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The UN Security Council: Maintaining Peace during a Global Power Shift

Congyan Cai

I. INTRODUCTION

Since international and domestic society are distinct in terms of their structure and governance,[1] any significant realignment of international power is more likely to influentially impact the legal order in international society than in domestic society. Such realignment of international power refers, in particular, to the cyclical rise and fall of great power,[2] which Georg Schwarzenberger has labelled the change of 'international oligarchy'.[3] In fact, the rise and fall of great powers is the very thread Wilhelm G. Grewe used to examine the evolution of the international legal order from the 16th century to the second half of the 20th century.[4]

World peace is especially threatened at the moment when great powers rise and fall. In the 16th century, a handful of Western powers with a shared background of Christian civilisation and then, in the 20th century, a shared liberal ideology became the prominent players in international relations, encountering few meaningful challenges. However, that dominance was interrupted in the early 20th century by the rise of the Union of Soviet Socialist Republics (USSR), which – with its Marxist ideology – was considered a non-Western country. The established world order began to split as a result.

[1] See below, section II.A.

[2] Paul Kennedy, *The Rise and Fall of the Great Powers* (New York: Random House, 1987).

[3] Georg Schwarzenberger, *Power Politics: A Study of World Society* (London: Stevens & Sons, 1964), 110–20.

[4] Wilhelm G. Grewe, *The Epochs of International Law* (Berlin: Walter de Gruyter, 2000, transl. and rev'd Michael Byers).

Beginning in the late 1940s, the Cold War lasted four decades.[5] As a result, some Western observers began to question the imagined universality of international law.[6] This was especially true of the United Nations' Security Council, which, in accordance with Article 24 UN Charter, was entrusted with the 'primary responsibility for the maintenance of international peace and security'. The Security Council was largely paralysed by the struggles between the United States and the USSR.[7] In the early 21st century, a similar concern looms in the context of the rise of China – another socialist country with a Sinic civilisation.[8] China may have even more potential than did the since-dissolved USSR to shape the contours of international relations and the international legal order.

Given the history of the rise and fall of great powers and the more recent experience of the Cold War, a concern has emerged that China may become a new major threat to world peace,[9] the future of the West,[10] and the established international legal order.[11] It is feared that a more powerful China, with permanent membership of the Security Council, could manoeuvre this UN body into a struggle with the Western powers.[12] Indeed, China has irritated some Western powers in recent years: it has begun to exercise the veto power more often – or, at least, has threatened to do so – which has prevented or delayed the UN enforcement measures the Western powers have sought. Thus, they have argued, China – together with Russia – should be blamed for the Security Council's failure, again and again, to address threats to peace in a timely and effective manner.[13] Relations between China and the United States have deteriorated in recent years – especially since Russia initiated its

[5] Antonio Cassese, *International Law in A Divided World* (Oxford: Oxford University Press, 2nd edn, 2005), 57–8.

[6] Kurt Wilk, 'International Law and Global Ideological Conflict: Reflections on the Universality of International Law', *American Journal of International Law* 45 (1951), 648–70.

[7] See below, sections III.A, III.B, and III.C.

[8] Congyan Cai, *The Rise of China and International Law* (Oxford: Oxford University Press, 2019).

[9] Barry Buzan, 'China in International Society: Is "Peaceful Rise" Possible?', *Chinese Journal of International Politics* 3 (2010), 5–36; John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton & Co., 2001).

[10] G. John Ikenberry, 'The Rise of China and the Future of the West', *Foreign Affairs* 87 (2008), 23–37.

[11] Tom Ginsburg, 'Authoritarian International Law', *American Journal of International Law* 114 (2020), 221–60; James V. Feinerman, 'Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?', *The China Quarterly* 141 (1995), 186–210.

[12] Matthieu Burnay, *Chinese Perspectives on the International Rule of Law* (Cheltenham: Edward Elgar, 2018), 175–214; Lisa MacLeod, 'China's Security Council Engagement: The Impact of Normative and Causal Beliefs', *Global Governance* 23 (2017), 383–401.

[13] See below, section III.C.

so-called special military operation (SMO) against Ukraine in February 2022, which has brought the relationship between Russia and the West into freefall. A new Cold War seems imminent.[14] This intensifies concerns about whether China would be willing to have recourse to the Security Council in a struggle with the United States and its allies.

Because of the broad authority entrusted to the Security Council, together with the legal privileges granted to the great powers, it is inevitably a major forum for power politics. International lawyers are generally used to conducting textual analysis, examining case studies, and exercising their legal imagination in connection with the Security Council.[15] Some commentators engage in a more general evaluation of the workings of the Security Council from the perspective of law and politics. For example, after making a brief survey of the privileges enjoyed by the great powers in the Security Council, Nico Krisch examines the existing limits of those privileges.[16] In his view, these limits can be external, such as growing pressure for more transparency from other UN members and civil society. They may also refer to internal limits among the great powers themselves, such as the compromise one of the Security Council's five permanent members (P5) must make to secure support for an initiative it favours and avoid another permanent member using the veto.[17] Krisch specifically stresses the benefits the great powers derive from Security Council approval of their initiatives, including more cooperation among them and increased acceptance of the relevant actions among UN members.[18]

[14] *Ibid.*

[15] See, e.g., Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart, 2004); David M. Malone, *The UN Security Council: From the Cold War to the 21st Century* (Boulder: Lynne Rienner, 2004); Niels Blokker and Nico Schrijver (eds), *The Security Council and the Use of Force* (Leiden: Nijhoff, 2005); Vaughan Lowe, Adam Roberts, Jennifer Welsh, and Dominik Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford: Oxford University Press, 2008); Lise Morjé Howard, *UN Peacekeeping in Civil Wars* (Cambridge: Cambridge University Press, 2008); Hitoshi Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter* (Leiden: Nijhoff, 2009); Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge: Cambridge University Press, 2010); Peter G. Danchin and Horst Fischer (eds), *United Nations Reform and the New Collective Security* (Cambridge: Cambridge University Press, 2010); Tamsin Phillipa Paige, *Petulant and Contrary: Approaches by the Permanent Five Members of the UN Security Council to the Concept of 'Threat to the Peace' under Article 39 of the UN Charter* (Leiden: Brill Nijoff, 2017); Tom Ruys, Olivier Corten, and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford: Oxford University Press, 2018).

[16] Nico Krisch, 'The Security Council and the Great Powers', in Lowe et al. (eds), *The United Nations Security Council and War* (n. 15), 133–53 (135–7).

[17] *Ibid.*, 142–9.

[18] *Ibid.*, 137–42.

Clearly, Krisch expects or believes that the great powers will pay respect to one another and to the Security Council. However, Krisch does not go further to illustrate whether those actions authorised by the Security Council are really justified or helpful in the long run, either from the perspective of targeted states or, more generally, for international peace and the international rule of law.

Krisch conducted his research in the early 2000s, when many people were still encouraged by unity among the P5 following the end of the Cold War.[19] Krisch might have reconsidered his arguments had he completed that work several years later, in the face of confrontations among the P5 disabling the Security Council, as though the Cold War were happening all over again.

By contrast, David L. Bosco – who published *Five To Rule Them All: The UN Security Council and the Making of the Modern World*[20] in the late 2000s, when confrontations among the P5 were again more prevalent – takes a more passive stance regarding the Security Council's role in the maintenance of international peace. He found that 'two distinct, and sometimes competing, visions' of the Security Council exist: in the first, the Security Council is expected to 'maintain international peace and security', while in the second, it is expected to 'help prevent conflict between the great powers'.[21] In Bosco's view, the first vision requires the Security Council to exercise the authority to 'govern', while the second vision requires 'concert' among the P5.[22] By investigating many situations and disputes, he found that the Security Council succeeded in avoiding sustained military clashes between the great powers but largely failed in maintaining peace, even though the great powers could reach consensus on particular occasions[23] – and hence Bosco suggested that observers should lower their expectations of the Security Council. He asked rhetorically: '[W]hy not abandon the conceit that is managing international peace and security?'[24] According to Bosco, power politics in the 21st century became more complex. He highlights the rise of China and the revival of Russia, arguing that the two non-Western powers are a challenge to US-led Western hegemony.[25]

[19] *Ibid.*, 136.
[20] David L. Bosco, *Five to Rule Them All: The UN Security and the Making of the Modern World* (Oxford: Oxford University Press, 2009).
[21] *Ibid.*, 4–5.
[22] *Ibid.*
[23] *Ibid.*, 5–6.
[24] *Ibid.*, 253.
[25] *Ibid.*, 256.

It is now, again, the right time to examine the relationship between law and politics – especially how interactions among great powers in the new power constellation may affect the Council-centred mechanism of maintaining international peace. This examination is helpful in rethinking both the action and inaction of the Security Council, as well as its impact on international peace during the Cold War and on the 'New World Order', respectively. It is also helpful in exploring a better approach to maintaining international peace in the new power constellation of the globalised world. And it is especially helpful to ponder whether a more powerful China will disable the Security Council, as the USSR once did, or instead enable it to better shoulder its responsibility.

While it is the common endeavour of international lawyers – including the authors of this Trialogue – to explore ways of enhancing the Security Council so it may better shoulder the responsibility of maintaining peace, it would be wise to stay open to different approaches. In this volume, Larissa van den Herik, like many other lawyers, continues to explore enhancing the institutional strength of the Security Council itself; in contrast, Tiyanjana Maluwa seeks more promises regarding regional arrangements outside the Security Council. In their chapters, both Van den Herik and Maluwa take a more generally legalist approach than I do.[26] Van den Herik seeks to enhance the institutional strength of the Security Council by advancing accountability mechanisms rooted in the rule of law, such as more participation from less powerful states in the Security Council's decision-making and stronger reporting requirements for actions authorised by the Security Council. In doing so, she expects to reduce the negative impact of power politics – especially that arising from struggles among great powers.

In contrast, Maluwa has high expectations of regional arrangements, hoping that they may be less susceptible to the struggles among the great powers that often disable the Security Council. This legally institutional approach is generally desirable. However, we should be aware that any legal designs concerning the Security Council cannot help but be deeply embedded in power politics itself, whether we like it or not. As the Security Council's history illustrates, the great powers can render the legal means available to the Security Council useless, or misuse or abuse them. From a theoretical perspective, some of the legal proposals aimed at enhancing the functionality of the Security Council could create tremendous risks that their advocates may not expect.

[26] See also Sherif A. Elgebeily, *The Rule of Law in the United Nations Security Council* (New York: Routledge, 2017).

Van den Herik's chapter elaborates the improvement of a more inclusive decision-making and reporting mechanism; it is interesting, however, that she does not discuss the impact of those more ambitious legal proposals. Meanwhile, since Maluwa confines himself to the African Union, he largely ignores the negative impacts of the regional approach, which are illustrated by the North Atlantic Treaty Organization (NATO). This implies that a purely legalist approach is not enough. Thus, in contrast with Van den Herik and Maluwa, I take a hybrid approach in this chapter, centring both politics and law.

This chapter consists of five sections in addition to this introduction (section I) and its conclusion (section VII).

- Section II examines the interactions between politics and law in the Security Council. It first deals with the relationship between politics and law at the international level; then, it examines the politics underlying the legal privileges granted to great powers and investigates the legal restraints on great powers that are already in existence. Furthermore, it deconstructs the tension between the institutional nature and actions of the Security Council. Bearing in mind the complexity of interactions between politics and law, I do not take a one-sided approach but instead seek to strike a balanced stance on the relationship between the two. This is the starting point from which I evaluate what the Security Council has done and what it has failed to do over the past decades.
- Section III portrays how global power shifts affected the workings of the Security Council during the Cold War, during the 'New World Order', and during what is arguably a 'new Cold War', respectively, illustrating how the law of peace and war is interpreted, enforced, and created within the Security Council. I respond here too to Bosco's bold support for a resetting of the mandate of the Security Council.
- Section IV investigates several novel threats that the Security Council faces and explores how it might address them. It illustrates how power politics can influence the Security Council to address such threats.
- Section V focuses on China's role in the Security Council. Many people are increasingly concerned with the implications of a more powerful China on the Security Council; I consider what China may bring about on the Security Council and in terms of international peace. After reviewing China's historical engagement with the Security Council, this section discusses how the new power setting and Chinese international legal policies influence China's behaviour in the Security Council. Furthermore, it examines China's normative role in relation to the law of peace and war.

- Section VI ponders the trajectory of Security Council reforms by reviewing some legal proposals made under the universal and regional approaches.

I present four core arguments in this chapter. First, the Security Council was, and continues to be, deeply embedded in power politics. Legal proposals to reform the Security Council should therefore give power politics due consideration; otherwise, some legal proposals aimed at helping the Security Council to better shoulder responsibility for the maintenance of international peace may instead create unexpected risks.

Second, the functioning of the Security Council still largely depends on the relations among the P5. It is not expected that the elected members of the Security Council will play a significant role, and hence the deteriorating relationships among the great powers of the past decade – expected to continue in the coming years – risks disabling the Security Council, much as they did during the Cold War.

Third, some actions that the Security Council has sanctioned are not necessarily legally sound and are not desirable in the long run. While struggles between the great powers are likely to disable the Security Council, might they not also prevent the Security Council from taking measures that are inconsistent with the UN Charter or prove undesirable?

Fourth, a more powerful China will play a larger role in the Security Council. China's normative role in the Security Council has multiple dimensions: as norm defender, as norm taker, as norm 'antipreneur', and as norm entrepreneur. Thus this chapter goes beyond the one-sided perspective that cannot fully explore the impact of a more powerful China on the workings of the Security Council.

II. THE UN SECURITY COUNCIL: BETWEEN POLITICS AND LAW

Despite centuries of debate, the relationship between politics and law remains unsettled. As Loughlin observes, such a relationship at the domestic level 'tends to be characterised as one of reason *versus* will, might *versus* right, or justice *versus* power, which not only highlights law's ideal qualities but also presents politics in a negative light'.[27] Implicit in such thinking is a belief that law 'seems to exist to control the exercise of politics – understood as an arena of power – and to direct it towards the pursuit of the good'.[28] In other words, the

[27] Martin Loughlin, *Sword and Scales: An Examination of the Relation between Law and Politics* (Oxford: Hart, 2001), 12.

[28] *Ibid.*, 13.

triumph of law over politics has been deemed a worthwhile pursuit. Such thinking is also popular among international lawyers. In this volume, Van den Herik explores the institutional strength of the Security Council based on her conception of rule of law. Yet, based on his examination of what law really is and how it is created at the national level, Martin Loughlin has suggested that the predominant thinking on the relationship between politics and law is highly polarised.[29] It is, according to Loughlin, based on a simplified conception of law whose meaning, creation, and function should rather be understood in multiple directions.

As illustrated through this section, the interaction between politics and law at the international level – including in the Security Council – is far more complicated than that at the national level. People should therefore be more sensitive to the political logic underlying legal arrangements and initiatives in connection with the Security Council, and should not take for granted the actions that the Security Council has taken or authorised. This section first reviews the relationship between politics and law at the international level, and then examines the political logic underlying the legal arrangements in connection with the Security Council.

A. *The Relationship between Politics and Law at the International Level*

According to Loughlin's observation, divergent understandings of the relationship between law and politics exist. For instance, the end of law arguably means the beginning of tyranny, but it may also mean the end of liberty,[30] depending on differing conceptions of law.[31] While law has been increasingly influential in the conducting of politics, this 'does not mean that law is replacing politics, but it is indicative of a change in the role and function of politics in the modern era'.[32] Notably, a process toward the 'legalization of politics has led primarily to a politicization of law'.[33] Nevertheless, a critique of politics is not absolutely unfounded. In practice, decisions influencing social life are commonly irrational or self-interested in that they may be made based on the decision-makers' own particular understanding of human conditions.[34] Yet politics should also be understood as an activity

[29] *Ibid.*, 12, 225.
[30] *Ibid.*
[31] *Ibid.*, 9–12, 218–25.
[32] *Ibid.*, 231.
[33] *Ibid.*, 233.
[34] *Ibid.*, 7–8.

closely linked to the virtues of freedom and civilisation.[35] It may be a vocation tied to exploring appropriate patterns of collective life.[36] Thus, sometimes, politics are necessary to produce shared norms and to make the law work as expected.[37] Some political values should be respected and pursued, as is necessary to make 'good' laws.[38] Loughlin concludes by stressing that, 'rather than existing in opposition to one another, politics and law can be understood as each performing important roles in the activity of creating and maintaining a normative universe'.[39]

In terms of structure and governance, because of the differences between domestic and international society, law's relationship to politics in the domestic context is not the same as it is in the international context. Nevertheless, divergent conceptions of the relationship between law and politics provide a spectrum on which to understand the history and reality of such a relationship in international society.

In domestic society, a common consensus has existed among constituents on building an advanced and hierarchical organism based on law instead of politics. This explains what people have long debated: whether law has triumphed over politics and, if not, how to achieve this end, rather than whether law *should* triumph over politics. While today is still not the right time to announce the 'end of politics and the triumph of law', law has been firmly recognised as 'a cordon' within which power politics is conducted.[40] As a result, the influence of power – the core of politics – on the creation and enforcement of law has been well controlled to the extent that constituents of domestic society find it acceptable, if not wholly satisfactory. The wealthy can lobby legislators to approve laws in their favour, but their influence is limited. Legislators are not easy to capture. The adoption of laws must comply with sophisticated procedures, including internal deliberations and public participation, thereby ensuring that competing arguments and interests receive fair consideration. Furthermore, the legislature may make timely updates to laws in light of new circumstances. The executive branch, which enforces laws, is subject to legal scrutiny, especially from judges. In short, at the domestic level, law is fairly reliable and giving too much regard to politics is often considered threatening to the rule of law.

[35] *Ibid.*, 112.
[36] *Ibid.*, 7.
[37] Robert Post, 'Theorizing Disagreement: Reconceiving the Relationship between Law and Politics', *California Law Review* 98 (2010), 1319–50 (1340–3).
[38] Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1996 [1651]), 239–40.
[39] Loughlin, *Sword and Scales* (n. 27), 17.
[40] *Ibid.*, 232–3.

However, we see quite a different picture in international society. There is a fundamental distinction between international and domestic society that should serve as a starting point from which to understand the relationship between law and politics in the former[41] – namely, sovereign states, both strong and weak, are unlikely to intend to organise international society as a state-like organism. There may be two major reasons for this: first, such an organism would impose undue constraints on sovereignty, to an extent that sovereign states would find unacceptable; and second, such an organism would be no more effective than sovereign states themselves in achieving their state interests. Consequently, power is far less regulated at the international level than it is at the domestic – which, in some sense, is precisely what sovereign states want. While there have been attempts to extend the concept and practice of the rule of law from the domestic level to the international level,[42] international rule of law therefore 'remains a contested concept and barely more than a hopeful project in the making'.[43]

This distinction brings about two additional consequences. First, those states with prominent power are often the major sources of threats to international peace. Like less powerful states, they inevitably prioritise their own state interests. They are reluctant to act in a manner that disadvantages them. They may further abuse their power to pursue their own interests. This is not to say that they do not care at all about the interests of other states or of international society; rather, they are often willing to shoulder the responsibility of promoting and protecting interests beyond their own. This is mainly because, unlike those who are less powerful, great powers have more resources to internalise the costs that may arise from actions protecting interests other than their own. Moreover, in a closely interconnected world in which no one actor can fully isolate from another, great powers have more resources and breath to invest in seeking long-term advantages, even at immediate cost. They are capable of renouncing short-term advantages that they calculate may become boomerangs against them later. Thus they may act with a long-term perspective rather than short-sightedly.

[41] See further Matthieu Burnay, *Chinese Perspectives on the International Rule of Law* (Cheltenham: Edward Elgar, 2018), 47–52.

[42] See, e.g., GA Res. 60/1 of 24 October 2005, UN Doc. A/RES/60/1, para. 11; GA Res. 67/1 of 30 November 2012, UN Doc. A/RES/67/1.

[43] Burnay, *Chinese Perspectives* (n. 41), 55; Machiko Kanetake, 'The Interfaces between the National and International Rule of Law: A Framework Paper', in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels* (Oxford: Hart, 2016), 11–41 (18–22).

Second, given that nearly all states, whether powerful or not, prefer to cater to their own interests, international law often fails to be well made, duly updated, or effectively enforced. Great powers often have little interest in initiatives constraining the exercise of their prominent power.[44] They also attempt to seek de jure privilege, or 'legalized hegemony',[45] and de facto privileges in their favour.[46] The Covenant of the League of Nations was the first universal treaty that legally privileged great powers. Several great powers acquired permanent membership of the Council of the League of Nations.[47] The UN Charter goes even further. In addition to granting permanent Security Council membership to the P5, the UN Charter provides them with veto power, whereby each can block any non-procedural initiatives proposed in the Security Council.[48] More generally, great powers are used to taking a selective approach to international law. While nearly all states treat international law in a selective way, the great powers' selective approach is far more consequential.

