

2. Superior Outcomes

From the perspective of the United States, a Concert of Democracies will result in superior outcomes. Democracies generally have similar perspectives on modern threats to international peace and security, most notably the spread of weapons of mass destruction to rogue regimes and terrorism—

⁶⁷ See, e.g., Ivo Daalder & Robert Kagan, *The Next Intervention*, WASH. POST, Aug. 6, 2007, at A17 (“There is a difference between force used to enlarge one’s territory and force aimed at alleviating a grievous harm done to others. A just cause, a clear strategy for success and a definitive threat to ourselves or to others whom we are obliged to protect all lend legitimacy to military action.”).

in no small part because terrorists and rogue regimes target democracies more often than non-democracies. Indeed, in the past ten years alone, transnational terrorism has struck in the United States, Europe, and India, as well as in America's new democratic allies, Iraq and Afghanistan. A Concert of Democracies would, therefore, be more inclined than the U.N.S.C. to take forceful action in response to these threats. This point is not merely theoretical. Since September 11, democracies have proven far more supportive than their non-democratic counterparts of punitive measures against, among others, the Taliban in Afghanistan, Iran, and North Korea.⁶⁸ To be sure, democracies are not always in full agreement about the magnitude of the threat and the best method of resolution. Nonetheless, there is far greater agreement among democracies than there is between the democracies and the non-democracies.⁶⁹

A Concert of Democracies would also result in superior outcomes for the international community. Notwithstanding the fact that it is in the entire international community's interests to eliminate terrorism and prevent the spread of weapons of mass destruction to rogue regimes, a Concert of Democracies would also accomplish more on issues such as genocide and other gross human rights violations. Democracies have a more deeply-rooted commitment to upholding human rights and assuring that other countries do the same. Indeed, every major humanitarian intervention in the past fifty years—including those in El Salvador, Mozambique, Somalia, Bosnia, and Kosovo—has been spearheaded by democracies.⁷⁰

If, as expected, a Concert of Democracies succeeds in addressing challenges to international peace and security, it will enhance the organization's standing among members and non-members alike. Democracies will appreciate that the organization allows them to more efficiently tackle modern threats, and will, as a result, become more loyal to the Concert of Democracies over time. Many non-democracies, in turn, will

⁶⁸ Benard & Leaf, *supra* note 15.

⁶⁹ *See, e.g.*, Kagan, *supra* note 31:

The enduring ideological conflict since the Enlightenment has not been between capitalism and communism but between liberalism and autocracy . . . democracies have pursued foreign policies to make the world safe for democracy. And autocracies pursue foreign policies aimed at making the world safe, if not for all autocracies, at least for their own continued rule The competition between [democracies and autocracies] has become a defining feature of the international scene.

⁷⁰ *See, e.g.*, MEISLER, *supra* note 5.

see the Concert of Democracies' interventions in humanitarian crises and will come to recognize the value that the organization provides. The superior outcomes achieved through a Concert of Democracies, then, will ultimately reinforce the organization's legitimacy.

3. Superior Incentives

One of the drawbacks of the present international security architecture is that it provides states with perverse incentives to accumulate power. As noted in Part II, at the founding of the United Nations, the states that wielded the most power were rewarded with a permanent seat on the U.N.S.C. They were also given a veto, and with it a disproportionate capacity to shape the course of world events. The pattern continues today, as countries that have become more powerful in recent decades—including India, Brazil and Japan—are now under consideration for permanent seats if the U.N.S.C. expands its membership.⁷¹ The lesson countries learn from this is that if they want to be taken seriously and shown respect from their peers in the international community, they would do well to become more powerful in military and economic terms.⁷² This is hardly the effect an international organization—particularly one dedicated to maintaining international peace and security—should have on state behavior.

A Concert of Democracies would provide far healthier incentives.⁷³ Rather than reward the accumulation of power, it would reward states for steps they take towards establishing democratic governance. States that become solidly democratic would be granted membership and an equal voice in the organization. The Concert of Democracies could thereby

⁷¹ See *UN Security Council Enlargement*, *supra* note 28.