Because of the unique structure and governance of international society, the focus has long been on how to induce great powers, individually or collectively, to respect international law rather than on how to try to control them. Implicit in the legal privilege granted to great powers is that they are expected to take advantage of their power 'for the common good and promote and [to] obey international law'.[49] This does not mean, however, that there has been no important legal progress achieved in constraining the great powers. The UN Charter, while privileging great powers, also represents great achievements in this regard. It is the first multilateral treaty that provides the principle of sovereign equality. The United Nations, in accordance with Article 2 UN Charter, is based on the principle of sovereign equality for 'all its Members'. This principle was reaffirmed and clarified in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among

[44] For example, none of the P5 participated or joined the UN Treaty on the Prohibition of Nuclear Weapons of 7 July 2017, 3380 UNTS (TPNW), adopted with the approval of 122 UN Members at the General Assembly in July 2017 and, as of 11 May 2023, signed by 92 UN Members with ratifications or accessions from 68 Contracting Parties.

[45] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004), x.

[46] See generally Jacob Katz Cogan, 'Representation and Power in International Organization: The Operational Constitution and its Critics', *The American Journal of International Law* 103 (2009), 209–63.

[47] Art. 4(2) Covenant of League of Nations.

[48] Arts 23 and 27 UN Charter.

[49] *A More Secure World: Our Shared Responsibility, Report of the High–Level Panel on Threats, Challenges and Change*, 2 December 2004, UN Doc. A/59/565, 4.

States, adopted by the UN General Assembly in 1970.[50] These achievements arguably comfort people, like Emer de Vattel, who conceive of the relationship between politics and law thus: '[P]ower or weakness does not in this respect produce any difference . . . a dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.'[51] Importantly, as indicated by Van den Herik's examination in this volume of numerous proposals aiming to refine the decision-making procedure regarding the use of force,[52] many states – especially those that are less powerful – continue their efforts to infuse more law into politics in the Security Council.

B. *The Politics of Legal Privileges and the Great Powers*

Debates on the relationship between politics and law in the Security Council, first and foremost, refer to how the political rationale underlying legal privileges granted to the great powers can be understood, and whether the conventional assumptions about the relationship between politics and law still holds. This issue can be illustrated from two different angles.

First, while great powers are the major sources for threats to peace, they are also guardians of that same international peace. This functional advantage is often invoked to justify great powers' seeking privileges, de jure and de facto. The Permanent Court of International Justice (PCIJ) once admitted that:

> [I]t is hardly conceivable that resolution on questions affecting the peace of the world could be adopted against the will of those among the Member of the Council who, although in a minority, would by reason of their position, have to bear the larger share of the responsibility and consequences ensuing therefrom.[53]

This indicates that, given their prominent state power, great powers may act without due regard for the interests of other states and international society.

However, the PCIJ pointed out an important fact: while great powers make up a minority of the international society, they can provide huge resources to maintain peace that less powerful states cannot. For example, from 2019 to 2021, the effective rate of assessment for the peacekeeping operations of the P5 accounted for more than half of the total UN peacekeeping budget, while the

[50] GA Res. 2625 (XXV) of 24 October 1970, UN Doc. A/RES/2625(XXV).

[51] Emer de Vattel, *The Law of Nations* (Indianapolis: Liberty Fund, 2008), 75.

[52] See Larissa van den Herik, 'The UN Security Council: A Reflection on Institutional Strength', Chapter 2 in this volume, section II.B.

[53] PCIJ, *Article 3, Paragraph 2 of the Treaty of Lausanne*, advisory opinion no. 12 of 21 November 1925 (Ser. B), 29.

other 188 UN member states contributed the remaining portion.[54] It is unlikely that the contribution of the great powers to the maintenance of peace will considerably diminish in the near future.

Indeed, great powers have made some promises to justify their privileges. In explaining the justification for the veto power arrangement in the Security Council in the 1940s, the great powers stated that:

> [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.[55]

Implicit in this statement is that they would act in the interest of international peace if they were granted the veto power. In its report *A More Secure World*, submitted in 2004, the UN High-Level Panel on Threats, Challenges, and Change frankly stated that the great powers' privilege was an 'exchange' granted to them, and that it implied their promise to use their overwhelming power in the interests of international society.[56]

The difference between the promises the great powers have made and the privileges they have attained should be noted. What the great powers have seized are 'legal' privileges; by contrast, apart from those legal obligations universally applicable to UN member states (e.g., the obligation of non-intervention), what the great powers have promised are not legal obligations as prescribed in the UN Charter but political obligations. Some negotiating states already took note of this problem at the San Francisco Conference. The representative from New Zealand, who was very concerned with potential abuse of the veto power, warned that the great powers 'have so recognised their great responsibility, their pledge, not written, not entered into the Charter but spoken as of good faith'.[57] He added: 'I don't think the possible effects of the veto were exaggerated at all.'[58] While aware of concerns raised by states such as New Zealand, the great powers did not express any intention to commit, in the exercise of the veto power, to any legal obligations; rather, they merely stated that '[i]t is not to be assumed, however, that the

[54] *Implementation of General Assembly Resolutions 55/235 and 55/236*, Report of the Secretary-General to the 73rd Session, 24 December 2018, UN Doc. A/73/350/Add.1, Annex.

[55] Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council, 7 June 1945, available at www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/Statement%20of%20four%20sponsoring%20states.pdf, para. 9.

[56] *A More Secure World* (n. 49), 4.

[57] UN Conference on International Organization (UNCIO), Verbatim Minutes of the Fifth Meeting of Commission III, 22 June 1945, UN Doc. 1150, III/12, 9, reprinted in 11 Doc. U.N. Conf. on Int'l Org. 170 1945, 171.

[58] *Ibid.*

permanent members, any more than the non-permanent members, would use their "veto" power maliciously to obstruct the operation of the Council'.[59]

Second, while less powerful states often complain that the great powers use and abuse their legal privileges, in addition to their raw power, the great powers in turn are gravely concerned about a 'tyranny of the majority' in international society.[60] As noted above, both powerful and less powerful states prioritise their own state interests in international dealings. Thus, while less powerful states are particularly susceptible to coercion from powerful states in whatever form, they are not necessarily 'good citizens' in international society. Arguably, the major difference between powerful states and less powerful states is that the former often are more efficient in simply employing their prominent raw power. In contrast, the latter are more likely – perhaps have no other choice but – to rely on the legal principle of sovereign equality, whereby they disfavour any kind of weighed voting arrangement in international decision-making. The great powers' concern with a tyranny of the majority is therefore not totally unfounded on 'one country, one vote' occasions, such as in the General Assembly. In fact, the UN High-Level Panel states frankly that it 'recognise[s] that the veto had an important function in reassuring the United Nations' most powerful members that their interests would be safeguarded'.[61] For the great powers' part, their claim of legal privileges, arguably, does not (only) purport to acquire legal advantage over less powerful states but also ensures that their state interests are not threatened by those states who, albeit less powerful, constitute a majority in international society and who, like the great powers, prioritise their own state interests.

C. *Legal Restraints on the Great Powers*

Given the long-standing and widely accepted assumption that the great powers are dangerous to international peace inside or outside of the Security Council, actors have constantly reflected on how to best conceive meaningful constraints on them. In fact, legal restraints on the veto power have long been a major agenda item for those less powerful states. During the San Francisco Conference, they expressed a grave concern that the great powers would use their legal privileges 'unthinkingly or unjustly or tyrannically', but their efforts to constrain those privileges have largely failed.[62]

[59] 1945 Statement by the Four Sponsoring Governments (n. 55), para. 8.
[60] Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (The Hague: Kluwer Law International, 1998), 165.
[61] *A More Secure World* (n. 49), 82.
[62] See UNCIO, Verbatim Minutes (n. 57), 171.

Nevertheless, a number of political and legal restraints on the great powers exist. We cannot say that these restraints do not make any difference at all, but it is fair to say that they do not work as expected. One example is the 'group veto'. In arguing for veto power in the 1940s, the great powers suggested that they could not act 'by themselves'; rather, elected members, 'as a group', could block any actions that the P5 initiated with unanimity.[63] In practice, however, this legal constraint is of little relevance. Legally, elected members of the Security Council, if they unite, can block any initiatives proposed by the great powers. Unfortunately, there is no evidence that the elected members have the willingness to unite. In fact, the right of 'group veto' of the elected members has never been used in the history of the Security Council.

Some commentators argue that the elected members could shift from 'lame ducks' to become key players.[64] In this volume, Van den Herik takes a similar stance. For her, the less powerful states do not only play a secondary role.[65] Van den Herik notes that those less powerful but democratic Western states may form a democratic alliance with the United States, France, and the United Kingdom. In particular, she would expect this alliance to resist 'a move away from current structures and liberal values'.[66]

In my view, the idea of a democratic alliance is a major source of confrontations, disabling the Security Council, whose primary responsibility is to maintain international peace and not to enhance domestic democracy. This is not to say that the Security Council can do nothing to enhance domestic democracy, but when domestic democracy gives rise to a situation or event that endangers international peace, calls for the Security Council to take enforcement action are likely to little more than exacerbate international confrontations and disrupt international peace. More importantly, other than by blocking the great powers' initiative and uniting themselves to exercise the 'group veto', elected members of the Security Council cannot legally compel any of the P5 to take any action, because every P5 can exercise its veto power. Nevertheless, the elected members may put great political pressure on the P5. From the perspective of power politics, the P5 may find that they have to take this political pressure into serious consideration.

[63] 1945 Statement by the Four Sponsoring Governments (n. 55), para. 8.
[64] Blocker and Schrijver, *The Security Council and the Use of Force* (n. 15), 9.
[65] Van den Herik 'A Reflection on Institutional Strength', Chapter 2 in this volume, section I.
[66] *Ibid*.

D. *A Politicised Institution and Legalised Actions*

Even though the Security Council was established in accordance with the UN Charter, a legal instrument, this UN organ is traditionally considered to be a political organ rather than a legal one. People in favour of this argument suggest generally that there is no conflict between the nature and activities of the Security Council. For example, Andreas S. Kolb submits that 'there is no contradiction per se between the observation that the Security Council is a political body in that its decisions are shaped by political considerations and the possibility that international law may still define boundaries for its conduct'.[67] Such a general argument is unhelpful – especially considering the fact that political considerations regularly prevail over law in the workings of the Security Council. Indeed, as illustrated above, politics interact with law in both negative and positive ways.[68]

In examining many meeting records of the Security Council, I have found that many Security Council members – especially the great powers – are accustomed to blaming each other, using very diplomatic but hypocritical language. They show little interest in identifying the relevant facts in legal terms – apart from rhetorically referring to UN Charter provisions or abstract values.[69]

Indeed, the first and foremost mission of the Security Council is to maintain international peace, which, on some occasions, implies sacrificing justice. This reminds us of the argument of Judge Stephen M. Schwebel in the International Court of Justice (ICJ), in the *Nicaragua* case, which has frustrated many international lawyers. Judge Schwebel suggested that, '[i]n short, the Security Council is a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to

[67] Andreas S. Kolb, *The UN Security Council Member's Responsibility to Protect* (Berlin: Springer, 2018), 146.

[68] See below, sections II.A and II.B.

[69] During the debates on SC Res. 189 concerning the Ukrainian situation, Rwanda's representative stated:

> The situation in Ukraine has rapidly unfolded. We are concerned that the rhetoric of, and pressure from, many actors have blinded us from carefully analysing the situation and understanding the root causes, thereby preventing us from finding a suitable solution and, in the process, de-escalating the crisis. Why, then, did we vote in favour? The draft resolution contains important principles on which we all agree: respect for the independence, sovereignty and territorial integrity of countries and the need for a de-escalation of the crisis. Most important to us is the fact that the draft text calls for a Ukrainian inclusive political dialogue.

See UN Doc. S/PV.7138, 15 March 2014, 7.

apply them.'[70] Specifically, he supported the way in which the Security Council addressed a particular asserted aggression. He said that, '[h]owever compelling the facts which could give rise to a determination of aggression, the Security Council acts within its rights when it decides that to make such a determination will set back the cause of peace rather than advance it'.[71]

However, it should be stressed that the 'decisions' adopted by the Security Council are legally binding for all UN members, whether they are in agreement or not.[72] These Security Council resolutions may also apply to non-UN member states if they are deemed 'necessary for the maintenance of international peace and security'.[73] Thus it is justified to inquire what role law, or rule of law, can and should play in enhancing the accountability of the Security Council.

Since the end of Cold War, accountability has become more important for the Security Council. Noticeably, the requirement of accountability is invoked unevenly. The Security Council, by referring to accountability, often requires a targeted state to enforce Council measures.[74] It also requires that individuals in peacemaking operations be held accountable for any sexual exploitation and abuse they perpetrate.[75] However, the Security Council hardly specifies what 'accountability' means – that is, what the Security Council has done to make its decision-making processes more inclusive or to establish a more participatory process, as Van den Herik highlights in this volume.[76]

[70] ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, judgment of 27 June 1986, ICJ Reports 1986, dissenting opinion of Judge Schwebel, 259, 290.

[71] *Ibid.*

[72] Art. 25 UN Charter provides that '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Chapter'.

[73] Art. 2(6) UN Charter. The ICJ once held that, 'when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision [...] To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter': ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, advisory opinion of 21 June 1971, ICJ Reports 1971, 16, para. 116.

[74] As to the examination of the Security Council's resolutions with reference to accountability, see Jeremy M. Farrall, 'Rule of Accountability or Rule of Law? Regulating the UN Security Council's Accountability Deficits', *Journal of Conflict and Security Law* 19 (2014), 389–408 (398–402).

[75] For example, SC Res. 2135 of 30 January 2014, UN Doc. S/RES/2135(2014), para. 12; SC Res. 2109 of 11 July 2013, UN Doc. S/RES/2109(2013), para. 39. See also Farrall, 'Rule of Accountability or Rule of Law?' (n. 74), 389.

[76] See Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section II.

This inquiry is warranted because of the revival of the Security Council in the wake of the Cold War, which demonstrated its strength while increasing the risks arising from its institutional weakness.

First, it has been generally recognised that a threat to peace does not necessarily indicate an act that is in violation of international law. Unlike the League of Nations, the United Nations' collective security mechanism is 'not conceived as a reaction to a violation of international law, but as a preventive tool to ensure the maintenance of peace', and hence it primarily assumes a 'police function' under Chapter VII UN Charter.[77] Hans Kelsen suggests that an act without breach of international law may also trigger the application of Article 39.[78] Furthermore, Kelsen argues that the Security Council has the power to adopt and enforce 'a decision which it considered to be just though not in conformity with existing law' if it finds the existing law unsatisfactory.[79] Given that international law was less developed in the 1940s, Kelsen's argument is sound. Perhaps inspired by the dual nature of the UN's collective security mechanism, some authors go further and distinguish 'law enforcement', which targets acts in violation of international law, from 'peace enforcement', which targets acts not inconsistent with international law.[80] However, we should bear in mind an important fact: while 'peace enforcement' is not triggered by a wrong act, relevant legal measures or actions may also be adopted and enforced. Obviously, the sovereignty of a state is more likely to be unduly compromised by 'peace enforcement' than by 'law enforcement'. A cautious approach should therefore be taken when peace enforcement is enacted against a state that has not violated any primary rules of international law (perhaps because such rules did not exist at the time of the impugned behaviour).

Such a cautious approach has already been adopted in the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted in 2001. Under the Draft Articles, some legal burdens may be imposed on a state that acts in ways not prohibited by international law. The consequences on this occasion would be distinct from those arising from an international wrongful act – that is, what is incurred

[77] Nico Krisch, 'Article 39', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 3rd edn, 2012), 1272–96 MN 10, (p. 1278).

[78] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London: Stevens, 1950).

[79] Kelsen, *The Law of the United Nations* (n. 78), 295.

[80] See Krisch, 'Article 39' (n. 77), MN 10–11 (p. 1278).

on the former occasion refers to 'international liability', while, in the latter situation, it is 'international responsibility'. Furthermore, the loss incurred on the first occasion may be divided between the relevant states in the dispute.[81] This is indeed significant since the international law of peace has been far more developed in the 21st century than in Kelsen's time. The distinction between 'law enforcement' and 'peace enforcement' is less important. Yet it is still meaningful for two reasons: first, novel international threats continue to emerge,[82] but the relevant international law is not created or updated in a timely fashion; second, some states do not accept the relevant extant international law or they withdraw from their international commitments.

Second, some authors seem to assume that the measures provided in Article 39 UN Charter can be taken in disregard of international law.[83] Kelsen was a leading proponent of this view. Based on his understanding of 'measures' in Article 39, Kelsen suggests that enforcement measures were not designed 'to maintain or restore the law, but to maintain, or restore peace'.[84] Thus they are 'purely political measures ... which the Security Council may apply at its discretion for the purpose to maintain international peace and security'.[85] Kelsen further argues that the requirement 'in conformity with the principles of justice and international law' in Article 1(1), which the Security Council shall comply with when it acts in accordance with Article 24, did not apply to the Security Council measures under Chapter VII but only to those under Chapter VI.[86] In Kelsen's view, to interpret measures under Chapter VII not as 'sanctions' (i.e., as responses to a prior breach of the law) subject to general international law but instead as measures at the discretion of the Security Council 'would be in conformity with the general tendency which prevailed in drafting the Charter: the predominance of the political over the legal approach'.[87] Notwithstanding, Kelsen is aware of the weakness of such interpretation, recognising that it 'lead[s] to the consequence that with respect to enforcement measures there is no difference between a Member which has violated its obligations under the Charter, and a Member which is

[81] James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2013), 95–104 and 503–20.

[82] See below, section IV.

[83] According to Krisch, the Security Council's effective action 'shall not be delayed by time-consuming procedures to determine the responsibility of the parties': Krisch, 'Article 39' (n. 77), 1278.

[84] Kelsen, *The Law of the United Nations* (n. 78), 294 and 733.

[85] *Ibid.*, 733.

[86] *Ibid.*, 295.

[87] *Ibid.*, 735.

not guilty of any such violation'.[88] Thus Kelsen admits that such interpretation is 'not the only possible one'.[89] An alternative exists: '[I]n accordance with general international law, a forcible interference in the sphere of interest of a state, that is reprisals or war, is permitted only as a reaction against a violation of law, that is to say as sanction.'[90] Interpreted thus, the enforcement measures under Chapter VII – given that they constitute forcible interferences – 'must be interpreted as sanctions if the Charter is supposed to be in conformity with general international law'.[91]

Kelsen further distinguishes the situations under Articles 41 and 42. He appears confident on the alternative interpretation of the Article 41 measures as sanctions: 'No other interpretation is possible with respect to the enforcement measures not involving the use of armed force as determined in Article 41', because those measures 'have the character of reprisals; and according to a generally accepted opinion, reprisals are permissible only as reaction against a violation of international law, that is to say, as sanctions'.[92] By contrast, Kelsen is less confident of the interpretation of measures under Article 42 as sanctions (requiring a prior breach). Under Article 42, the use of armed force may be initiated when the Security Council finds the Article 41 measures inadequate. Kelsen contends that 'whether such action is always possible without constituting a violation of general international law' remains debatable.[93]

The requirement of 'prompt and effective' UN action, as demanded by Article 24 UN Charter, is another factor invoked to support the enforcement of Security Council measures without regard for international law. According to Krisch, Security Council actions shall not be delayed by time-consuming procedures to ensure their effectiveness.[94] Because of the United Nations' shameful failure to respond to the Rwanda genocide in 1994, it is absolutely necessary that the Security Council act promptly and effectively. However, the criteria of 'prompt and effective' is a major source of disagreement among Council members. Looking into the meeting records of the Security Council, we readily find that members often disagree not over what measures should be taken but over when they should be taken. Comparatively speaking, the Western powers generally insist that coercive enforcement measures be

[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*
[93] *Ibid.*
[94] Krisch, 'Article 39' (n. 77), 94.

taken as soon as possible, while some others argue that hasty measures are not helpful in maintaining the peace. Actually, the requirement 'prompt and effective' is not only a legal issue but also a factual one. Thus the understanding of 'prompt and effective' on a particular occasion largely depends on whether the relevant situations or disputes can be assessed and verified credibly. Unfortunately, as many Security Council meeting records show, the Security Council members often quarrel with each other over what has really happened.

Third, the Security Council undertook some significant legislative activities. They affected particular states targeted by Security Council measures and also broadly impacted international law. In Kelsen's view, when the Security Council makes and enforces 'a decision which it considered to be just though not in conformity with existing law' that it finds unsatisfactory, it seeks to remedy the situation by 'creat[ing] new law for the concrete case'.[95]

It has been suggested that the Security Council, in accordance with the UN Charter, is not prevented from undertaking legislative activities. In the *Tadić* case, the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that judicial, executive, and legislative functions were not clearly divided among the UN organs.[96] Anne Peters submits that, while the UN Charter drafters might have conceived of a 'police function', it was not explicitly provided for by the UN Charter. The 'measures' provided for in Article 39 are sufficiently broad so as to include legislative measures. It can therefore be assumed that while nothing in the Charter explicitly authorises the Security Council to adopt resolutions with legislative content, 'it does not rule it out, either'.[97] Peters observes that the majority of the UN members appear to be in support of the Security Council's legislative activities.[98]

Fourth, the determination of relevant facts faces a high risk of manipulation in the context of politicised institutions and legalised actions. Whether the legal actions approved by the Security Council or in the name of the Security Council resolutions are justified or not depends on whether a situation or dispute can be duly determined, which is particularly significant for those outside the Security Council. The Iraq war is a strong example. No one argued that the Security Council was not entitled to authorise enforcement measures

[95] Kelsen, *The Law of the United Nations* (n. 78), 294.

[96] ICTY, *Prosecutor v. Duško Tadić*, Appeal Chamber decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, case no. IT-94-1-A, para. 43.

[97] Anne Peters, 'Article 24', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 4th edn, 2024 forthcoming), MN 70–84 (MN 74).

[98] *Ibid.*, MN 73.

should Iraq have been found to have gravely violated Resolutions 687 and 1441; rather, the debate very much focused on whether Iraq had indeed gravely violated those resolutions.

On 5 February 2003, then US Secretary of State Colin Powell presented evidence before the Security Council – 'some are United States sources and some are those of other countries' – firmly asserting that the United States 'know[s] about Iraq's weapons of mass destruction as well as Iraq's involvement in terrorism', and thus Powell accused Iraq of grave breaches of Resolutions 687 and 1441.[99] The United Kingdom supported the US 'evidence'.[100] China, while welcoming the information presented by the United States, supported the UN Monitoring, Verifying and Inspection Commission (UNMVIC), which, together with the International Atomic Energy Agency (IAEA), wanted to progress its work.[101] Russia held a similar position.[102] Interestingly, unlike the United Kingdom, France – while noting there were some grey areas in Iraq's cooperation with the UNMVIC – did not support the United States' accusations.[103] In other words, the Security Council members could not agree on whether Iraq gravely violated Resolutions 687 and 1441. For the United States' part, the important thing was that it had already presented 'evidence' before the Security Council, not whether the asserted evidence would be verified by the UNMVIC or other Security Council members.

Based on its self-identified 'evidence', the United States, together with the United Kingdom, launched 'Operation Iraqi Freedom' on 20 March 2003.

On 30 May, when the Iraq war ended, the UNMVIC submitted a report to the Security Council, stating that it 'did not find evidence of the continuation or resumption of programmes of weapons of mass destruction or significant quantities of proscribed items from before the adoption of Resolution 687 (1991)'.[104]

Again, in reviewing the United Kingdom's intervention in Libya in 2011, which was based on Security Council Resolution 1973, the Foreign Affairs Committee of the UK House Commons admitted that the evidence of the threat to civilians in Libya was presented with 'unjustified certainty' and thus intervention in Libya was a 'intelligence-light decision'.[105] However, the great

[99] UN Doc. S/PV.4701, 5 February 2003, 2–17.
[100] *Ibid.*, 18–20.
[101] *Ibid.*, 18.
[102] *Ibid.*, 20–1.
[103] *Ibid.*, 23–4.
[104] Note by Secretary-General, UN Doc. S/2003/580, 30 May 2003, Annex, para. 8.
[105] House of Commons Foreign Affairs Committee, *Libya: Examination of Intervention and Collapse and the UK's Future Policy Options,* Third Report of Session 2016–17, September 2016, HC 119, para. 37.

powers who justified their actions with the relevant Security Council resolutions were not held accountable for their actions. Nor did the Security Council later announce that the use of force against Iraq in 2003 and Libya in 2011 were in breach of the UN Charter and the relevant Security Council resolutions.

These cases show that serious long-term consequences often occur other than might be expected by the Security Council and those states actively supporting or seeking the Security Council actions. Based on his observation on UN peacekeeping operations, Martti Koskenniemi suggests that 'there is very little that is predictable about such operations'.[106] Indeed, the UK Foreign Affairs Committee acknowledged that the intervention brought about in Libya 'political and economic collapse, inter-militia and inter-tribal warfare, humanitarian and migrant crises, widespread human rights violations, the spread of Gaddafi regime weapons across the region and the growth of ISIL in North Africa'.[107]

All this notwithstanding, international law is absolutely relevant to the workings of the Security Council. In the *Conditions of Admission Case*, the majority of the ICJ judges suggested that 'the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment'.[108] They argued that, '[t]o ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution'.[109] In that case, the ICJ noted that 'the limits of this freedom are fixed by Article 4, and allow for a wide liberty of appreciation. There is therefore no conflict between the functions of the political organs and the exhaustive character of the prescribed conditions'.[110] In other words, the Security Council can exercise discretion out of political considerations only to the extent that Article 4 allows. The ICJ concluded that the requirements specified in Article 4(1) were exhaustive and that any additional requirements were unjustified.[111] Unfortunately, many of the UN Charter provisions are so broad that a definite clarification cannot be made. Thus they are susceptible to misuse and abuse by either the Security Council or particular UN members. Furthermore, the ICJ is not often sought out for advisory opinions to clarify

[106] Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart, 2011), 85.
[107] *Ibid.*, 3.
[108] ICJ, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, advisory opinion of 28 May 1948, ICJ Reports 1948, 57 (64).
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*

UN Charter provisions and few of the advisory opinions it has delivered concern the workings of the Security Council.[112]

Since the 1990s, propositions have emerged that more legal limits on the workings of the Security Council should be considered, thereby enhancing the accountability of this UN organ. Like many others, Peters agrees that peace may not necessarily be brought about through lawful actions. However, she stresses that:

> [T]he mere fact that the purpose (end) of Security Council action is not as such to secure compliance (of States) with the law does not automatically relieve the Council from observing the law when applying specific means to that end. The means (peace) must be distinguished from the ends (Council action) to reach it.[113]

In her view, the fact that the Security Council takes actions under Chapter VII in emergency situations 'does not justify any move to place the decisions as such outside the law'.[114]

Peters further suggests that the legislative activities of the Security Council should be subject to substantive and procedural constraints. The former mainly include the following.

(i) The Security Council should limit its legislative activities on occasions of 'significant, new and urgent threat in an emergency situation', which amount to a threat to peace as provided for in Article 39.
(ii) The Security Council should respect the institutional balance between the main UN organs and, especially, should not adopt legislative resolutions inconsistent with General Assembly resolutions.
(iii) The legislative measures should intrude as little as possible.
(iv) The Security Council should respect general international law as much as possible.

As a rule, the Security Council should legislate only when there is a gap in the existing international law and the legislative resolutions should not contradict international law.

As for procedural constrains, Peters suggests that the Security Council subject deliberations to the requirement of transparency, seek a broad consensus among

[112] For the number and subject of the ICJ advisory cases as of January 2021, see 'Advisory Proceedings', available at www.icj-cij.org/en/advisory-proceedings.
[113] Anne Peters, 'Article 25', in Simma et al. (eds), *The Charter of the United Nations* (n. 97), MN 73.
[114] *Ibid.*, MN 70.

states, and consider leeway to relevant states and help them to carry out legal measures.[115]

Ius cogens has also been invoked to impose constraints on the Security Council.[116] However, the great powers tend to resist these attempts. For example, Van den Herik observes that while many middle-class states support the idea of extending the ius cogens to the Security Council, the P5 discourage such an attempt.[117] It is the great powers' resistance that has sidelined some legal arrangements already existing in the UN Charter that would help to enhance the Security Council's accountability. Under Article 43, an agreement should be negotiated between the Security Council and a particular UN member, or a group of UN members, in the maintenance of international peace. Furthermore, under Article 47, a military staff committee could and should be established. Unfortunately, these two Articles have remained dead letter for decades.

III. HOW POWER POLITICS INFLUENCE THE WORKINGS OF THE SECURITY COUNCIL

In terms of the rise and fall of great powers since the 1940s, power politics can be roughly divided into three periods: the Cold War, the 'New World Order', and the 'new Cold War'.

In this section, I do not argue for or against particular Security Council actions or inaction; I instead seek to unpack the law and the political dynamics underlying its workings, calling for reflection on what the Security Council has done. This is helpful as we think about how best to reform the Security Council.

A. *The Cold War*

In World War II, the Allied forces – especially the great powers – exhibited unity in fighting the Axis alliance. In Tehran, in 1943, Roosevelt, Churchill, and Stalin stated: 'We came here with hope and determination. We leave

[115] Peters, 'Article 24' (n. 97), MN 80–82.

[116] Erika de Wet, *The Chapter VII Power of the United Nations Security Council* (London: Hart, 2024 forthcoming), ch. 5.

[117] Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section II.

here, friends in fact, in spirit and in purpose."[118] During their negotiations for establishing the United Nations, almost all participating states agreed that unity among the great powers was a precondition to the would-be organisation making a difference in the maintenance of peace.

As its 'chief designer', the United States' vision of world unity was particularly significant.[119] During the San Francisco Conference, Senator Connally, an American representative, affirmed a belief that 'the Security Council when united, can preserve peace; we fear that if it is not united, it cannot preserve peace'.[120] He applauded participants, saying: 'Now we are united. Now we are marching forward under the same banner on behalf of peace and security and with the same unity, the same harmony, the same purposes, and the same resources."[121] Connally stated: '[W]e are voting and did vote for those measures that would contribute to the continued unity and harmony among permanent members of the Security Council."[122] Arguably, it was that vision of unity, together with overwhelming state power, that made US President Roosevelt change his mind, shifting from a regional approach to a global approach to world peace. As a result, the United States strongly recommended that the UN Security Council be conferred with the primary responsibility of maintaining peace and, to this end, be entrusted with extensive authority, while the great powers be granted legal privileges.

However, that rosy vision of international unity was questioned from the very beginning. Some British elites warned that their country should not have high expectations of the United Nations. They doubted that the USSR would be a reliable partner: the United Kingdom was cautious that the USSR may be more dangerous than Nazi Germany.[123] For its part, the USSR was similarly suspicious of the new organisation. Thus it insisted on the principle of unanimity among the P5 in Security Council decision-making and threatened that, without veto power, 'there would simply be no United Nations'.[124]

The Cold War emerged in 1947. During the next four decades, the USSR-led East/socialist bloc and the US-led West/capitalist bloc struggled with each other – largely because of ideological and strategic considerations. In 1945,

[118] Declaration of the Three Powers, 1 December 1943, available at https://avalon.law.yale.edu/wwii/tehran.asp.

[119] José E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005), 67.

[120] UNCIO, Verbatim Minutes of the Fourth Meeting of Commission III, 22 June 1945, UN Doc. 1149, III/11, 29.

[121] *Ibid.*, 30.

[122] *Ibid.*, 29.

[123] Bosco, *Five to Rule Them All* (n. 20), 18–19, 39.

[124] *Ibid.*, 23–4.

when the United Nations was founded, and during the Cold War, only the United States and the USSR qualified as world powers. While these two enjoyed this privilege on the Security Council, the United Kingdom, France, and China were merely the 'middle' great powers. They could only 'expect to be consulted on any issue within the radius of their actual power'.[125] How the Security Council worked largely depended on relations between the two world powers.

The Cold War had multiple implications for international law[126] – particularly for the working of the Security Council and, even more specifically, for the undue exercise of the veto power. Between 1946 and 1989, the Security Council debated 646 draft resolutions, 189 of which were vetoed. Nearly 50 per cent of these vetoes happened in the 1950s. Most vetoes were cast by the USSR and thus the exercise of the veto power was considered 'almost synonymous with Soviet foreign policy'.[127] Because of the conspicuous abuse of the veto power,[128] a call emerged for the renegotiation of the UN Charter and the reconstruction of the Security Council.[129] Since the 1970s, however, the United States and the United Kingdom have overtaken the USSR: between 1970 and 1989, the USSR vetoed on only 16 occasions, while the United States and the United Kingdom exercised their veto power 80 times and 30 times, respectively.[130]

The result of these struggles among the great powers – especially between the United States and the USSR – was that the Security Council is generally said to have been fundamentally disabled, except for peacekeeping operations.[131] Such an assessment is sound, if a bit too general. Here, I would like to discuss the influence of power politics on particular legal

[125] Schwarzenberger, *Power Politics* (n. 3), 119–20.

[126] See generally Matthew Craven, Sundhya Pahuja, and Gerry Simpson (eds), *International Law and the Cold War* (Cambridge: Cambridge University Press, 2020).

[127] Thomas Schindlmayr, 'Obstructing the Security Council: The Use of the Veto in the Twentieth Century', *Journal of the History of International Law* 3 (2001), 218–34 (226, 227).

[128] These abuses often happened on the occasion of voting on UN membership. In 1948, the ICJ decided that the requirements as provided for UN membership in Art. 4(1) were exhaustive and any additional requirements were therefore unjustified: ICJ, *Admission of a State to the United Nations* (n. 108), 65. However, the United States and the USSR vetoed applications for UN membership again and again. In fact, most vetoes cast in the 1950s concerned UN membership. It should be noted that while those vetoes damaged the universality of the United Nations, they were not very harmful to international peace and security.

[129] Bosco, *Five to Rule Them All* (n. 20), 46–7.

[130] Schindlmayr, 'Obstructing the Security Council' (n. 127), 228.

[131] Mats Berdal, 'The Security Council and Peacekeeping', in Lowe et al. (eds), *The United Nations Security Council and War* (n. 15), 175–204.

arguments that were expounded in the Security Council by examining the P5's position on the humanity and sovereignty of Viet Nam's intervention in Cambodia in the late 1970s.[132]

It is well known that, since the 1990s, some states have relied on humanitarian concerns to justify their initiatives or actions within or outside the Security Council, while some other states have invoked the principle of sovereignty to oppose humanitarian interventions. That landscape was different during the Cold War.

In December 1978, Viet Nam waged a military intervention against Cambodia and soon controlled most of the Cambodian territory. Viet Nam's intervention led to the collapse of Pol Pot's regime. As a major justification for its intervention, Viet Nam asserted that the regime had massacred some 3 million civilians in Cambodia.[133] While condemning the regime's consistent and grave human rights violations, France and the United Kingdom's arguments marked a sharp contrast with their position after the end of the Cold War. France stated:

> The notion that because a regime is detestable foreign intervention is justified and forcible overthrow is legitimate is extremely dangerous. That could ultimately jeopardise the very maintenance of international law and order and make the continued existence of various regimes dependent on the judgement of their neighbours. It is important for the Council to affirm, without any ambiguity, that it cannot condone the occupation of a sovereign country by a foreign Power.[134]

The United Kingdom took a similar stance. It stated that:

> Whatever is said about human rights in Kampuchea, it cannot excuse Viet Nam, whose own human rights record is deplorable, for violating the territorial integrity of Democratic Kampuchea, an independent State Member of the United Nations ... Respect for the sovereignty, territorial integrity and political independence of Member States is one of the cornerstones of the Charter and of the United Nations system.[135]

The USSR expressed a totally different position. In its view, the gross violation of human rights deprived the Pol Pot regime of legitimacy; thus it was the

[132] See, in detail, Gregory H. Fox, 'The Vietnamese Intervention in Cambodia – 1978', in Ruys et al. (eds), *The Use of Force in International Law* (n. 15), 242–54.
[133] *Ibid.*, 250–3.
[134] UN Doc. S/PV.2109, 12 January 1979, 4.
[135] *Ibid.*, 6–7.

Cambodian people that overthrew the vicious Pol Pot regime. The USSR stated that:

> It would appear that in this way certain persons are attempting to divert the attention of the world public opinion from the monstrous crimes committed by this clique against people of their own country and their acts of aggression against neighbouring states, which have led to the undermining of stability in international security in the area ... In a country with a population of 8 million, the rulers destroyed, according to statistics reported in, among others, the Western press, from 2 to 3 million people. The vocabulary used in international practice to describe mass violations of human rights is simply inadequate to describe these monstrous crimes.[136]

In contrast with these three states, the United States held a moderate position. Intriguingly, the US position reminds many people of China's more recent statements in the Security Council.[137] The United States argued that:

> The invasion by Viet Nam of Kampuchea presents to the Council *difficult political and moral questions. The issue is affected by history, rival claims and Charter principles. It appears complex because several different provisions of the Charter are directly relevant to deliberations.* These are that: the fundamental principles of human rights must be respected by all governments, one State must not use force against the territory of another State, a State must not interfere in the affairs of another State, and, if there is a dispute between States that must be settled peaceably.[138]

Unlike France and the United Kingdom, and particularly the USSR, China did not mention the gross violations of human rights committed by the Pol Pot regime. However, it did – as did France and the United Kingdom – argue that Viet Nam's action constituted aggression against Cambodia. Thus China appealed that 'it is the incumbent duty of all peace-loving and justice-upholding countries to stop Viet Nam's aggression, support the Kampuchean people's struggle and save peace in South-East Asia'.[139]

The P5's positions on humanitarian concern and sovereignty were heavily influenced in this case by considerations of power politics. The USSR's support for Viet Nam comes as no surprise, because it was an ally of Viet Nam, and its condemnation of the Pol Pot regime's atrocities was obviously hypocritical. The United States', the United Kingdom's, and France's opposition is understandable, for they opposed the action of Viet Nam, and they

[136] UN Doc. S/PV.2108, 11 January 1979, 14–15.
[137] See, e.g., UN Doc. S/PV.7138, 15 March 2014, 7.
[138] UN Doc. S/PV.2110, 13 January 1979, 7 (emphasis added).
[139] UN Doc. S/PV.2108, 11 January 1979, 10.

sided with the USSR even though they acknowledged the humanitarian disaster in Cambodia. In contrast, China's position is more complicated. On the one hand, the relations between China, the USSR, and Viet Nam were very bad in the 1970s, and there were actually occasional military conflicts between China and Viet Nam. On the other hand, China maintained close relations with the Pol Pot regime. Therefore, while China condemned Viet Nam's aggression, it was silent on the regime's atrocities. Thus each permanent member interpreted humanity and sovereignty in ways that served their own state interests.

Although power politics largely disabled the Security Council in the Cold War, they did not totally prevent the UN members from seeking new arrangements to maintain international peace. A significant example is the 'Uniting for Peace' (UFP) procedure. The idea for the procedure came from the United States. According to the UFP procedure, if a threat to peace could not be addressed by the Security Council because of a lack of unanimity among the P5, it should be referred to the UN General Assembly and the Assembly should make an appropriate recommendation for collective measures.[140]

In the early months after the outbreak of the Korean War, the USSR was absent from the Security Council. As a result, the Security Council successfully adopted three resolutions declaring that North Korea's armed attack against South Korea constituted a 'breach of the peace'; these resolutions authorised UN members to provide assistance to South Korea and to restore peace in the Korean Peninsula.[141] Aware that the USSR's return would make it impossible to adopt any new resolutions in the Security Council, the United States sought an alternative path. It succeeded in convincing the General Assembly to approve a UFP resolution, since, in the United Nations' early years, the majority of Members had an affinity with the Western world.[142] That resolution stated that if the Security Council, 'because of lack of unanimity of the permanent members', were to fail to exercise its primary responsibility for the maintenance of peace in the case of a breach of the peace or acts of aggression, the General Assembly would consider the matter immediately with a view to making appropriate recommendations to the UN members for collective measures, including the use of armed force when it is necessary

[140] Dominik Zaum, 'The Security Council, The General Assembly, and War: The Uniting for Peace Resolution', in Lowe et al. (eds), The *United Nations Security Council and War* (n. 15), 154–74.

[141] SC Res. 82 of 25 June 1950, UN Doc. S/RES/82(1950); SC Res. 83 of 27 June 1950, UN Doc. S/RES/83(1950); SC Res. 84 of 7 July 1950, UN Doc. S/RES/84(1950).

[142] GA Res. 377 (V) of 3 December 1950, UN Doc. A/RES/377(V).

to maintain or restore peace and security.[143] In other words, the General Assembly, on these occasions, would assume the 'primary' responsibility for the maintenance of peace.

Actions under the UFP procedure were taken four times in the 1950s.[144] However, it was rarely used in the following decades[145] – until it was again applied in response to the Russian invasion in Ukraine.