⁷² The five permanent members of the U.N.S.C. are also the only countries lawfully entitled to possess nuclear weapons under the Non-Proliferation Treaty. See BOLTON, *supra* note 30, at 250. Countries will either draw from this the lesson that a nuclear arsenal makes permanent membership in the U.N.S.C. more likely, or that permanent membership in the U.N.S.C. helps confer legitimacy upon a nuclear arsenal. Neither is a healthy lesson to draw.

⁷³ Some have argued that a Concert of Democracies would create incentives for non-democracies to band together in an effort to counterbalance the Concert of Democracies. See, e.g., Kupchan, *supra* note 65. Several scholars have offered powerful rebuttals of this argument. Robert Kagan, for example, has said that while some claim a Concert of Democracies would increase divisions in the world, “. . . those divisions are already there. The question now is whether there is any way to pursue American interests and liberal democratic ends despite them.” Kagan, *supra* note 31.

become a powerful catalyst for the worldwide expansion of democracy, much like the European Union catalyzed the expansion of democracy on its continent. Such an expansion of democracy would enhance respect for civil and political rights worldwide, and would also be in harmony with the stated U.S. national security objectives.

4. Collective Authorization

Finally, the Concert of Democracies preserves the most appealing feature of the present system—the concept of collective authorization. As noted in Part II, some of the reform proposals would do away with that concept and, for example, expand the definition of self-defense to allow countries to use force in a larger number of situations without having to consult other members of the international community. However, the idea of a body charged with considering the merits of the use of force is a sensible one. The use of force by any country imposes substantial externalities on the international community. The international community should, therefore, have a voice in the decision-making process leading up to the use of force. The affirmation of the international community through collective authorization, in turn, can be extremely helpful to the United States, by providing diplomatic cover and other valuable benefits.

IV. MAKING THE CONCERT OF DEMOCRACIES A REALITY

The idea for a Concert of Democracies is ambitious, and some countries may at first feel reluctant to join. They may think it unnecessary, for example, to commit to a new international institution. Alternatively, they may fear that a Concert of Democracies undermines the current international security architecture and violates international law. It will be important, therefore, to develop incentives that help overcome wait-and-see instincts and to craft arguments that place a Concert of Democracies within the bounds of international law.

A. Incentives

The most obvious incentive for joining the Concert of Democracies would be an economic benefit. Many of the countries eligible for membership in the Concert of Democracies are among the world's poorer countries.⁷⁴ These countries would value economic assistance for development as

⁷⁴ See *supra* note 58 for the list of countries.

well as to strengthen institutions and the rule of law. These countries would be more likely to join the Concert of Democracies if membership were linked to those forms of economic assistance. Furthermore, by strengthening democratic governance among recipient countries, these benefits would also help to advance one of the chief goals of the Concert of Democracies.

The Concert of Democracies could also attract members by emphasizing that the organization offers the opportunity to wield greater influence on the world stage. Today, important democracies like Brazil, Germany, India, and Japan are not able to provide meaningful input when the U.N.S.C. makes decisions on matters of war and peace. But these countries are obviously interested in participating in the decision-making process, and have signaled their interest by lobbying for permanent seats in the U.N.S.C.⁷⁵ The Concert of Democracies would offer a faster, more realistic way for these countries to gain the influence they seek.

Finally, a Concert of Democracies might consider exploring whether to provide trade benefits or security guarantees to members. This is a strategy that has proven effective for the European Union and NATO. The European Union, for example, allows for the generally free movement of goods, services, and capital among all member states.⁷⁶ NATO's charter, meanwhile, contains provisions relating to economic cooperation, but far more important, says that an armed attack against one will be considered an armed attack against all.⁷⁷ Some combination of these policies might be appropriate in the context of a Concert of Democracies.

B. Arguments under International Law

1. U.N. Charter

The first option, and the one that is perhaps least disruptive, would be to justify the Concert of Democracies through the U.N. Charter. The U.N. Charter, after all, explicitly endorses human rights, equality, and other democratic values. Advocates of the Concert of Democracies could argue that these provisions in the U.N. Charter are entirely compatible with the

⁷⁵ See *UN Security Council Enlargement*, *supra* note 28.

⁷⁶ See European Commission, Enterprise and Industry, Single Market for Goods, http://ec.europa.eu/enterprise/policies/single-market-goods/index_en.htm (last visited Dec. 15, 2009).