B. *The 'New World Order'*

The 'New World Order' was a fashionable political discourse in the 1990s and 2000s. In his address delivered before the US Congress on 11 September 1990, President George W. Bush introduced his conception of the 'New World Order':

> [O]ur fifth objective – a new world order – can emerge; a new era – freer from the threat of terror, stronger in the pursuit of justice, and more secure in the quest for peace, an era in which the nations of the world, East and West, North and South, can prosper and live in harmony. A hundred generations have searched for this elusive path to peace, while a thousand wars raged across the span of human endeavour. Today, that new world is struggling to be born, a world quite different from the one we have known, a world where the rule of law supplants the rule of the jungle, a world in which nations recognize the shared responsibility for freedom and justice, a world where the strong respect the rights of the weak.[146]

While there were debates, at the outset, as to what it really meant[147] and whether it would come to fruition, the 'New World Order' betokened a less confrontational and more harmonious world for many states. Indeed, China and Russia were optimistic about what the world might look like after the Cold War. In a declaration issued jointly in 1997, Russia and China stated:

> The Parties believe that profound changes in international relations have taken place at the end of the twentieth century. The cold war is over. The

[143] *Ibid.*, para. 1: 'If not in session at the time the General Assembly may meet in emergency special session within twenty four hours of the request thereof. Such emergency special session may be called if requested by the Security Council on the vote of any seven members, or by a majority of the United Nations.'

[144] Lowe et al. (eds), *The United Nations Security Council and War* (n. 15), appx 6.

[145] Zaum, 'The Uniting for Peace Resolution' (n. 140), 160, 166.

[146] George H. W. Bush, 'Toward a New World Order', *US Department of State Dispatch* 1 (1990), 91–4.

[147] Joseph S. Nye, Jr., 'What New World Order', *Foreign Affairs* 71 (1992), 83–96; Anne-Marie Slaughter, 'The Real New World Order', *Foreign Affairs* 76 (1997), 183–97.

> bipolar system has vanished. A positive trend towards a multipolar world is gaining momentum, and relations between major States, including former cold-war adversaries, are changing.[148]

The New World Order had two major features: first, democracy and human rights attained greater importance in the foreign policy of the Western states than they had during the Cold War; second – and more importantly – the Western states acquired overwhelming power to pursue their foreign policy agendas and the world entered a 'unipolar' era. The United States became 'the first and the only truly global power' in the wake of the Cold War.[149] The USSR disappeared in December 1991. Yeltsin-led Russia struggled to rebuild the nation and was neither powerful enough nor willing to challenge the US-led international order; rather, Russia adopted a pro-Western policy. China, meanwhile, was under a wide range of sanctions imposed by Western states who accused China of forcefully suppressing protests in Tiananmen Square in 1989.[150] For China, release from international sanctions and improved relations with the Western world were a priority, and hence China maintained a policy of 'keeping a low profile' in international relations.[151]

This context has significantly shaped the workings of the Security Council since the 1990s. Now with unrivalled power, the United States and like-minded states felt comfortable reshaping the world order – in particular, the workings of the Security Council – to meet their own expectations. They encountered few difficulties in pursuit of the Security Council's approval for measures they favoured. While Russia and China were not supportive of many of these measures, they were reluctant to exercise their veto power; their abstention votes grew significantly in the 1990s, compared with the 1980s – Russia, from 15 to 20, and China, from 13 to 42.[152] This gave many people the impression that unity existed among the great powers of the Security Council.

In this new context, the Security Council played a more complicated role in the maintenance of peace. On the one hand, it succeeded more often in taking

[148] Annex to letter dated 15 May 1997 from the Permanent Representatives of China and the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc. S/1997/384 ('Russian-Chinese Joint Declaration on a Multipolar World and the Establishment of a New International Order, adopted in Moscow on 23 April 1997').

[149] Zbigniew Brzezinski, *The Grand Chessboard: American Primacy and its Geostrategic Imperatives* (New York: Basic Books, 1997), 3–29.

[150] See Rosemary Foot, *Rights beyond Borders: The Global Community and the Struggle over Human Rights in China* (Oxford: Oxford University Press, 2000), 113–49.

[151] John W. Garver, *China's Quest: The History of the Foreign Relations of the People's Republic of China* (Oxford: Oxford University Press, 2016), 486–7.

[152] Joel Wuthnow, *Chinese Diplomacy and the UN Security Council: Beyond the Veto* (London: Routledge, 2013), 19, 21.

'prompt and effective measures' to address threats to international peace, increasing international confidence in the UN collective security system and defending an international order centred on the UN Charter. On the other hand, some measures that the Security Council adopted were controversial both within or outside the Security Council and opened the door to different interpretations, risking misuse and abuse.

After Iraq invaded Kuwait on 2 August 1990, the Security Council adopted six resolutions within four months.[153] Resolution 660, for example, condemned the Iraq invasion of Kuwait, demanding 'that Iraq withdraw immediately and unconditionally all its forces' from Kuwait. Resolution 678, in particular, authorised UN members to use 'all necessary measures' to enforce Resolution 660 unless Iraq implemented it. The permanent members vetoed only one Security Council resolution concerning the Gulf War in 1990 – that one a resolution concerning humanitarian need proposed by Cuba but vetoed by the United States, the United Kingdom, and France.[154] On 17 January 1991, in accordance with Resolution 678, a US-led coalition of states initiated collective action against Iraq and soon expelled the Iraqi forces from Kuwait. Resolution 687 acknowledged 'the restoration to Kuwait of its sovereignty, independence and territorial integrity and the return of its legitimate Government'.

Ten years later, the Security Council acted promptly after terrorist attacks against the World Trade Centre in New York on 11 September 2001. One day after the attack, the Security Council members unanimously adopted Resolution 1368 to combat 'by all means' threats to international peace and security caused by terrorist acts.[155] More importantly, the Resolution mentioned in its Preamble 'the inherent right of individual or collective self-defence in accordance with the Charter'. Thus Resolution 1368 implied that non-state actors could trigger Article 51 UN Charter, which had traditionally been understood as being applicable to attacks by sovereign states.[156]

[153] SC Res. 660 of 2 August 1990, UN Doc. S/RES/660(1990); SC Res. 661 of 6 August 1990, UN Doc. S/RES/661(1990); SC Res. 662 of 9 August 1990, UN Doc. S/RES/662(1990); SC Res. 664 of 18 August 1990, UN Doc. S/RES/664(1990); SC Res. 665 of 25 August 1990, UN Doc. S/RES/665(1990); SC Res. 666 of 13 September 1990, UN Doc. S/RES/666(1990); SC Res. 667 of 16 September 1990, UN Doc. S/RES/667(1990); SC Res. 669 of 24 September 1990, UN Doc. S/RES/669(1990); SC Res. 670 of 25 September 1990, UN Doc. S/RES/670(1990); SC Res. 674 of 29 October 1990, UN Doc. S/RES/674(1990); SC Res. 678 of 28 November 1990, UN Doc. S/RES/678(1990).

[154] UN Doc. S/PV.2939, 14 September 1990, 6.

[155] SC Res. 1368 of 12 September 2001, UN Doc. S/RES/1368(2001), cons. 2.

[156] According to Christian J. Tams, a state's self-defence against a non-state actor 'ostensibly seems to fall foul of the prohibition against the use of force in international relations,

Surprisingly, such a significant legal breakthrough met with no challenge in the Security Council when the draft resolution was debated. It should be noted, however, that not all UN members were in support of it. Specifically, members were divided in the UN General Assembly debate on terrorism in early 2001 as to whether the provision of self-defence could serve as a legal basis to combat terrorism. The legal propriety and consequence of Resolution 1368 remains open to debate.[157]

Nevertheless, the Security Council after the Cold War seemed more susceptible to power politics. Significantly, it has sometimes had to legitimise, in some sense, those actions that were taken by several great powers but opposed by many of the other members. The 1999 Kosovo War is an example.[158] The Security Council did not authorise NATO's use of force against the Federal Republic of Yugoslavia (FRY) and some of NATO's members recognised that there was no legal basis for the use of force. Yet NATO conducted airstrikes against the FRY for 70 days in the name of a humanitarian emergency in the FRY.[159] It should be stressed that few UN members accepted this explanation and many contended that NATO's actions were categorically unlawful under the UN Charter.[160] While Russia and China condemned NATO's flagrant violation of the Charter provision prohibiting the use of force, they could not stop NATO's actions inside or outside of the Security Council. Ultimately, they had to accept that Resolution 1244 mapped a way out of the Kosovo crisis in line with the principles established by the then Group of Eight (G8) foreign ministers.[161]

enshrined in Art. 2(4) of the UN Charter and customary international law': Christian J. Tams, 'Self-Defence against Non-State Actors: Making Sense of the "Armed Attack" Requirement', in Mary-Ellen O'Connell, Christian Tams, and Dire Tladi, *Self-Defence against Non-State Actors*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 1 (Cambridge: Cambridge University Press, 2019), 90–173 (95). Tams appears to admit that an extension of self-defence does not find support from the literal provision of Art. 51 or conventional understanding of Art. 2(4): *ibid.*, 112–16. He argues that '[w]hile the Charter does not stipulate that the armed attack must be by "a State", this has, until recently, been the generally accepted interpretation of Article 51', and that this interpretation 'is consistent with the context of the Charter provisions': *ibid.* In contrast, the arguments based on 'practice' that international law permits the unilateral use of force in self-defence against non-state actors are 'at best unconvincing and, at worst, dangerous': *ibid.*, 87–8.

157 *Ibid.*, 36–52; Michael Byers, 'The Intervention in Afghanistan – 2001', in Ruys et al. (eds), *The Use of Force in International Law* (n. 15), 625–38.

158 Daniel Franchini and Antonios Tzanakopoulos, 'The Kosovo Crisis – 1999', in Ruys et al. (eds), *The Use of Force in International Law* (n. 15), 594–622 (594–7).

159 *Ibid.*, 598–603.

160 *Ibid.*, 603–4.

161 SC Res. 1244 of 10 June 1999, UN Doc. S/RES/1244(1999). Russia cast an affirmative vote, while China abstained. The G8 comprised the United States, the United Kingdom, France, Germany, Italy, Canada, Japan, and Russia.

We can also see some evidence of the Security Council legitimising the consequences of a use of force in the context of the 2003 Iraq War. Resolution 687 included disarmament obligations for Iraq in the package of measures targeting threats to peace arising from Iraq's invasion of Kuwait. Given Iraq's failure to fully implement those obligations, the Security Council adopted several resolutions in the following years. Resolution 1441, for example, offered Iraq 'a final opportunity' to comply with its disarmament obligations.[162] Some Security Council members recognised that Iraq had made progress towards compliance with those obligations. However, the United States, the United Kingdom, and like-minded states asserted that Iraq had cheated the world again and again. On 18 March 2003, they launched 'Operation Iraqi Freedom' and overturned the regime of Saddam Hussein – even though the United States and the United Kingdom disagreed somewhat over the legal basis of their operation. The United States argued that if Resolution 1441 were not effectively enforced, the use of force would be justified.[163] In contrast, the United Kingdom's legal advisers have tended to believe that they needed a new Security Council resolution to authorise the use of force.[164]

It was later found that there was no evidence that Iraq had violated the disarmament obligations.[165] In addition to ruining Iraq, 'Operation Iraqi Freedom' had other serious consequences – not least that an enfeebled Iraq became a breeding ground for terrorism, including the so-called Islamic State of Iraq and Syria (ISIS), which constituted a new threat to international peace in the Middle East. All across the world 'Operation Iraqi Freedom' was condemned as unlawful, and the United States and its allies were accused of having committed an aggression.[166] Yet the United States and the United Kingdom were not held accountable for their actions.

[162] SC Res. 1441 of 8 November 2002, UN Doc. S/RES/1441(2002).

[163] The United States stated that '[i]f the Security Council fails to act decisively in the event of further Iraqi violation, this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security': UN Doc. S/PV.4633, 8 November 2002, 3.

[164] Michael Wood, legal adviser to the UK Foreign and Commonwealth Office, warned that, 'without a further decision by the Council, and absent extraordinary circumstances', the United Kingdom would not be able to lawfully use force against Iraq: *The Report of the Iraq Inquiry*, Report of a Committee of Privy Counsellors, vol. 5, HC 265-V, Pt 5 ('Advice on the Legal Basis for Military Action, November 2002 to March 2003'), 65.

[165] UN Doc. S/PV.4768, 3 June 2003, 2.

[166] Marc Weller, 'The Iraq War – 2003', in Ruys et al. (eds), *The Use of Force in International Law* (n. 15), 639–61 (647–50).

C. A 'New Cold War'?

Given the deteriorating relations between the Western world and Russia and China during the past decade, there has been a growing concern that the world is at risk of sinking into a 'new Cold War'.[167] Speaking at a China–US think tanks media forum, China's Foreign Minister Wang Yi refused to give a direct answer when asked about the possibility of a 'new Cold War' brewing between China and the United States; instead, he cautioned that if the United States 'chooses to conjure up "China Threats" of various kinds, its paranoia may turn into self-fulfilling prophecies at the end of the day.'[168] In contrast, Russia's attitude is frank. Russian Foreign Minister Sergey Lavrov has explicitly warned of the start of a 'new Cold War'.[169] Either way, it appears certain that the world now faces a power constellation similar to that of the Cold War, which may again significantly affect the workings of the Security Council.

As already noted, Russia had adopted a pro-Western policy in the 1990s, with the expectation that it would be welcomed as a partner to or member of the Western world. Russia was soon disappointed. Not only did NATO not disband when the Warsaw Treaty Organization ceased to exist, but also it expanded eastward to include several Eastern European countries that had been members of the former USSR. NATO constantly expanded its influence over other Eastern European countries and over former USSR members, some of whom sought NATO membership.[170] From the perspective of international law, NATO had the right to expand and the relevant states had the right to apply for NATO membership. From the perspective of power politics, however, these actions placed Russian strategic interests at stake.[171] Russia claimed that NATO's expansion – along with an increased NATO military presence and activities approaching the Russian border – constituted 'a violation of the principle of equal and indivisible security and [led]

[167] Eric Engle, 'A New Cold War? Cold Peace, Russia, Ukraine, and NATO', *Saint Louis University Law Journal* 59 (2014), 97–174.

[168] Wang Yi, 'Stay on the Right Track and Keep Pace with the Times to Ensure the Right Direction for China–US Relations', 9 July 2020, available at www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/202007/t20200709_468780.html.

[169] Andrea Peters, 'Russian Foreign Minister Warns of a New "Cold War"', *World Socialist Website*, 28 April 2021, available at www.wsws.org/en/articles/2021/04/29/rutr-a29.html.

[170] Andrey Makarychev, 'Russia, NAFTA, and the "Color Revolution"', *Russian Politics and Law* 47 (2009), 40–51.

[171] J. L. Black, 'Russia and NATO Expansion Eastward: Red-Lining the Baltic States', *International Journal* 54 (1999), 249–66.

to the deepening of old dividing lines in Europe and to the emergence of new ones'.[172]

In fact, some Western strategic analysts had already warned of the potential negative impact of NATO's expansion.[173] After Vladimir Putin became president in 2000, Russia began to 'leave … the West'[174] and turned to a more aggressive foreign policy. The Syrian crisis is an example.[175] Unlike Ukraine, Syria is not a part of the former USSR, but it is one of few places where Russia can still exercise strategic deterrence in lieu of the Western powers. The struggle between Russia and the Western powers is a major cause of the Syrian crisis that has already lasted more than ten years. Notably, UN Secretary-General António Guterres has explicitly referred to it as a 'proxy war': in Syria, 'we see confrontations and proxy wars involving several national armies, a number of armed opposition groups, many national and international militias, foreign fighters from all over the world and various terrorist organizations'.[176]

The Ukrainian crisis, however, could have a more destructive impact on international peace. People are not shy in talking about it in Cold War terms. From the Russian perspective, NATO's eastern expansion to include Ukraine constitutes a strategic threat to Russia; thus Russia asserts that Ukraine 'is merely a geopolitical playground for some Western politicians'.[177] In contrast, Western powers suggest that Russia is the very source of rebels and the secessionist movement in the eastern part of Ukraine.

An event crucial to the crisis occurred in 2014, after the local Crimean government held an independence referendum in March that was unconstitutional under Ukrainian law and Russia immediately accepted Crimea's application to become a part of Russia. The Western powers condemned Russia's action as an annexation. They explicitly compared the Crimean crisis with what the USSR once did to Hungary and Czechoslovakia. The United Kingdom stated: 'This is not 1968 or 1956. The era in which one country can suppress democratisation in a neighbouring state through military intervention on the

[172] Foreign Policy Concept of the Russian Federation, 30 November 2016, available at https://interkomitet.com/foreign-policy/basic-documents/foreign-policy-concept-of-the-russian-federation-approved-by-president-of-the-russian-federation-vladimir-putin-on-november-30-2016/, para. 70.

[173] See, e.g., John J. Mearsheimer, 'Why the Ukraine Crisis is the West's Fault: The Liberal Delusions that Provoked Putin', *Foreign Affairs* 93 (2014), 1–12.

[174] Dmitri Trenin, 'Russia Leaves the West', *Foreign Affairs* 85 (2006), 87–96.

[175] Anne Lagerwall, 'Threats of and Actual Military Strike against Syria – 2013 and 2017', in Ruys et al. (eds), *The Use of Force in International Law* (n. 15), 828–54 (828–33).

[176] UN Doc. S/PV.8233, 14 April 2018, 2.

[177] UN Doc. S/PV.7125, 3 March 2014, 4.

basis of transparently trumped-up pretexts is over."[178] Similarly, France's representative argued: 'It is in fact the voice of the past that we have just heard. I was 15 years old in August 1968, when the USSR forces entered Czechoslovakia. We heard the same justifications, the same documents being flaunted and the same allegations."[179] On 1 April 2014, the General Assembly adopted Resolution 262 calling for all states 'to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means'.[180] It is noteworthy, however, that only 100 states supported the Resolution, while 58 states abstained and 11 states opposed it. Nearly all of the states, including those that cast abstention votes, expressed their support for the principle of sovereignty and territorial integrity. It seems as though some of them considered the annexation partly attributable to the Western powers. For example, Ecuador stated that the 'irresponsible presence of foreign politicians' aggregated violence in Ukraine, which were the 'precedents' for the referendum taking place in Crimea and the basis for Russia consenting to Crimea's application to join Russia.[181]

The Ukrainian crisis deteriorated into the so-called SMO that Russia waged on 22 February 2022. The UN General Assembly, by convening an Emergency Special Session, adopted a resolution on 2 March 2022[182] – after 141 states voted in favour of it, 5 opposed it, 35 abstained, and 12 states did not vote. Resolution ES-11/1 states that the SMO constitutes an aggression against Ukraine. The Resolution recognises that the SMO is 'on a scale that the international community has not seen in Europe in decades' and that urgent action is needed to 'save this generation from the scourge of war'.[183] It condemns the SMO and states that 'no territorial acquisition resulting from the threat or use of force shall be recognized as legal'.[184]

Two additional points are worth mentioning. First, while the European Union, most NATO members, and some of the United States' allies (i.e., some 50 states or so) have imposed a wide range of sanctions on Russia, and have provided economic and military assistance to Ukraine, most states have maintained normal relations with Russia, even though they supported the General Assembly's Resolution ES-11/1. Second, while it is clearly impossible to adopt any meaningful actions through the Security Council, NATO has not

[178] *Ibid.*, 7. See also UN Doc. S/PV.7138, 15 March 2014, 3.
[179] UN Doc. S/PV.7125, 3 March 2014, 5.
[180] GA Res. 68/262 of 1 April 2014, UN Doc. A/RES/262(2014), 2.
[181] UN Doc. A/68/PV.80, 7 March 2014, 124–5.
[182] GA Res. ES-11/1 of 1 March 2022 on aggression against Ukraine, UN Doc. A/RES/ES-11/1.
[183] *Ibid.*
[184] *Ibid.*

directly undertaken intervention as the United States did in the Kosovo War. Furthermore, although the UFP procedure was triggered because the General Assembly convened an Emergency Special Session, the General Assembly, in Resolution ES-11/1, did not take strong action as it had done on the occasion of the Korean War in the 1950s.[185] This partly supports an argument proposed a decade ago: that what has occurred in Ukraine is a 'proxy war'.[186]

There is also a growing concern that a 'new Cold War' will occur between China and the United States.[187] This has been betokened by the fact that the United States identifies China both as the only country with the intent to reshape the international order[188] and, in particular, as a country attempting to 'challenge American power, influence, and interests, attempting to erode American security and prosperity'.[189] As a result, in 2020, the United States announced its plans to compete with China 'through a whole-government approach and guided by a return to principled realism'.[190]

In this context, it is of grave concern to the Western powers that Russia and China might develop an alliance, since both are in a strategic struggle with the US-led Western powers. Currently, the two states define their relationship as a 'comprehensive strategic partnership'.[191] While China has established comprehensive strategic partnerships with many other states, that between China and Russia is far more profound given their leading role in international relations, including their permanent membership on the Security Council. In recent years, the two states have issued a number of significant statements

[185] Michael Ramsden, 'Uniting for Peace: The Emergency Special Session on Ukraine', *Harvard Journal of International Law*, April 2022, available at https://journals.law.harvard.edu/ilj/2022/04/uniting-for-peace-the-emergency-special-session-on-ukraine/.

[186] Geraint Hughes, 'Ukraine: Europe's New Proxy War', *Fletcher Security Review* 1 (2014), 105–18; Robert Heinsch, 'Conflict Classification in Ukraine: The Return of the Proxy War', *International Law Studies Series* 91 (2015), 323–60.

[187] Odd Arne Westad, 'The Sources of Chinese Conduct: Are Washington and Beijing Fighting a New Cold War?', *Foreign Affairs* 98 (2019), 86–95 (87).

[188] Antony J. Blinken, 'The Administration's Approach to the People's Republic of China', 26 May 2022, available at www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/.

[189] National Security Strategy of the United States of America, December 2017, available at https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf, 2.

[190] United States Strategic Approach to the People's Republic of China, 26 May 2020, available at https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.24v1.pdf, 16.

[191] See, e.g., Joint Statement of the People's Republic of China and the Russian Federation on the Development of a Comprehensive Strategic Partnership for Collaboration in the New Era, 5 June 2019; Joint Statement between the People's Republic of China and the Federation of Russia, 8 June 2018.

regarding their common stances on international relations and international law. On 25 June 2016, the two states released a joint declaration on international law, in which they elaborated their common stances on several crucial issues.[192] For example, they argued that any attempts of 'regime change' and extraterritorial application of national law violate the principle of non-intervention.[193] They also submitted that international dispute settlement means and mechanisms should be based on consent, and used in good faith and in the spirit of cooperation (i.e., that they should not be abused).[194] In addition, they suggested that the imposition of unilateral coercive measures 'defeat[s] the objects and purposes of measures imposed by the Security Council, and undermine[s] their integrity and effectiveness'.[195]

In March 2021, the two issued a joint statement on global governance.[196] This statement highlighted the significance of good relations among states – especially among the 'major global powers'. It urged them 'to strengthen mutual trust and to be in the forefront of defending international law as well as the world order based on it'.[197] For this purpose, it called for dialogues 'aimed at rapprochement of all countries, not disunion; at cooperation, not confrontation'.[198] On the one hand, this statement, as Achilles Skordas observes, indicates that the two states have turned to a concerted approach to global governance, which include several other leading powers beyond the P5, and may thus please those states.[199] On the other hand, because of the two states' stance on human rights and democracy, which Skordas characterises as pro-sovereignty, he suggests that the two states seem to promote or induce an 'authoritarian' global governance.[200]

Compared with these previous statements, the joint statement that China and Russia issued on 4 February 2022 – after Russia's SMO against Ukraine – seemed to stir more caution among the Western powers.[201] In addition to reaffirming many common positions that had already been formulated in prior

[192] Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016.
[193] *Ibid.*, para. 4.
[194] *Ibid.*, para. 5.
[195] *Ibid.*, para. 6.
[196] Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions, 23 March 2021.
[197] *Ibid.*
[198] *Ibid.*
[199] Achilles Skordas, 'Authoritarian Global Governance? The Russian-Chinese Joint Statement of March 2021', *Heidelberg Journal of International Law* 81 (2021), 293–302 (299, 301).
[200] *Ibid.*, 295–6, 302.
[201] Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development, 4 February 2022, available at http://en.kremlin.ru/supplement/5770.

documents, this statement included a sentence with distinctly Chinese characteristics: 'Friendship between the two States has no limits, there are no "forbidden" areas of cooperation.'[202] Some Western powers may have experienced this sentence as provocative, aggravating their concerns about whether the partnership between China and Russia may become an alliance. In my view, however, this diplomatic language does not mean that a substantial change to China's foreign policy is forthcoming, including for its policy on Russia. We can look, for evidence, at the 'Five Points' on the SMO that China announced on 25 February 2022.[203]

Many Western powers are unhappy with the 'Five Points' because China neither joined them in condemning the SMO nor imposed sanctions on Russia[204] – but China's position is not exceptional. As already noted, 52 UN members – including China and India – either opposed, abstained, or did not vote on General Assembly Resolution ES-11/1 condemning Russia's SMO. More importantly, few states imposed sanctions on Russia. As a matter of fact, in its 'Five Points', China expressed its support for Ukraine by reaffirming its long-standing policy of respect for the sovereignty and territorial integrity of all countries, including for the purposes and principles of the UN Charter. In particular, the 'Five Points' explicitly stated that the position 'applies equally to the Ukraine issue'.[205] China neither said the SMO was lawful nor did it provide assistance to Russia.

Nevertheless, it is also obvious that China shares stances with Russia on other issues because both states face hostility from some Western powers. For instance, in the 'Five Points', China argues that states should pursue a policy of 'common, comprehensive, cooperative and sustainable security', which is threatened by military alliances.[206] This statement has been made not only because China considers the Ukrainian crisis, including the SMO, largely attributable to NATO's expansion[207] – an idea shared by some Western observers[208] – but also because NATO, which identifies China as posing

[202] *Ibid.*

[203] Ministry of Foreign Affairs of the People's Republic of China, 'Wang Yi Expounds China's Five-Point Position on the Current Ukraine Issue', 26 February 2022, available at www.fmprc.gov.cn/eng/zxxx_662805/202202/t20220226_10645855.html.

[204] *Ibid.*

[205] *Ibid.*

[206] *Ibid.*

[207] *Ibid.*

[208] See, e.g., The Robert Schuman Centre of Advanced Studies, 'The Causes and Consequences of the Ukraine War: A Lecture by John J. Mearsheimer', 6 June 2022, available at www.youtube.com/watch?v=qciVozNtCDM. See also Mearsheimer, 'Why the Ukraine Crisis is the West's Fault' (n. 173).

systematic challenges to Euro-Atlantic security,[209] has encroached upon the Asia-Pacific region in recent years, thereby increasing security pressures on China. In short, given their common challenges and threats, it is unsurprising that China has deepened its comprehensive strategic partnership with Russia. However, China has not changed, and is not expected to substantially change, its long-standing foreign policy. The conception of common security and comprehensive security, under which China is always critical of military alliance, was not first stated in the 'Five Points'; it was expounded on as early as 20 years ago.[210]

This new constellation of power has brought the Security Council into a more troubled position. Consider the role of the Security Council in the Syrian and Ukrainian crisis as examples. Seventeen draft resolutions concerning the Syrian crisis were vetoed between 2011 and 2019.[211] By contrast, while the Security Council held many meetings on the Ukrainian crisis, only one draft resolution has been co-sponsored by 42 UN members between 2014 and 2021, and it was vetoed by Russia.[212] This indicates that the UN members have no expectation that the Security Council can make a difference in handling the Ukrainian crisis and thus they have no intention of proposing more draft resolutions for debate. As of August 2022, the Security Council had held more than 15 meetings discussing peace and security in Ukraine arising from Russia's SMO, but no other resolutions had been adopted other than one calling for an emergency special session of the General Assembly.[213]

Accordingly, actions outside the Security Council are expected to increase. Efforts aiming to end the Ukrainian crisis are undertaken outside the Security Council, such as the international sanctions on Russia imposed by individual

[209] NATO 2022 Strategic Concept, 29 June 2022, available at www.nato.int/cps/en/natohq/topics_210907.htm, para. 14.

[210] Ministry of Foreign Affairs of the People's Republic of China, 'China's Position Paper on the New Security Concept', 31 July 2002, available at www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/gjs_665170/gjzzyhy_665174/2612_665212/2614_665216/200208/t20020806_598568.html, Pt III.

[211] Draft SC Res. S/2019/962 of 20 December 2019; Draft SC Res. S/2019/757 of 19 September 2019; Draft SC Res. S/2019/756 of 19 September 2019; Draft SC Res. S/2019/961 of 20 December 2019; Draft SC Res. S/2018/355 of 14 April 2018; Draft SC Res. S/2018/322 of 10 April 2018; Draft SC Res. S/2018/321 of 10 April 2018; Draft SC Res. S/2017/172 of 28 February 2017; Draft SC Res. S/2017/315 of 12 April; Draft SC Res. S/2016/1026 of 5 December 2016; Draft SC Res. S/2016/1026 of 5 December 2016; Draft SC Res. S/2016/846 of 8 October 2016; Draft SC Res. S/2016/847 of 8 October 2016; Draft SC Res. S/2014/348 of 22 May 2014; Draft SC Res. S/2012/538 of 19 July 2012; Draft SC Res. S/2012/77 of 4 February 2012; Draft SC Res. S/2011/612 of 4 October 2011.

[212] Draft SC Res. S/2014/189 of 15 March 2014.

[213] SC Res. 2623 of 27 February 2022, UN Doc. S/RES/2623(2022).

states and the European Union without the Council's approval. According to Van den Herik, in this volume, these unilateral sanctions 'should not be regarded as a challenge to the UN Security Council but rather as a correction in the event of inactivity'.[214] This position is arguably right in the unique instance of the SMO. On the one hand, Russia absolutely would not allow the Security Council to approve any actions that aim to end the SMO, which means that the Security Council can do nothing. On the other hand, while many states do not explicitly condemn the SMO, few, if any, states regard the SMO to be lawful. More importantly, the General Assembly adopted Resolution ES-11/1 identifying Russia's aggression against Ukraine. However, we should not be blind to the possibility that these sanctions may be abused. As Van den Herik notes, some legal regimes and mechanisms at the international and domestic levels are already in place to scrutinise the enforcement of the UN sanctions, even though they are not yet perfect.[215] Nevertheless, unilateral sanctions, as a general matter, are likely to be abused by the great powers.

D. *The Security Council for International Peace – or for Peace between Only the Great Powers?*

As noted in section I, Bosco thinks the Security Council has demonstrated that it is unable to effectively address threats to peace, and that the vision of maintaining international peace should therefore be abandoned and priority given to tactics that avoid military conflicts between the great powers. Bosco has observed that while, on several occasions, military conflicts occurred between the United States and the USSR, the two always managed to 'pull back in time', and that there have never been prolonged military clashes between permanent members of the Security Council.[216] Not only does Bosco's proposition run counter to the Security Council's primary responsibility for maintaining international peace but also it dismantles the very rationale for the founding of the United Nations, which aimed to save the world from 'the scourge of war'.[217] In fact, it is hard to say to what extent the Security Council matters in keeping peace between the great powers. A major reason behind the great powers' avoidance of sustained military conflict

[214] Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section IV.A.
[215] *Ibid.*, section IV.B.
[216] Bosco, *Five to Rule Them All* (n. 20), 6.
[217] UN Charter, Preamble.

between them is that each of them has a powerful military and hence none can afford sustained or large-scale military conflict with another great power.

Nevertheless, Bosco's heretical argument is meaningful. It is indeed necessary to improve the functionality of the Security Council – especially by finding ways of reducing the negative impact of power politics among the great powers. All of the contributors to this volume seek to achieve this purpose from different perspectives.

IV. NOVEL THREATS AND THE RESPONSE OF THE SECURITY COUNCIL

From the perspective of the UN Charter and more importantly, in international relations when the UN Charter was initially drafted in the 1940s, 'threat to the peace' in Article 39 referred to military threats to international peace among states.[218] This fundamentally determined the Security Council's institutional structure and culture.

The world has changed significantly since the UN Charter was initially drafted – especially since the 1990s, which witnessed the end of Cold War and the acceleration of globalisation. In a globalised world, new risks and threats have emerged, and some of them are too grave to be effectively addressed by states individually. To address them effectively, states have needed to seek more involvement from international institutions, including the United Nations. As a result, it has been recognised that the very meaning of 'threat to the peace' should be updated. In its report *A More Secure World*, UN High-Level Panel on Threats, Challenges, and Change advised that the Security Council is fully empowered under Chapter VII to address 'the full range of security threats with which States are concerned'.[219] Indeed, 'threat to the peace' has been interpreted more broadly over time – but while the UN members generally support a more liberal interpretation of 'threat to the peace', disagreements remain. Even though threats such as HIV/AIDS, for example, may not be less dangerous than wars, whether they should be addressed as threats under the terms of Article 39 remains a contentious issue.

Many studies have been done to determine what constitutes a 'threat to the peace'.[220] Here, I examine how the Security Council addresses novel threats by focusing on public health, extremism, and cyber-attacks, elaborating on

[218] Kelsen, *The Law of the United Nations* (n. 78), 930.
[219] *A More Secure World* (n. 26), para. 198.
[220] See, e.g., Inger Österdahl, *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter* (Uppsala: Och Justus Forlag, 1998).

whether it is desirable for the Security Council to expand its authority as much as possible, what side-effects its activities aiming to protect the peace may have, and whether a purely legalist approach is feasible to address threats to the peace.

A. *International Public Health Crisis*

At time of writing, COVID-19 is one of the most significant new international threats international society has encountered. The UN Security Council was criticised for its silence in response to the threat – a silence that lasted several months after the outbreak of the pandemic.[221] From April 2020 to May 2021, the Security Council held 15 meetings discussing issues related to the virus, including the implications of the pandemic for sustaining peace, equitable access to vaccines, and the cessation of hostilities.[222] In Resolution 2532, adopted on 1 July 2020, the Security Council stated that 'the unprecedent extent of COVID-19 pandemic is likely to endanger the maintenance of international peace and security', and it thus demanded 'a general and immediate cessation of hostilities in all situations'. While, in that Resolution, the Security Council did not mention any particular provisions of the UN Charter, it decided to 'remain seized of the matter'.

COVID-19 is not the first public health issue to be brought before the Security Council. The Security Council debated the AIDS pandemic in Africa between 2000 to 2005. During that time, the United States observed that '[w]e tend to think of a threat to security in terms of war and peace. Yet no one can doubt that they havoc wreaked and the toll exacted by HIV/AIDS do threaten our security.'[223] In its view, AIDS was 'a global aggressor'.[224] Given that the United Nations was created to stop wars, the United States suggested that '[n]ow we must wage and win a great and peaceful war of our time – the war against AIDS',[225] asking, '[H]ow could it not be a threat to international peace and security?'[226] Clearly, in the United States' view, the grave impact of AIDS qualified it as a 'threat to peace'. However, the United States did not

[221] Security Council Report, 'International Peace and Security, and Pandemics: Security Council Precedents and Options', 5 April 2020, available at www.securitycouncilreport.org/whatsinblue/2020/04/international-peace-and-security-and-the-covid-19-pandemic-security-council-precedents-and-options.php.

[222] For a list, see Security Council Report, 'Health Crises', available at www.securitycouncilreport.org/health-crises/page/2.

[223] UN Doc. S/PV.4087, 10 January 2000, 2.

[224] *Ibid.*, 5.

[225] *Ibid.*, 7.

[226] UN Doc. S/PV.4227, 17 November 2000, 10.

suggest what the Security Council could do to combat the threat. By contrast, the other four permanent members of the Security Council held a different position.[227] China acknowledged that AIDS 'has not only constituted a major threat to human life and health, but seriously affected the economic development and social stability of the countries and regions concerned. Thus it has become one of the most important non-traditional security issues.'[228] However, China suggested that fighting the AIDS epidemic should be left to other 'relevant international bodies'.[229] This does not mean, however, that China thought a public health crisis such as AIDS irrelevant to international peace. China supported the Security Council in accordance with its mandate and devoted increased attention to the issue of peacekeepers and HIV/AIDS, as well as the impact of AIDS on peace and security.[230] The United Kingdom too argued that an effective response to AIDS 'needs the coordinating response of the United Nations bodies, including the Security Council'.[231] Russia thought AIDS, generally, was an issue for other UN organs – especially the General Assembly, the Economic and Social Council, and the Secretariat.[232] Similarly, France suggested that AIDS, as a whole, was an issue that fell outside the Security Council and landed with the Secretariat.[233] Ultimately, while it held many meetings, the Security Council did not adopt any resolutions on AIDS.

In short, some novel international issues are indeed relevant to international peace. Especially when they affect certain of its measures, the Security Council needs to consider taking action to prevent its mission from being disrupted by threats such as COVID-19, even if they may not constitute 'threats to peace' as such. The alternative, as illustrated shortly, is that such attempts may mean little and risk exacerbating disagreements between the UN members, while disrupting international efforts to address specific international matters. Based on her observations of the attitudes of some states – especially developing states – Van den Herik is also cautious about the consequences of treating matters such as public health as security issues within the reach of the Security Council.[234]

[227] Tamsin Phillipa Paige, *Petulant and Contrary: Approaches by the Permanent Five Members of the UN Security Council to the Concept of 'Threat to the Peace' under Article 39 of the UN Charter* (Leiden: Brill Nijhoff, 2017), 164–6.
[228] UN Doc. S/PV.5228, 18 July 2005, 14.
[229] UN Doc. S/PV.4859, 17 November 2003, 16.
[230] UN Doc. S/PV.5228, 18 July 2005, 14.
[231] UN Doc. S/PV.4259, 19 January 2001, 20.
[232] UN Doc. S/PV.4859, 17 November 2000, 13.
[233] *Ibid.*, 17–18.
[234] Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section V.

Still, the possibility that threats such as COVID-19 will be identified as a 'threat to the peace' ought not to be totally precluded. As the debates on AIDS and COVID-19 in the Security Council suggest, there are several factors that the Security Council may consider when identifying a 'threat to the peace'. One is whether the relevant impact is on the same level as those that have already been identified as threats to the peace. A second is whether the Security Council can take meaningful measures. As noted above, although the United States argued that AIDS should be identified as a 'threat to the peace', it did not explain what the Security Council – and the United States itself – could do to combat it. If what the Security Council or the United Nations can do, or promise to do, is mere rhetoric, it is meaningless to identify a threat such as COVID-19 as a 'threat to the peace'. Arguably, doing so merely increases quarrels among the members of the Security Council. And given that the United States frequently advocates the securitising of matters such as public health, it is not unreasonable to suggest that the United States might leverage such action to pursue its own interests. A third factor of relevance is whether a threat is already addressed by other international institutions. In the case of COVID-19, for example, the World Health Organization (WHO) undoubtedly has the competence to address the pandemic and it, together with its members, has extended great efforts. As a consequence, the WHO's leadership in this field should be respected. If the Security Council were to intervene in fighting COVID-19 by identifying it as a 'threat to the peace', it could undermine the leadership of the WHO and disrupt international efforts to fight the virus.

B. *Extremism*

Since the 1990s, terrorism has emerged as a threat that often causes devastating casualties. As a result, the UN organs, in addition to individual states, have listed counter-terrorism as a major item on their agendas again and again. On 20 September 2006, the General Assembly approved the Global Counter-Terrorism Strategy, guiding the counter-terrorism efforts of states and the UN organs.[235] More importantly, the Security Council adopted successive resolutions identifying terrorism as a 'threat to the peace' and authorising or requiring measures aimed to tackle terrorism.[236] Over time, however, these

[235] GA Res. 60/288 of 20 September 2006, UN Doc. A/RES/60/288.