⁷⁷ North Atlantic Treaty art. 4, Apr. 4, 1949.

creation of a Concert of Democracies, since the Concert of Democracies would help advance the cause of human rights, equality, and democratic governance. Indeed, by this logic, the Concert of Democracies would not only be compatible with the U.N. Charter, but it would actually complement and strengthen it.

It is unclear, however, whether this justification alone would be sufficient to afford the Concert of Democracies the powers it will need under international law in order to function effectively. If the Concert of Democracies truly operates within the existing legal framework of the United Nations—much like NATO—then, at least in theory, the Concert of Democracies would still require a U.N.S.C. resolution in order to take any punitive measures. This, of course, would to a large extent defeat the purpose of establishing a Concert of Democracies.

2. Right of Revolution

A more dramatic option would be to replace the U.N. Charter altogether, and the right of revolution may supply a rationale for doing so. The right of revolution is the widely recognized principle that a government can be replaced if it no longer serves the ends for which it was instituted.⁷⁸ Perhaps the most elegant expression of that principle appears in the United States Declaration of Independence, which states that “whenever any Form of Government becomes destructive” of certain ends, it is “the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing in such form, as to them shall seem most likely to effect their Safety and Happiness.”⁷⁹ Expressions of this right can also be found in several state constitutions in the United States. The constitution of New Hampshire, for example, states that “whenever the ends of government are perverted . . . the people may, and of right out to reform the old, or establish a new government.”⁸⁰ Similarly, the constitution of Kentucky states that “for the advancement of these ends, [the people] have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they deem proper.”⁸¹

⁷⁸ See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690); THOMAS PAINE, RIGHTS OF MAN (1791).

⁷⁹ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁸⁰ N.H. CONST. art. X.

⁸¹ KY. CONST. pt. 1, § 4.

Advocates of the Concert of Democracies might argue that the principle applies equally in the international context. The U.N. Charter was instituted for certain purposes, including to effectively manage threats to international peace and security and to protect human rights, among other things. The U.N.S.C.'s manifest inability to take action in response to the spread of weapons of mass destruction, the threat of terrorism, and humanitarian crises, then, arguably constitutes a failure of the U.N. Charter to achieve the purposes for which it was enacted. The international community may have an argument, therefore, that it is entitled to replace the U.N. Charter the same way that national constitutions have been replaced over the years when they have proven ineffectual.⁸²

3. Customary International Law

The notion that the U.N.S.C. does not, or should not, possess a monopoly on the authority to authorize punitive measures may have already worked its way into international law through state practice. Since 1946, many states have used force without explicit authorization from the U.N.S.C. and without an explicit self-defense rationale.⁸³ The United States, for example, instituted a blockade against the Soviet Union during the Cuban Missile Crisis, and claimed it was empowered to do so because of an authorization from the Organization of American States (OAS).⁸⁴ More recently, NATO took action against Serbia in defense of Kosovo without explicit authorization from the U.N.S.C.⁸⁵ In spite of the absence of

⁸² The United States Constitution, for example, replaced the Articles of Confederation in 1789. Similarly, the United Nations Charter replaced the Covenant of the League of Nations in 1945.

⁸³ International law scholars disagree on the precise uses of force that have violated the Charter, but there is a general consensus that many examples of the use of force “have not been authorized by the Security Council, and cannot be placed within any reasonable conception of self-defense.” Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q. 89, 100 (2003) (listing the Soviet action in Czechoslovakia (1948); the North Korean invasion of South Korea (1950); U.S. actions in Guatemala (1954); the Israeli, French, and British invasion of Egypt (1956); the Soviet invasion of Hungary (1956); the U.S. sponsored Bay of Pigs invasion (1961); the Indian invasion of Goa (1961); the U.S. invasion of the Dominican Republic (1965); the Warsaw Pact invasion of Czechoslovakia (1968); the Arab attack on Israel in the Six-Day War (1973); North Vietnamese actions against South Vietnam (1960-1975); the Vietnamese invasion of Kampuchea (1979); the Soviet invasion of Afghanistan (1979); and the Tanzanian invasion of Uganda (1979)).

⁸⁴ Yoo, *supra* note 44, at 763.

⁸⁵ See Javier Solana, *NATO's Success in Kosovo*, FOREIGN AFF., Nov.-Dec., 1999.