[236] See, e.g., SC Res. 1267 of 15 October 1999, UN Doc. S/RES/1267(1999); SC Res. 1269 of 19 October 1999, UN Doc. S/RES/1269(1999); SC Res. 1368 of 12 September 2001, UN Doc. S/RES/1368(2001); SC Res. 1373 of 28 September 2001, UN Doc. S/RES/1373(2001).

efforts were found to be insufficient. Many states came to recognise that the approach adopted in the 2006 Global Counter-Terrorism Strategy needed improving upon. In 2013, the General Assembly adopted Resolution 68/127, which was concerned with the broader issue of combating 'violence and violent extremism'.[237] That Resolution does not explicitly incorporate counter-extremism into the framework of counter-terrorism, but it foreshadows this trend. Resolution 2178, adopted by the Security Council in 2014, indicates the close linkage between terrorism and extremism. That Resolution takes note of 'terrorist acts including those motivated by intolerance or extremism', and it recognises that 'terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone', underlining 'the need to address the conditions conducive to the spread of terrorism'. It therefore calls for collective efforts, 'including preventing radicalization, recruitment and mobilization of individuals into terrorist groups and becoming foreign terrorist fighters'.[238]

From that time on, counter-extremism received more attention. As then UN Secretary-General Ban Ki-moon noted, traditional 'security-based' counter-terrorism measures came to be understood as insufficient in preventing the spread of violent extremism, which encompasses 'a wider category of manifestations'.[239] Ban Ki-moon also warned of the risk that 'a conflation of the two terms may lead to the justification of an overly broad application of counter-terrorism measures, including against forms of conduct that should not qualify as terrorist acts'.[240] In 2016, the General Assembly adopted Resolution 291. This Resolution acknowledged the difficulty of preventing the violent extremism conducive to terrorism.[241] Thus it proposed a new Global Counter-Terrorism Strategy, under which the United Nations and its members were urged to 'unite against violent extremism as and when conducive to terrorism, encourage the efforts of leaders to discuss within their communities the drivers of violent extremism conducive to terrorism and to evolve strategies to address them', as well as to 'take measures, pursuant to international law and while ensuring national ownership, to address all drivers of violent extremism conducive to terrorism, both internal and external, in a balanced manner'.[242] For this purpose, the UN members are expected to

[237] GA Res. 68/127 of 13 February 2013, UN Doc. A/RES/68/127.
[238] SC Res. 2178 of 24 September 2014, UN Doc. S/RES/2178(2014).
[239] *Plan of Action to Prevent Violent Extremism*, Report of the Secretary-General, UN Doc. A/70/674, 24 December 2015, para. 4.
[240] *Ibid.*
[241] GA Res. 70/291 of 19 July 2016, UN Doc. A/RES/70/291, para. 40.
[242] *Ibid.*, para. 38.

consider, 'in the national context', the implementation of recommendations suggested in the Plan of Action to Prevent Violent Extremism.[243] It should be stressed that none of these UN instruments define the meaning of extremism. Furthermore, they focus only on 'violent' extremism. However, extremism, in the previously adopted UN resolutions, was not confined to only its 'violent' type. Moreover, as Van den Herik observes in this volume, there is not yet a definition of 'violent extremism' either.[244] In a nutshell, neither the General Assembly nor the Security Council has developed any meaningful rules on counter-extremism. The ambiguities around extremism may therefore become a new source for division among the members of the Security Council.

On the one hand, counter-extremism again indicates the complexity of national circumstances in the context of international peace. The tension between the Security Council's authority to maintain the peace and the principle of non-intervention is expected to increase. On the other hand, as already noted, a state may decide the counter-extremism measure 'in the national context'. Based on the principle of non-intervention and the New Global Counter-Terrorism Strategy, a state may be encouraged to claim the legitimacy and legality of its actions to defend particular measures that aim to combat extremism. Furthermore, given that extremism refers not only to particular acts but also to a 'source' conducive to terrorism, which is clearly broader in terms of content and scope, those measures aimed at combating extremism are at a high risk of misuse or abuse. This is especially true of the international obligations entered into by a state. For example, human rights obligations are susceptible to violations. Such risks have been recognised. And while stating that counter-terrorism measures, the protection of human rights, fundamental freedoms, and the rule of law 'are not conflicting goals, but complementary and mutually reinforcing, and are an essential part of a successful effort to counter violent extremism', Resolution 68/217 requires a state to ensure that the relevant measure complies with its obligations under international law, as well as refugee and humanitarian law.[245] Yet the risk of the Security Council and the UN members unduly intervening in domestic affairs may increase. Several commentators have acknowledged the uncertainties in the New Global Counter-Terrorism Strategy.[246] Similarly, Van den

[243] *Ibid.*, para. 40.
[244] Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section IV.
[245] GA Res. 68/127 of 13 February 2013, UN Doc. A/RES/68/127, cons. 13.
[246] David H. Ucko, 'Preventing Violent Extremism through the United Nations: The Rise and Fall of a Good Idea', *International Affairs* 94 (2018), 251–70. See also Naz Modirzadeh, 'If it's

Herik suggests that there is a risk of the 'securitisation of development and the politicisation of the humanitarian space'.[247]

From China's perspective, the United States, together with some other Western states, already seeks to intervene in Chinese domestic affairs by limiting China's efforts to fight terrorism and extremism in Xinjiang, an area inhabited by Chinese Uygur Muslims. According to China, people living in Xinjiang, including the Uygur, face grave terrorist threats and extremism.[248] Based on a preventive approach, it has taken a wide range of measures.[249] China claims that these measures aim to tackle terrorism and extremism, and to protect human rights in Xinjiang. Thus it claims that they do not violate but in fact protect human rights.[250] Several Western states hold a totally different view of these measures. They condemn China's government, arguing that, by enforcing the measures, commit gross violations of human rights against the Uygur[251] – some even alleging 'genocide'.[252] Several sanction laws have been adopted against China[253] and, in a closed-door consultation, several Western states raised the issue of China's counter-extremist measures before the Security Council in 2019.[254]

I do not want to debate here what has really happened in Xinjiang; instead, I would prefer to stress two normative issues. First, given the new UN Global Counter-Terrorism Strategy,[255] as well as the relevant Shanghai Cooperation Organization (SCO) conventions on counter-terrorism and extremism, China

Broke, Don't Make it Worse: A Critique of the UN Secretary-General's Plan of Action to Prevent Violent Extremism', *Lawfare*, 23 January 2016, available at www.lawfaremedia.org/article/if-its-broke-dont-make-it-worse-critique-un-secretary-generals-plan-action-prevent-violent-extremism.

247 Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section IV.

248 The State Council Information Office of China, *The Fight against Terrorism and Extremism and Human Rights Protection in Xinjiang* [White Paper], March 2019, available at http://geneva.china-mission.gov.cn/eng/ztjs/aghj12wnew/Whitepaper/202110/t20211014_9587980.htm, March 2019, Preamble, Pts II and III.

249 *Ibid.*, Pt V; Xinjiang Uygur Autonomous Region Regulation on De-radicalization, adopted 29 March 2017, chs III–V.

250 State Council Information Office of China, *The Fight against Terrorism* (n. 248), Preamble.

251 See, e.g., Joint Statement [of the Foreign Minister of Canada, Foreign Secretary of the United Kingdom, and United States Secretary of State] on Xinjiang, 22 March 2021, available at www.state.gov/joint-statement-on-xinjiang/.

252 See, e.g., Michael R. Pompeo, 'Determination of the Secretary of State on Atrocities in Xinjiang', 19 January 2021, available at https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/index.html.

253 See, e.g., the US Uyghur Human Rights Policy Act of 17 June 2020.

254 The closed-door consultation is not documented. China was unhappy with how the consultation was leaked. See, e.g., Reuters, 'U.S., Germany Slam China at U.N. Security Council over Xinjiang: Diplomats', 3 July 2019, available at www.reuters.com/article/us-china-usa-rights/us-germany-slam-china-at-un-security-council-over-xinjiang-diplomats-idUSKCN1TX2YZ.

255 See below, section V.D.4.

has a legal basis on which to consider, in its national context, measures to tackle extremism. Second, given that international laws setting standards on how to conduct counter-extremism are not yet well developed, those measures that are asserted to contain counter-extremism are at risk of being misused or abused, thereby leading to violations of human rights of particular populations.

C. *Cyber-Attacks*

Cyber-security is one of most prominent issues facing the Security Council in the 21st century and it is particularly challenging to the application of the UN Charter – especially of Article 51 on self-defence. From the perspective of the UN Secretary-General, cyber warfare has become a first-order threat to international peace, but the methods of cyber warfare are not yet fully understood.[256] As a peace and security issue, cyber-security has been hotly debated.[257] There have been numerous news reports of cyber-attacks, and some member states, such as the United States and China, accuse each other of initiating cyber-attacks.[258] In fact, several powerful countries have established cyber forces, for example the United States' Cyber Command, established in 2010. China, too, has included the topic of strengthening its capability in cyberspace in its military strategy.[259] In its view, some countries are 'strengthening a cyber deterrence strategy, aggravating an arms race in cyberspace, and bringing new challenges to global peace'.[260]

At the core of cyber-security concerns is the debate about whether cyber-attacks constitute an 'armed attack', as provided for in Article 51 UN Charter. By referring to the ICJ's decision in *The Legality of the Threat or Use of Nuclear Weapons*, in which the Court opined that the right of self-defence does not depend on the type of weapon used in an attack,[261] some commentators have

[256] Annex to the letter dated 30 April 2018 from the Permanent Representative of Finland to the United Nations addressed to the President of the Security Council, UN Doc. S/2018/404, 3 May 2018, 3.

[257] See, in particular, Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge: Cambridge University Press, 2013).

[258] Zhixiong Huang and Kubo Macák, 'Towards the International Rule of Law in Cyberspace: Contrasting Chinese and Western Approaches', *Chinese Journal of International Law* 16 (2017) 271–310 (272–3).

[259] Cyberspace Administration of China, 'International Strategy of Cooperation on Cyberspace', 1 March 2017, available at www.xinhuanet.com/english/china/2017-03/01/c_136094371.htm, sect. 3.1.

[260] Cyberspace Administration of China, 'National Cybersecurity Strategy', December 2016, available at www.cac.gov.cn/2016-12/27/c_1120195926, sect. I.2.

[261] ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, 226, para. 39.

suggested that, despite their novelty and specific character, cyber-attacks could be identified as armed attacks and thus trigger the right of self-defence.[262]

The United States is a major advocate of the right to self-defence against cyber-attacks. It argues that, 'consistent with the United Nations Charter', states 'have an inherent right to self-defense that may be triggered by certain aggressive acts in cyberspace'.[263] The United States has worked with NATO partners to develop means and methods of collective self-defence in cyberspace.[264] By contrast, China's position appears a bit ambivalent. Illustrated below are some of the debates that have occurred within the UN Group of Governmental Experts (UNGGE) on information technology.

On the one hand, China opposes the United States' argument for directly referring to the right of self-defence towards cyber-attacks; on the other hand, it supports the application of the UN Charter in cyberspace. China especially highlights the principles of sovereignty and the peaceful settlement of disputes.[265] Clearly, there is some contradiction in China's policy, in that while China intentionally avoids directly referring to the right of self-defence, it does not openly preclude the application of Article 51 UN Charter in cyberspace. There might be two explanations why. First, China's cyber capability is perhaps not yet comparable with that of the United States and hence China may be afraid of potential cyber-attacks from the United States under the guise of self-defence. Second, open agreement on the application of Article 51 in cyberspace increases the risk that prominent cyber actors may abuse this provision. It remains to be seen how long China will maintain such ambiguous gestures, and how it will frame a clearer position on the relationship between the right of self-defence and cyber-attacks.

One interesting proposition was made on 24 October 2020, when several Chinese academic institutions and think tanks jointly issued the report, *Sovereignty in Cyberspace: Theory and Practice* (version 2.0).[266] The report suggests that sovereignty in cyberspace includes the rights of independence,

[262] Schmitt, *Tallinn Manual* (n. 257), 54–68.

[263] See, e.g., International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World, 10 May 2011, available at https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf.

[264] *Ibid.*, 20.

[265] Cyberspace Administration of China, 'International Strategy' (n. 259), sects 2.1 and 2.2.

[266] Chinese Academy of Social Sciences, Tsinghua University, Fudan University, Nanjing University, University of International Business and Economics, and Cybersecurity Association of China, *Sovereignty in Cyberspace: Theory and Practice* (Version 2.0), 25 November 2020, available at www.wicinternet.org/2020-11/26/c_808744.htm.

equality, jurisdiction, and 'cyber-defence'.[267] The right of cyber-defence, according to the report, means that each state has the right to 'conduct capacity building on cyber security and adopt lawful and reasonable measures under the framework of the UN Charter to protect its legitimate rights and interests in cyberspace from external infringement'.[268] The report refers to Article 51 UN Charter, but it intentionally uses the term 'cyber-defence' instead of 'self-defence'. Arguably, the report is cautious in justifying the use of force to combat cyber-attacks. It seems that China's cyber authority, the Cyberspace Administration of China, is sympathetic with the report,[269] even though it does not yet explicitly endorse it. This includes the Chinese use of the term 'cyber-defence'.

In the General Assembly, cyber-security has been a hot topic in international peace. Adopted in 2011, Resolution 66/24 required that a group of government experts be established to study threats in the sphere of information security and possible measures to address them, which included 'norms, rules or principles of responsible behaviour of States'.[270] The UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications (ITC) in the Context of International Security was duly appointed in 2012. The Group completed its first report in 2013, suggesting that international law – 'in particular, the UN Charter' – should be applicable in cyberspace, which is 'essential to maintaining peace and stability and promoting an open, secure, peaceful and accessible ITC environment'.[271] According to the Group's second report of 2015, states, in their use of ITC, 'must observe, among other principles of international law, state sovereignty, sovereign equality, the settlement of disputes by peaceful means and non-intervention in the internal affairs of other States'.[272] In addition, the Group suggested, given the unique attributes of ITC, 'new norms' could be developed.[273] Clearly, whether cyber-attacks can trigger the right of self-defence is a crucial issue in the Group's deliberations. Because of strong opposition from China and some other countries, however, the 2015 report merely 'noted' the inherent right of states to take measures consistent with international law and as

[267] *Ibid.*, sect. I.1.
[268] *Ibid.*, sect. I.1.4.
[269] The official website of the Cyberspace Administration of China publishes the report.
[270] GA Res. 66/24 of 13 December 2011, UN Doc. A/RES/66/24.
[271] Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, UN Doc. A/68/98, 24 June 2013 (hereinafter 2013 UNGGE Report), 8.
[272] Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, UN Doc. A/70/174, 22 July 2015 (hereinafter 2015 UNGGE Report), 12.
[273] 2013 UNGGE Report (n. 271), 8; 2015 UNGGE Report (n. 272).

recognised in the UN Charter.[274] It did not explicitly refer to the right of self-defence; rather, it suggested that 'further study on this matter' was needed.[275]

The United States' attempt to reach a consensus on the right of self-defence within the Group failed again at its 2017 meeting.[276] To make debates on cybersecurity 'more democratic, inclusive and transparent', the General Assembly adopted – upon Russian initiative – Resolution 73/27 to establish an Open-Ended Working Group (OEWG).[277] In 2021, the duly convened OEWG submitted its first substantive report to the General Assembly.[278] While affirming international law – especially the UN Charter – to be applicable in maintaining peace and security, and promoting an open, secure, stable, accessible, and peaceful ITC,[279] the report said nothing about the application of Chapter VII. It instead urged states to seek the settlement of disputes with peaceful means.[280] It comes as no surprise that China was happy with this report.[281] The United States, which voted against Resolution 73/27, was frustrated. From its perspective, the OEWG, while identifying some state obligations, had failed to mention that states may respond to unlawful actions consistent with the right of self-defence.[282] The United States therefore labelled the report 'not perfect'.[283]

In contrast with the General Assembly, the Security Council remains inactive in this field, even though the Secretary-General urged it to find ways of dealing with cyber warfare as soon as possible.[284] In 2020, the Security Council held an

274 2015 UNGGE Report (n. 272), 12.

275 *Ibid.*

276 See Michele G. Markoff, 'Explanation of Position at the Conclusion of the 2016–2017 Group of Governmental Experts (GGE) on Developments in the Field of Information and Telecommunications in the Context of International Security', 23 June 2017, available at https://2017-2021.state.gov/explanation-of-position-at-the-conclusion-of-the-2016-2017-un-group-of-governmental-experts-gge-on-developments-in-the-field-of-information-and-telecommunications-in-the-context-of-international-sec/.

277 GA Res. 73/27 of 11 December 2018, UN Doc. A/RES/73/27.

278 Final Substantive Report of the Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security, UN Doc. A/AC. 290/2021/CRP.2, 10 March 2021.

279 *Ibid.*, para. 34.

280 *Ibid.*, para. 35.

281 Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security, Compendium of Statements in Explanation of Position on the Final Report, UN Doc. A/AC.290/2021/INF/2, 25 March 2021, 25.

282 United States Comments on the Chair's Pre-Draft of the Report of the UN Open Ended Working Group (OEWG), available at https://front.un-arm.org/wp-content/uploads/2020/04/oewg-pre-draft-usg-comments-4-6-2020.pdf, 3.

283 OEWG, Compendium of Statements (n. 281), 85.

284 Annex to the letter dated 30 April 2018 from the Permanent Representative of Finland to the United Nations addressed to the President of the Security Council, UN Doc. S/2018/404, 3 May 2018, 3.

informal meeting concerning the protection of civilians and humanitarian efforts related to cyber-attacks on critical infrastructure during the COVID-19 pandemic.[285] This was, perhaps, the sole occasion on which the Security Council has addressed cyber-attacks, but the topic of the meeting had nothing to do with international peace. Van den Herik argues, in this volume, that the inaction of the Security Council on cyber-security can be attributed to the P5, who are the most prominent cyber actors.[286] This explanation is reasonable. As already noted, the P5 – or, at least, the United States and China – tend to consider Chapter VII applicable to cyber-attacks. Cyber-security, including cyber warfare, will therefore be tabled in the Security Council sooner or later.

Arising from technology, cyber-attacks represent a unique threat to peace. New technologies bring with them huge benefits, but they may cause tremendous threats to international peace. Compared with threats arising from other technologies, cyber-attacks reveal an unpredictable dimension of technology. If we say that nuclear weapons astonish people with their horribly destructive effects, we can say that cyber-attacks beset people with their high degree of uncertainty. It is often difficult to locate where cyber-attacks have been initiated, and by whom. Even worse, it is often hard to verify whether they have done damage.[287] There is an established presumption that any legal determination should be fact-based, but it seems that such presumption does not apply in the context of cyber-attacks. As a result, legal determination and action in the face of alleged cyber-attacks might not have a solid factual basis, and there is a high risk that their origin may be misidentified. In this unique context, in the absence of trust between the major cyber actors, including the United States and China, it is impossible to effectively address the issue of cyber-attacks inside or outside of the Security Council.

V. CHINA'S ASCENSION AND THE UN SECURITY COUNCIL

In the first thirty years since the People's Republic of China (PRC) – in accordance with General Assembly Resolution 2758, adopted in 1971[288] – began to sit on the Security Council, it has attracted little attention in this

[285] OCHA, 'Acting Assistant Secretary-General for Humanitarian Affairs, Ramesh Rajasingham's Opening Remarks on Contemporary Challenges for the Protection of Civilians and the Humanitarian Aspects Related to Cyber-Attacks at the Arria-Formula Meeting on Cyber-Attacks', 26 August 2020, available at https://reliefweb.int/report/world/acting-assistant-secretary-general-humanitarian-affairs-ramesh-rajasingham-opening.

[286] Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section V.

[287] See, e.g., Reuters, 'Suspicions Cyber Sabotage behind Fire at Iran Nuclear Facility, but Israel Says It's "Not Necessarily" Involved', *ABC News*, 5 July 2020, available at www.abc.net.au/news/2020-07-06/iran-nuclear-site-fire-causes-significant-damage,-official-says/12424586.

[288] GA Res. 2758 (XXVI) of 25 October 1971, UN Doc. A/RES/2758(XXVI).

most powerful UN organ. China, again and again, has pronounced a firm defence of the UN Charter, condemning blatant violations by some Western powers. However, this highly rhetorical gesture has rarely been followed by strong actions. China did not veto resolutions that it did not like; it instead abstained or did not participate in voting. Furthermore, China did not propose any provocative initiatives. Thus China was not a 'trouble-maker', in the eyes of the Western powers. They were happy to find that China has gradually become internationally socialised since the 1980s and hence has been sympathetic with many of the initiatives they sponsored. By contrast, developing states, with whom China always highlighted its affinity, might have been a bit frustrated: what they got from China was often merely rhetorical blessing, rather than any firm action. Neither did the Security Council benefit much from China: in terms of budget and personnel, China made only small contributions to UN peacekeeping missions. More recently, however, many people have come to recognise a change in China's approach, in the shape of its increased commitment to international peace and its more aggressive behaviour in the Security Council.

Because China is already a key player on the Security Council, several concerns have been raised.

- Will China be prepared to commit more to international peace through the Security Council?
- Will China reshape the institutional culture and methodology of the workings of the Security Council, helping it to better perform its mission?
- Will China use the Security Council as an instrument to engage with the Western world?
- Does China seek to reframe or reverse the law of peace and war favoured by Western powers through the Security Council mechanism?
- Is China keen to pursue its own normative agenda?