U.N.S.C. authorization in that case, however, NATO's punitive measures against Serbia were widely perceived as legitimate. The Kosovo intervention, then, demonstrated that Americans and Europeans "did not believe international legitimacy resided exclusively at the UN Security Council, or in the U.N. Charter, or even in the traditional principles of international law"⁸⁶ Rather, acting in Kosovo without Security Council approval "left the determination of international justice in the hands of a relatively small number of powerful Western [democracies]."⁸⁷

These examples could provide a legal justification under customary international law for authorizing the use of force through a Concert of Democracies. They demonstrate that countries can and do make decisions regarding the use of force outside of the U.N.S.C. framework. Moreover, they suggest that countries already accept the idea that organizations other than the U.N.S.C.—the OAS in one case, NATO in the other—can confer legitimacy upon punitive measures. A Concert of Democracies would encompass a larger number of countries than both the OAS and NATO and it would command a more coherent set of arguments for why it should be empowered to authorize the use of force. It could therefore be argued that a Concert of Democracies, empowered to authorize the use of force, is within the bounds of what has already been established under customary international law.

4. Right to Democratic Governance

Finally, international law scholars have begun to recognize the concept of a right to democratic governance.⁸⁸ According to these scholars, the right finds its origins in concept of self-determination. That concept became a central feature of the post-World War II order and was enshrined in the U.N. Charter. It was also enshrined in the International Covenant on Civil and Political Rights, which states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁸⁹ As one scholar has noted, the concept was thereby "universalized and internationalized," having become "a duty owed by all governments to their

⁸⁶ ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 127 (2004).

⁸⁷ *Id.*

⁸⁸ See Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

⁸⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

peoples and by each government to all members of the international community.”⁹⁰ Taken together, the provisions in the U.N. Charter and the Covenant entitle citizens of all nations to “determine their collective political status through democratic means.”⁹¹

Complementary provisions concerning the right to a democratic electoral process further bolster these provisions relating to self-determination. The Universal Declaration of Human Rights affirms the right of all persons to participate in “periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”⁹² The Covenant on Civil and Political Rights states that every citizen has the right “to vote and be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”⁹³ Several regional organizations have explicitly recognized this right as well. The OAS Charter requires members to promote “the effective exercise of representative democracy.”⁹⁴ Meanwhile, the European Convention on Human Rights obligates signatories to “undertake to hold free elections at reasonable intervals by secret ballot.”⁹⁵

Taken together, these concepts and provisions could form a strong legal foundation for the Concert of Democracies. International law has come to recognize the right to democratic governance and the supreme legitimacy of the democratic political system. Existing international institutions, however, do not reflect this development and continue to provide an equal forum for governments that do not uphold their obligations under the various charters and declarations affirming that right. A Concert of Democracies, by contrast, would only provide a role in the organization to those states that respect the right to democratic governance, thereby affirming the right as explicitly as possible. A Concert of Democracies, then, would constitute the institutional culmination of the right to democratic governance.

⁹⁰ Franck, *supra* note 88, at 54.

⁹¹ *Id.*

⁹² Universal Declaration of Human Rights, *supra* note 40.

⁹³ *Id.*

⁹⁴ Organization of American States Charter ch. II, art. 3(d), June 10, 1993, available at http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm.

⁹⁵ European Convention on Human Rights, Nov. 4, 1950, protocol 1, art. 3., available at <http://www.hri.org/docs/ECHR50.html#P1.Art3>.

V. CONCLUSION

The existing collective security apparatus is broken. The U.N.S.C. regularly fails to respond effectively to humanitarian crises, the threat of terrorism, and the proliferation of weapons of mass destruction. Reform proposals are in some cases appealing, but in general they would either fail to address the underlying deficiencies of the current system, or are not workable, given the ability of the permanent members of the U.N.S.C. to veto reforms they do not support.

The United States, together with other democratic countries, must spearhead the creation of a Concert of Democracies. Shared values would allow the members of a Concert of Democracies to cooperate more meaningfully in addressing modern threats. A Concert of Democracies could also serve as a catalyst for democratic reform, helping to strengthen institutions in nascent democracies and to spur political transformation in non-democracies. Over time, the Concert of Democracies would gain the respect of members and non-members alike, and would become the bedrock of international security architecture for the 21st century.