The potential normative impact that a more powerful China will have on the international legal order has attracted much attention. Generally speaking, most Western commentators consider the normative impact from China negative.[289] Some exceptions exist, however. For example, Scott Kennedy has argued that, given the unfairness of the current international order, the concern should not be that China has disrupted or will be

[289] See, e.g., Katrin Kinzelbach, 'Will China's Rise Lead to a New Normative Order? An Analysis of China's Statements on Human Rights at the United Nations (2000–2010)', *Netherlands Quarterly of Human Rights* 30 (2012), 299–332.

a disruptor of the status quo, but that 'it won't be, that it is so wedded to the status quo that China will forestall important reforms that are desperately needed'.[290] Through an investigation of China's recent engagement with UN peacekeeping operations, Lisa MacLeod has suggested that, as China ascends, its own global outlook and national priorities will be of foremost importance. Western powers 'can no longer expect that China will refrain from demanding that Council resolutions reflect its causal and principled beliefs'.[291]

It has also been suggested that China has come to seek more delicate normative arguments to justify its Security Council votes. Courtney J. Fung observes that China – especially in addressing the Syrian crisis – has innovated the discourse by introducing regime change rhetoric to oppose interventions, which appears to have won international support.[292] Similarly, according to three other scholars, China's engagement with the Darfur crisis has indicated 'a new Chinese approach to conflict resolution is in the making'.[293] They found that, instead of embracing the Western conception of humanitarian intervention, China advocated a new rule of 'conditional intervention', whereby an intervention is undertaken by 'actors at three levels: the host country at the national level; a pertinent intergovernmental organisation at the regional level; and the UN at the global level'.[294] This 'is likely to set a precedent for future interventions'.[295] While Larissa van den Herik does not discuss the role of a more powerful China in the Security Council at length in her chapter in this volume, her outlook does not seem positive.[296]

As a Chinese lawyer, I would like to note two starting points that are helpful when conducting a proper evaluation of China's potential impact on the law

[290] Scott Kennedy, 'China in Global Governance: What Kind of Status Quo Power?', in Scott Kennedy and Shuaihua Cheng (eds), *From Rule Takers to Rule Makers: The Growing Role of Chinese in Global Governance* (Bloomington, IN, Geneva: Research Center for Chinese Politics & Business [Indiana University] and International Centre for Trade & Sustainment Development, 2012), 9–22 (11).

[291] Lisa MacLeod, 'China's Security Council Engagement: The Impact of Normative and Causal Beliefs', *Global Governance* 23 (2017), 383–401.

[292] Courtney J. Fung, 'Separating Intervention from Regime Change: China's Diplomatic Innovations at the UN Security Council Regarding the Syria Crisis', *The China Quarterly* 235 (2018), 693–712 (699, 702). See also Matthias Vanhullebusch, 'Regime Change, the Security Council and China', *Chinese Journal of International Law* 14 (2015), 665–707.

[293] Pak K. Lee, Gerald Chan, and Lai-Ha Chan, 'China in Darfur: Humanitarian Rule-Maker or Rule-Taker?', *Review of International Studies* 38 (2012), 423–44 (440). See also Andrew Garwood-Gowers, 'China's Responsible Protection Concept: Reinterpreting the Responsibility to Protect (R2P) and Military Intervention for Humanitarian Purposes', *Asian Journal of International Law* 6 (2016), 89–118.

[294] Lee et al. (eds), 'China in Darfur' (n. 293), 437.

[295] *Ibid.*, 437.

[296] Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section I.

of peace and war through the Security Council. First, as illustrated in previous sections, we should bear in mind that the measures that the Security Council has adopted in the past decades – especially during the 'New World Order' period – are open to debate. Second, China needs to be accurately understood. In the absence of such understanding, we may misjudge how China behaves in the Security Council in the coming years. From my perspective, China's previous engagement with the Security Council, China's increased power in the world, Chinese foreign policies and international legal policies, and even Chinese philosophy are relevant to China's behaviour in the Security Council.

A. A *General Observation*

Socialist China's presence in the United Nations was cause for global concern from the very outset. Would it disrupt the Security Council by exercising the veto power in the same way the USSR did?[297] In the subsequent three decades or so, China demonstrated instead that it was a team player – a 'silent power'.[298]

Between 1971 and 1979, China cast 130 affirmative votes out of a possible 195, in comparison to 149, 166, 172, and 163 by the United States, the USSR, France, and the United Kingdom, respectively. China exercised the veto power only twice – far less than the 18, 7, 7, and 12 instances on which the United States, the USSR, France, and the United Kingdom, respectively, did so. By contrast, China abstained or did not participate in voting on 63 occasions, which was in sharp contrast with the 28, 22, 16, and 20 abstentions by the United States, the USSR, France, and the United Kingdom, respectively.[299]

Two major factors influenced China's voting pattern. First, Chinese diplomats were not well acquainted with the Security Council in their early years of membership. Qiao Guanhua, China's first ambassador to the United Nations, admitted: 'To tell the truth, we're quite unfamiliar with this institution. We need to honestly study and become familiar as soon as possible, so that China can carry out its duties as permanent member of the Security Council.'[300] Chairman Mao Zedong, in a meeting with Chinese diplomats on the eve of their departure to New York, required each to assume the attitudes of a 'student' and to avoid 'rushing into battle unprepared'.[301] As a consequence, Chinese

[297] Samuel S. Kim, *China, the United Nations, and World Order* (Princeton: Princeton University Press, 1979), 195.
[298] Wuthnow, *Chinese Diplomacy* (n. 152), 18.
[299] *Ibid.*, 16.
[300] *Ibid.*, 15.
[301] *Ibid.*

diplomats did not speak much in the Security Council. Second, as a socialist country, China distanced itself from the Western states. As a result, China's voting affinity with the United States during this period was only 46 per cent.[302] Nevertheless, it was observed that Chinese diplomats gave respect to other countries. They did not use provocative language nor did they sponsor any propaganda-induced proposals, like the USSR did. According to Samuel S. Kim, Chinese diplomats behaved 'more like a workhorse than a showhorse'.[303]

In the 1980s, China became more willing to involve itself in the workings of the Security Council. Out of a total 209, China cast 196 affirmative votes – second only to those of France (200) and more than those of the United States (162), the USSR (192), and the United Kingdom (189). All of China's votes from September 1983 on were affirmative. Specifically, China's abstentions or non-participation in voting dropped significantly to only 13 – less than those of the United States (27), the USSR (22), and the United Kingdom (14), and more only than those of France (5). China was the only permanent member of the Security Council that did not use the veto power throughout the 1980s. In addition, China's voting affinity with the United States grew, during this time, to 73 per cent.[304]

These developments were mainly induced by China's new foreign policy. In the late 1970s, China commenced its Reforming and Opening Up Policy, a key aim of which was to develop trading relations with and to attract investment from Western states. Thus it sought to improve relations with Western states both outside and inside the Security Council. Deng Xiaoping, the 'chief designer of the Reforming and Opening-up policy', set the tone for the Chinese foreign policy of 'keeping a low profile' in international relations. While, in the 1980s, some developing states expected China to act as 'a leader of the Third World', Deng clearly stated that China could not 'qualify as the leader in that we are not powerful enough to do that'.[305] According to Deng, China should insist on a fundamental national policy. It should not take on a leadership role – although this did not mean that China should do nothing to promote a fair international political and economic order.[306] In fact, given that Chinese diplomats became more familiar with the workings of the Security Council over time, China participated much more in voting and abstained much less frequently than before.

[302] *Ibid.*, 17.
[303] Kim, *China, the United Nations, and World Order* (n. 297), 196.
[304] Wuthnow, *Chinese Diplomacy* (n. 152), 19.
[305] Literature Office of the Central Committee of the CCP (ed.), *Selected Works of Deng Xiaoping*, vol. 3 (Beijing: People's Press, 1993), 363.
[306] *Ibid.*

During the 1990s, China's rate of affirmative voting was 93.1 per cent – the lowest among the P5, the rates of which were 98.9 per cent, 96.4 per cent, 99.7 per cent, and 100 per cent for the United States, the USSR/Russia, France, and the United Kingdom, respectively. China continued its highly self-constrained approach to the veto power and blocked only two resolutions.[307] Nevertheless, China's abstention pattern was noticeably revived in the 1990s: it abstained on 42 occasions – three times as many as it had done so in the 1980s.[308] It should be stressed that a large portion of these abstentions were cast on sanctions-related resolutions[309] – the most innovative practice of the Security Council in the 1990s. Western powers introduced new causes for triggering sanctions and included new contents in the sanctions, which had significant normative impacts.[310] China, like many other states, was concerned with whether those sanctions were consistent with the UN Charter – especially with Chapter VII.[311] While China was reluctant to offend the Western powers by exercising the veto power, it did not explicitly endorse the relevant sanctions. This explains why China, after casting abstention votes on the sanctions-related resolutions, often gave explanations for its voting.[312] In addition, China's voting affinity with the United States jumped up to 92.1 per cent from 73 per cent in the previous decade.[313]

Generally speaking, China sustained the same voting pattern in the first ten years of the 21st century. It cast 622 affirmative votes out of a total of 636, while exercising only the veto power twice. Importantly, China became more open to UN sanctions, leading to a considerable decrease in its abstentions.[314] Moreover, during this period, China's voting affinity with the United States rose to a new high of 95.3 per cent.[315]

Since the 2010s, however, China's behaviour in the Security Council has begun to make many Western states and observers unhappy. The most conspicuous change has been its increased use of the veto power. In the 2010s,

[307] Wuthnow, *Chinese Diplomacy* (n. 152), 21.
[308] *Ibid.*, 21, 19.
[309] *Ibid.*, 26. China abstained in 16 sanction-related votes in the 1990s, accounting for over a third of its total abstentions in this period.
[310] See generally Jeremy Matam Farral, *The United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007).
[311] See, e.g., UN Doc. S/PV.3238, 16 June 1993, 21. See also Richard Falk, 'The Haiti Intervention: A Dangerous World Order Precedent for the United Nations', *Harvard International Law Journal* 36 (1995), 341–58.
[312] China's UN mission issued remarks in 43 out 52 votes on sanctions: Wuthnow, *Chinese Diplomacy* (n. 152), 29.
[313] *Ibid.*, 20.
[314] China cast only 12 abstentions during this period – far less than those in the 1990s: *ibid.*, 29.
[315] *Ibid.*

China vetoed nine draft resolutions authorising sanctions and other coercive measures – far more than those in any previous period. Among those were eight vetoes cast on resolutions against Syria.[316] China's vetoes of resolutions relating to Syria enraged some Security Council members – especially those from the West. They blamed China, together with Russia, for the Security Council's repeated failure to address the humanitarian disaster in Syria. After Russia and China blocked Resolution 538,[317] for example, the UK representative condemned them: 'for the third time', they had blocked an attempt by the majority of the Security Council – supported by most states – to try a new approach, choosing instead 'to put their national interests ahead of the lives of millions of Syrians'.[318] He argued that the voting of Russia and China served to protect a brutal regime. The US representative expressed a similar position.[319] China firmly denied such accusations and affirmed that it upheld the UN Charter. Specifically, China emphasised that it had 'no self-interest' in addressing the Syrian crisis.[320] It argued further that the current situation in Syria was 'precisely the result of the wrongful conduct of some countries, and it is those countries that should reflect on their behaviour'.[321]

China has also significantly increased its financial and personnel contributions to the work of the Security Council. During 2010–12, China's contribution to UN peacekeeping operations amounted to 3.189 per cent of the total peacekeeping budget – far less than that of the United Kingdom (6.604 per cent) and France (6.623 per cent).[322] However, during 2019–21, China became the second largest contributor to the regular budget of UN peacekeeping operations, next to only the United States. During this period, the rate of assessment for China reached over 12 per cent – far more than the United Kingdom (4.567 per cent) and France (4.427 per cent).[323] In 2016, China established the China–UN Peace and Development Fund,

[316] Draft SC Res. S/2019/756 of 19 September 2019; Draft SC Res. S/2016/1026 of 5 December 2016; Draft SC Res. S/2019/961 of 20 December 2019; Draft SC Res. S/2017/172 of 28 February 2017; Draft SC Res. S/2016/1026 of 5 December 2016; Draft SC Res. S/2014/348 of 22 May 2014; Draft SC Res. S/2012/538 of 19 July 2012; Draft SC Res. S/2012/77 of 4 February 2012; Draft SC Res. S/2011/612 of 4 October 2011.

[317] Draft SC Res. S/2012/538 of 19 July 2012. Eleven Council members were in favour of that resolution, two (Pakistan and South Africa) abstained, and two (Russia and China) vetoed.

[318] UN Doc. S/PV.6810, 19 July 2012, 3.

[319] *Ibid.*, 10.

[320] *Ibid.*, 13.

[321] UN Doc. S/PV.8263, 19 September 2019, 9.

[322] *Implementation of General Assembly Resolutions 55/235 and 55/236*, Report of the Secretary-General, UN Doc. A/64/220/Add.1, 31 December 2009, Annex.

[323] *Implementation of General Assembly Resolutions 55/235 and 55/236*, Report of the Secretary-General, UN Doc. A/73/350/Add.1, 24 December 2018, Annex.

contributing US$1 billion to it in the ten years that would follow. In 2015, China decided to join the UN Peacekeeping Capability Readiness System and, for this purpose, built a standby peacekeeping force of 8,000 troops. China was also the largest source country for peacekeeping forces among the P5. By December 2018, China had participated in 24 UN peacekeeping operations and dispatched more than 39,000 troops.[324]

B. *How the New Power Constellation Influences China's Behaviour in the Security Council*

As illustrated by section IV, great powers may adjust their policy of international peace in the Security Council in light of the power shift.

From the perspective of power politics – with special reference to the growing state power of China and the accelerating hostilities of some Western powers – Resolution 1973 against Libya perhaps represents a turning point in China's Security Council voting. The Resolution strengthened the sanctions that had previously been approved in Resolution 1970.[325] The new Resolution explicitly established a 'no-fly zone'.[326] It also allowed UN members to take 'all necessary measures' to protect civilians.[327] Conscious of the high levels of uncertainty implicit in that provision, several Security Council members, including China, Germany, Brazil, India, and Russia, abstained from voting on the Resolution.[328] According to China, they and several other countries had raised serious concerns, but 'unfortunately, many of those questions failed to be clarified or answered', and therefore China had 'serious difficulty with parts of the resolution'.[329] Notwithstanding this, given the grave circumstances in Libya and especially the supportive position of the Arab League on the 'no-fly zone' provision,[330] China cast its vote in abstention on Resolution 1973. Similarly, Germany 'decided not to support a military option, as foreseen in paragraphs 4 and 8 of the resolution', and therefore abstained from voting on the draft resolution.[331] Obviously, at least five Security Council members did not support the military attacks authorised under Resolution 1973.

[324] State Council Information Office of China, *China and the World in the New Era* [White Paper], September 2019, available at http://english.scio.gov.cn/2019-09/28/content_75252746.htm, sect. I.3.
[325] SC Res. 1970 of 26 February 2011, UN Doc. S/RES/1970(2011).
[326] *Ibid.*, paras 6–12.
[327] *Ibid.*, para. 4.
[328] UN Doc. S/PV.6498, 17 March 2011, 5, 6, 8.
[329] *Ibid.*, 10.
[330] *Ibid.*
[331] *Ibid.*, 5.

Two days after the adoption of Resolution 1973, however, a multi-state, NATO-led coalition launched airstrikes against Libya with the asserted aim of enforcing Resolution 1973. Given the provision for 'all necessary measures' in the Resolution, the military intervention was justified. During a Security Council meeting, China stated that the 'original intention' of Resolutions 1973 and 1970 'was to put an end to violence and to protect civilians', and it claimed that NATO had wilfully interpreted the two resolutions to justify its military actions.[332] Clearly, the literal provision of Resolution 1973 should prevail over the 'original intention', as understood by China, and hence Sun suggests that China's acquiescence to Resolution 1973 was 'a complete loss'.[333]

Arguably, China has learned two lessons from Resolution 1973. First, the Western great powers still paid little regard to its concerns and interests, even though China had never been more powerful. China had huge economic interests in Libya.[334] It was also reported that the Chinese government evacuated more than 30,000 Chinese citizens from Libya and that Chinese companies incurred more than US$20 billion in losses. Second, China learned not to leave any loopholes in the relevant Security Council resolutions that some Western powers could use to justify their interventions. In short, the enforcement of Resolution 1973 made China realise that it needed to take a tougher stance on the Security Council. China's experience concerning Libya had a direct impact on its behaviour regarding Syria.[335]

It may therefore come as no surprise that China has repeatedly exercised the veto power on draft resolutions relating to the situation in Syria, where Russia has strategic interests but China has no substantial interests. China maintains a high affinity for voting with Russia, with one exception when China cast an abstention.[336] China, together with Russia, exercised the veto power on another eight resolutions. In particular, China vetoed draft Resolutions 348[337] and 172,[338] on Syria – resolutions co-sponsored by 65 and 45 states,

[332] UN Doc. S/PV.6531, 10 May 2011, 20–1.

[333] Yun Sun, 'Syria: What China Has Learned from its Libya Experience', *Asia Pacific Bulletin*, 152, 27 February 2012, 2.

[334] Deborah Brautigam, 'China and Libya: What's the Real Story?', *The China*Africa Research Initiative Blog*, 4 March 2011, available at www.chinaafricarealstory.com/2011/03/china-and-libya-whats-real-story.html.

[335] Yun Sun, 'Syria' (n. 333), 1.

[336] Draft SC Res. S/2016/846 of 8 October 2016; Draft SC Res. S/2017/315 of 12 April 2017.

[337] Draft SC Res. S/2014/348 of 22 May 2014. The most important point in this draft is to refer the situation in Syria to the International Criminal Court.

[338] Draft SC Res. S/2017/172 of 27 February 2017. This draft, among others, decided to establish a Committee of the Security Council to undertake tasks in relation to chemical weapons in Syria.

respectively. This had never happened in the history of China's Security Council votes. While this radical turn reflected China's thinking that legal loopholes should no longer be left open to the Western powers, as had been the case with Resolution 1973 on Libya,[339] it is reasonable to assume that growing hostilities from the Western world prompted China and Russia to support each other both outside and inside of the Security Council.

As has been noted, in its disabling of the Security Council, some Western states considered China an accomplice of Russia in the Syrian crisis. We should bear in mind, however, that those resolutions would undoubtedly have been vetoed by Russia whether or not China supported them. Furthermore, there is another angle from which to view China's more aggressive behaviour on the Security Council. While, in the era of the 'New World Order', Western powers rarely found the initiatives they favoured challenged in the Security Council, some of them were legally controversial or did not work as expected in practice.[340] It is therefore not totally unsound to say that a more aggressive China might prevent the Security Council from being dominated by Western hegemony.

Additionally, a more powerful China might enable the Security Council in a unique way. Consider how China engaged in the Darfur crisis. In Resolution 1706, the Security Council 'invited' Sudan to give the United Nations consent to deploy a peacekeeping force[341] and China abstained in the voting. China supported the idea of a UN peacekeeping deployment, but the push for adoption of a Security Council resolution, in China's view, 'would not contribute to the smooth implementation of the resolution nor help to stop further deterioration of the situation in Darfur'.[342] After Sudan's government expressed opposition to the 'invitation' extended by Resolution 1706, the United States and several other Western states imposed economic sanctions on Sudan – sanctions that made no difference. Western powers then urged China – Sudan's largest economic partner – to encourage Sudan to comply with Resolution 1706. It was reported that, to persuade Sudan to accept the UN's peacekeeping mission, China threatened to remove its

[339] China stressed that it had 'no self-interest' in addressing the Syrian crisis, alleging that those accusations against China were 'completely mistaken and are based on ulterior motives': UN Doc. S/PV.6810, 19 July 2012, 14.

[340] An important case is SC Res. 1970 and SC Res. 1973 against Libya, adopted in 2011. The Foreign Affairs Committee of the UK House of Commons could not help but admit that the interventions based on the two resolutions largely failed in bringing peace and order to Libya: House of Commons Foreign Affairs Committee, 'Libya' (n. 105).

[341] SC Res. 1706 of 31 August 2006, UN Doc. S/RES/1706(2006).

[342] UN Doc. S/PV.5519, 31 August 2006, 5.

preferred trade status and to discourage Chinese companies from investing in Sudan.[343] Sudan accepted the peacekeeping deployment. Since China has maintained close economic relationships with other states who are plagued by national disorders, it may be better positioned than Western powers to enhance the measures adopted by the Security Council when relevant situations in these states are identified as threats to the peace. Indeed, Maluwa has suggested, in this volume, that China's economic and ideological affinity with many African states has been helpful to the maintenance of peace in Africa.[344] However, it remains to be seen to what extent that this unique leverage might be sacrificed to the growing hostilities between China and several Western powers.

C. *How Chinese International Legal Policies Influence China's Security Council Behaviour*

How China engages with the Security Council largely depends on Chinese international legal policies. Since I have examined in depth the evolution of Chinese international legal policies elsewhere,[345] here I will focus on how they influence China's behaviour in the Security Council setting.

1. Shouldering More International Responsibility

As China adopts the policies of a 'responsible' great power, it is willing to make more commitments to international peace. There is a growing expectation among states that China could and should shoulder more international responsibilities. Robert B. Zoellick, a former US trade representative, has urged China to behave as a 'responsible stakeholder' and to do more to sustain the international system's peaceful prosperity.[346]

China has already established its policy of 'responsible' power. In a 2011 White Paper on Chinese foreign policy, China stated that it was a 'responsible' state and would shoulder more international responsibility

[343] Chin-Hao Huang, 'U.S.–China Relations and Darfur', *Fordham International Law Journal* 31 (2007–8), 827–42 (837–8).

[344] Tiyanjana Maluwa, 'The UN Security Council: Between Centralism and Regionalism', Chapter 3 in this volume, section III.C.

[345] Cai, *The Rise of China and International Law* (n. 8), 41–100.

[346] Robert B. Zoellick, 'Whither China: From Membership to Responsibility?', 21 September 2005, available at https://2001-2009.state.gov/s/d/former/zoellick/rem/53682.htm.

because its capabilities allowed it to do so.[347] The concept of 'public goods' was officially introduced into Chinese foreign policy in the 2010s. President Xi Jinping has stated, in particular, that China is willing to provide more 'international public goods' to the international community.[348]

A turn towards the policies of a 'responsible' great power explains the significant growth of China's contributions to UN peacekeeping missions. More importantly, this shift induces China to refine its conception of sovereignty – a major factor influencing its behaviour on the Security Council. Given the constant suppression of Western powers since the 19th century, China is 'a most enthusiastic champion' of sovereignty.[349] As a result, Five Principles of Peaceful Coexistence[350] – the core element of which is sovereignty – have been firmly established as a cornerstone of Chinese diplomacy.[351] However, China's conception of sovereignty tends to be flexible. In 2014, on the 60th anniversary of the Five Principles, President Xi Jinping reaffirmed that the 'spirit of the Five Principles of Peaceful Coexistence, instead of being outdated, remains as relevant as ever; its significance, rather than diminishing, remains as important as ever; and its role, rather than being weakened, has continued to grow', and he asserted that the Five Principles are 'open and inclusive'.[352] Moreover, the Five Principles have evolved over time: in addition to 'peaceful coexistence', new elements of 'peaceful development', a 'harmonious world', and a 'community of shared future for mankind' are now

[347] State Council of the People's Republic of China, *China's Peaceful Development* [White Paper], 2011, available at http://english.www.gov.cn/archive/white_paper/2014/09/09/content_281474986284646.htm, Pt III.

[348] Xi Jinping, 'Having Full Confidence in China's Economic Development Prospects to Build a Better Asia-Pacific that Will Guide the World and Benefit all Parties and the Offspring', 7 October 2013, quoted in Embassy of The People's Republic of China in the Republic of Indonesia, 'Xi Jinping Attends APEC CEO Summit and Delivers Important Speech', 16 October 2013, available at http://id.china-embassy.gov.cn/eng/ztbd/001288pyb/201310/t20131016_2345452.htm.

[349] Tieya Wang, 'International Law in China: Historical and Contemporary Perspectives', *Recueil des Cours* 221 (1990), 199–369 (288, 290, 297).

[350] The 'Five Principles' include: (a) mutual respect for each other's territorial integrity and sovereignty; (b) mutual non-aggression; (c) mutual non-interference in each other's internal affairs; (d) equality and mutual benefit; and (e) peaceful coexistence: Agreement between the Republic of India and the People's Republic of China on Trade and Intercourse between Tibet Region of China and India, 29 April 1954, Preamble.

[351] Constitution of the People's Republic of China, 1975, as amended in 2018, Preamble.

[352] President of the People's Republic of China Xi Jinping, 'Carry Forward the Five Principles of Peaceful Coexistence to Build a Better World through Win-Win Cooperation', Address at Meeting Marking the 60th Anniversary of the Initiation of the Five Principles of Peaceful Coexistence, 28 June 2014, available at www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/201407/t20140701_678184.html.

included.[353] Such illustrations are general, but they are meaningful in that they represent China's new conception of the world order, which may influence China's diplomacy to a greater or lesser extent. China should not be expected to embrace the same liberal conception of sovereignty that Western powers cling to. In fact, sovereignty remains a basic legal shield in China's struggles with Western powers on issues such as Tibet, Xingjiang, Taiwan, and Hong Kong.[354] Nevertheless, China has softened its conception of sovereignty on many matters related to international peace, as evidenced by its stance on the Responsibility to Protect (R2P), as will be discussed later in the chapter.[355]

2. Seeking a Larger Role in International Law-Making

China's new strategy of international normativity makes it more cautious of initiatives proposed in the Security Council that could have normative impacts in the future. For a long period, China's priority was to convince international society that it was a 'good citizen' in terms of compliance with international law.[356] Thus China has long been a 'taker' of international law. More recently, China has recognised that competition in international rule-making is fundamental to international relations. China has realised that unless it increases its role in international law-making, what it will be able to do, at best, is either comply with or violate international laws.[357] Thus China has begun to change its traditional strategy of normativity by shifting away from international law compliance towards international law-making.

This new strategy was evident in the Decision on Several Major Issues Concerning Comprehensively Enhancing Governance to Rule the State by

[353] Vice Minister of Foreign Affairs of the People's Republic of China Liu Zhengming, 'Following the Five Principles of Peaceful Coexistence and Jointly Building a Community of Common Destiny', Speech at the International Colloquium Commemorating the 60th Anniversary of the Five Principles of Peaceful Coexistence, 27 May 2014, available at www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/201405/t20140528_678165.html.

[354] Phil C. W. Chan, *China: State Sovereignty and International Legal Order* (Leiden: Brill, 2015), 179–233; Randall Peerenboom, 'China Stands up: 100 Years of Humiliation, Sovereignty Concern, and Resistance to Foreign Pressure on PRC Courts', *Emory International Law Review* 24 (2010), 657–68.

[355] See below, section V.D.2.

[356] See, in detail, Cai, *The Rise of China and International Law* (n. 8), 102–12.

[357] Wang Yang, 'To Construct Open-Oriented New Economic Regime', *People's Daily*, 22 November 2013. See also Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions, 23 March 2021.

Law, approved by the Chinese Communist Party (CCP) in 2014.[358] The decision outlined China's legal reform under Xi Jinping's presidency. It stated that China would 'actively participate in international rule-making ... [to] increase China's power of discourse and influence in international legal affairs'.[359] For China, its growing role in international law-making not only promotes and protects its state interests but also enhances the fairness of the international order. President Xi noted that, 'with the increase in global challenges and constant changes in the international balance of power, there is a growing demand for strengthening global governance and transforming the global governance system'.[360] He therefore urged China to 'seize the opportunity and take appropriate actions'.[361] He further required that China improve its ability to 'make rules and set agendas' in global governance.[362] As a result, China has recently been active in advocating 'Chinese wisdom' or 'Chinese proposals' on a range of international affairs, such as reform of the World Trade Organization (WTO).[363]

Such new strategy regarding international normativity may also influence China's behaviour on the Security Council. As will be highlighted later in the chapter,[364] China is alert to the emergence of any rule pertaining to regime change created by Security Council practice. This is perhaps a major consideration as China exercises, again and again, the veto power over the draft resolutions against Syria in the Security Council.

3. Maintaining the Friendly Policy towards Developing Countries

China's affinity with the developing world remains highly relevant to China's behaviour in the Security Council. China has sustained a foreign policy that it believes is beneficial to the developing world. As early as the 1970s, Deng Xiaoping stated before the UN General Assembly that China 'shall always belong to the Third World and shall never seek hegemony'.[365] Three decades

[358] See Central Committee of the Chinese Communist Party (CCP), Decision on Several Major Issues concerning Comprehensively Advancing Governance According to Law, 23 October 2014, available at www.gov.cn/zhengce/2014-10/28/content_2771946.htm.

[359] *Ibid.*, sect. VII.7.

[360] Xi Jinping, *The Governance of China (II)* (Beijing: Foreign Language Press, 2017), 487.

[361] *Ibid.*

[362] *Ibid.*, 490; Cai, *The Rise of China and International Law* (n. 8), 113–51.

[363] See World Trade Organization (WTO), China's Proposal on WTO Reform, Doc. WT/GC/W/773, 13 May 2019.

[364] See below, section V.D.3.

[365] Literature Office of the Central Committee of the CCP (ed.), *Selected Works of Deng Xiaoping*, vol. 2 (Beijing: People's Press, 2nd edn, 1994), 112.

later, President Xi reaffirmed that China 'will always belong to the developing countries'.[366] On numerous occasions, China has explained its position to the Security Council by referring to the situations and concerns of developing states.

China's emphasis of its affinity with developing states may be understood from different angles. Its friendly policy toward developing states – the majority among UN members – helps to make the Security Council more attentive to their situations and concerns. This explains why China always suggests that the Security Council should be highly constrained in approving sanctions, most of which target developing states. This is also demonstrated by Maluwa's examination of China's engagement with African countries in this volume.[367] There may be another explanation, however – namely, that its affinity with developing states may merely be a pretext for China's struggles with the Western powers.

4. Upholding the Universal International Legal Order

China insists on the universality of international law centred and based on the UN Charter. China has always stated that the authority of the UN Charter – and especially the authority of the Security Council in pursuit of international peace – should be maintained. It further disfavours broad readings of those UN Charter provisions that not only expand the United Nations' mission but also, and more importantly, allow for more interventive actions by the UN members, potentially damaging the authority of the United Nations and the universality of international law. This legal policy has seen growing tensions in the 'rules-based international order'(RBIO), which the Western powers have zealously advocated in recent years.[368]

It is generally acknowledged that the RBIO is poorly defined.[369] Van den Herik argues, in this volume. that the RBIO risks compromising the universality

[366] Xi Jinping, *The Governance of China (II)* (n. 360), 572. See also Information Office of the State Council (China), *China's Peaceful Development* (n. 347), Pt III.

[367] Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section III.

[368] See, e.g., Leader's Declaration, G7 Summit, 7–8 June 2015, available at https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf, 4, 7; US Department of State, 'Secretary Antony J. Blinken Virtual Remarks at the UN Security Council Open Debate on Multilateralism', 7 May 2021, available at www.state.gov/secretary-antony-j-blinken-virtual-remarks-at-the-un-security-council-open-debate-on-multilateralism/.

[369] Shirley Scott, 'In Defense of the International Law-Based Order', *Australian Outlook*, 7 June 2018, available at www.internationalaffairs.org.au/australianoutlook/in-defense-of-the-international-law-based-order/; Stefan Talmon, 'Rules-Based Order v. International Law?',

of international law.[370] Indeed, both Russia and China are critical of the RBIO. Russian Foreign Minister Lavrov has alleged that some Western powers, by advocating for the RBIO, sought to displace the multilateral legal framework, including the UN Charter, to make room for rules they favour.[371] China holds a similar position. On 26 July 2021, during talks with US Deputy Secretary of State Wendy Sherman, China's Vice Foreign Minister Xie Feng argued that the RBIO was an effort by the United States and a few other Western countries to frame their own rules as international rules and to impose them on other countries. If this is the case, the United States would thereby damage universally recognised international law and order, and it would damage the international system that it helped to build.[372] As a response, China explicitly proposed a conception of 'international law-based international order' (ILBIO). President Xi Jinping, in the general debate of the 76th session of the UN General Assembly in 2021, asserted: 'There is only one international order, i.e. the international order underpinned by international law. And there is only one set of rules, i.e. the basic norms governing international relations underpinned by the purposes and principles of the UN Charter.'[373] The ILBIO was explicitly included in China's Countering Foreign Sanctions, adopted in 2021.[374]

Perhaps the ILBIO vs the RBIO will become a new source of struggle between China and the Western powers, both inside and outside of the Security Council.

D. *China's Normative Role in the Security Council*

Western states and observers have been concerned about the potential normative impact a more powerful and aggressive China may bring to the workings

GPIL Blog, 20 January 2019, available at https://gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law/.

370 Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume.

371 Sergei V. Lavrov, 'The World at a Crossroads and a System of International Relations for the Future', *Russia in Global Affairs* 17 (2019), 8–18 (11–12).

372 Xie Feng, 'The U.S. Side's So-Called "Rules-Based International Order" is Designed to Benefit Itself at Others' Expense, Hold Other Countries Back and Introduce "the Law of the Jungle"', 27 July 2021, available at www.fmprc.gov.cn/mfa_eng/gjhdq_665435/3376_665447/3432_664920/3435_664926/202107/t20210726_9169451.htm.

373 Xi Jinping, 'Bolstering Confidence and Jointly Overcoming Difficulties: To Build a Better World', General Debate of the 76th Session of the United Nations General Assembly, 21 September 2021, available at www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/202109/t20210922_9580293.html.

374 Art. 2 China's Countering Foreign Sanctions (2021), which provides that China maintains 'the international order that is based on international law with the United Nations as its core'.

of the Security Council. Generally speaking, they consider China's normative role to be negative. However, such one-sided thinking is not helpful in accurately demonstrating what role China plays in the Security Council and in the maintenance of international peace. As a matter of fact, China's normative role in the Security Council has diverse dimensions: as norm-defender, as norm-taker, as norm 'antipreneur', and as norm entrepreneur.

1. China as Norm-Defender

China has proclaimed itself a 'staunch defender' of the international order centred on the UN Charter.[375] It has stated that the purposes and principles enshrined in that instrument – especially those of sovereign equality, non-interference in internal affairs, and the peaceful resolution of disputes – should always be upheld.[376] For China, these purposes and principles constitute 'the foundation stones upon which modern international law and conduct of international relations'.[377] Thus China often insists that these purposes and principles be included in relevant Security Council resolutions. For example, during the process of drafting Resolution 1244 against the Federal Republic of Yugoslavia (FRY), China proposed the addition of a preambular paragraph, 'bearing in mind the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security'. This proposed amendment was accepted. By proposing this amendment, China intended to emphasise respect for the sovereignty and territorial integrity of FRY, and to oppose the use of force.[378]

For China, defending an international order centred on the UN Charter demands its opposition of the broad interpretations of the UN Chapter that some Western powers favour. How to interpret Article 51 is worth special attention. In 2002, the United States announced a strategy of 'preemptive

375 Yi Wang, 'China, a Staunch Defender and Builder of International Rule of Law', *Chinese Journal of International Law* 13 (2014), 635–8.

376 See, e.g., China's Position Paper on the UN Reform (2005), Preamble, available at www.china.org.cn/english/government/131308.htm; The State Council Information Office of China, 'China and the World in the New Era', September 2019, available at www.scio.gov.cn/zfbps/32832/Document/1665443/1665443.htm, sect. III.5.

377 Wang, 'China, a Staunch Defender' (n. 375), 637.

378 See ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, oral statements, verbatim record 2009/29, 30.

self-defense',[379] which would relax the threshold triggering Article 51.[380] China opposes such a trend, stating at the time:

> We are of the view that Article 51 of the Charter should neither be amended nor reinterpreted. The Charter lays down explicit provisions on the use of force, i.e., use of force shall not be resorted to without the authorization of the Security Council with the exception of self-defense under armed attack. Whether an urgent threat exists should be determined and handled with prudence by the Security Council in accordance with Chapter 7 of the Charter and in light of the specific situation.[381]

It might be suspected that, in light of new threats to the peace, China's self-proclaimed role as norm-defender does not enable but rather disables the Security Council in the maintenance of international peace. It is especially likely that China, by 'defending' the UN Charter, instrumentalises the Security Council in engaging with the new distribution of power. However, we should remember that the majority of UN members are less powerful states whose sovereignty – as history shows – is particularly susceptible to infringement by the great powers and who are unable to hold the great powers accountable for wrongdoing. Then UN Secretary-General Kofi Annan, while arguing for humanitarian interventions, admitted that the principles of sovereignty and non-interference could 'offer vital protection to small and weak states'.[382] During debates on draft Resolution 612 against Syria, China also stated that the principle of non-interference in the internal affairs of states 'has a bearing upon the security and survival of developing countries, in particular small and medium sized countries'.[383]

2. China as Norm-Taker

China has long been an international norm-taker and it is rarely alone in advocating new international norms. From another angle, it can be said that China continues to be internationally socialised to embrace international law. In this regard, China's attitude towards the R2P – a variant of humanitarian intervention that China has always firmly opposed – is telling as an illustration of how China 'takes' new norms mainly advocated by the Western states.

379 See Christine Gray, 'The US National Security Strategy and the New Bush Doctrine of Preemptive Self-Defense', *Chinese Journal of International Law* 1 (2002), 437–47.

380 Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolution in Customary Law and Practice* (Cambridge: Cambridge University Press, 2010), 305–41.

381 China's Position Paper (n. 376), sect. II.7.

382 See UN Doc. A/54/2000, 27 March 2000, para. 217.

383 UN Doc. S/PV.6627, 4 October 2011, 5.

There have long been disputes between states over issues such as the legality, legitimacy, and consequences of humanitarian interventions.[384] For many states – especially less powerful ones – humanitarian intervention contravenes the principles of non-intervention, the peaceful settlement of international disputes, and the prohibition of the threat or use of force. And, in practice, most humanitarian interventions are initiated by the powerful states against the less powerful. China, like many other developing countries, therefore firmly opposes humanitarian intervention.[385]

In the 1990s, genocides and other gross and systematic violations of human rights committed in Rwanda and the former Yugoslavia changed many states' attitudes. While acknowledging that humanitarian intervention was 'a sensitive issue, fraught with political difficulty and not susceptible to easy answers',[386] then UN Secretary-General Kofi Annan proposed that:

> [S]urely no legal principle – not even sovereignty – can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community . . . Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished'.[387]

To 'build a broader understanding of the problem of reconciling intervention for human protection purpose and sovereignty',[388] the International Commission on Intervention and State Sovereignty (ICISS) introduced the concept of R2P. As the ICISS suggested, in cases in which the Security Council fails to act in a timely or effective manner, regional organisations should have the power to initiate the R2P, including the use of force.[389] The R2P was included in the 2005 World Summit Outcome, but with several limitations. Importantly, and in deviation from the ICISS report, the authorisation of military action was reserved for the Security Council.[390] Although the Security Council has referred to the R2P in only a few resolutions,[391] it is important that it has embraced the R2P.

[384] See generally J. L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethnic, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003).
[385] See UN Doc. A/63/PV.98, 24 July 2009, 23.
[386] See UN Doc. A/54/2000, 27 March 2000, paras 217, 219.
[387] *Ibid.*, para. 219.
[388] ICISS, *Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), 2.
[389] *Ibid.*, 53–5.
[390] GA Res. 60/1 of 24 October 2005, UN Doc. A/RES/60/1, paras 138–9.
[391] See, e.g., SC Res. 1674 of 28 April 2006, UN Doc. S/RES/1674(2006); SC Res. 1706 of 31 August 2006, UN Doc. S/RES/1706(2006).

China's attitude to the R2P may surprise many people. Several months ahead of the 2005 World Summit, in a position paper on UN reform, China expressed its support for the R2P:

> Each state shoulders the primary responsibility to protect its own population . . . No reckless intervention should be allowed. When a massive humanitarian crisis occurs, it is the legitimate concern of the international community to ease and defuse the crisis. Any response to such a crisis should strictly conform to the UN Charter and the opinions of the country and the regional organization concerned should be respected. It falls on the Security Council to make the decision in the frame of UN in light of specific circumstances which should lead to a peaceful solution as far as possible. Wherever it involves enforcement actions, there should be more prudence in the consideration of each case.[392]

According to the position paper, R2P action should be authorised by the Security Council. China did not, however, impose on the R2P the same limitations as the 2005 Outcome does but broadly refers to the 'humanitarian crisis', as in the R2P report.

China later seems to have considered that its position paper went too far: during the 2009 debates on the first General Assembly Resolution on the R2P, China stated that the R2P remained 'a concept' and was not yet 'a norm of international law',[393] and argued that circumstances triggering the R2P should be limited to those provided for in the 2005 Outcome document.[394] In addition, China stressed that the implementation of the R2P should not contravene the principles of state sovereignty and non-intervention in the internal affairs of states, that the R2P should not 'becom[e] a kind of humanitarian intervention', and, in particular, that 'no states must be allowed to unilaterally implement R2P'.[395] In other words, what China supports are R2P actions approved by the Security Council. As Maluwa observes in his chapter in this volume, Brazil, Russia, India, and South Africa – the other four so-called BRICS countries – shared China's position.[396] Furthermore, in China's view, it seems that if the Security Council can be secured as the sole competent institution to approve R2P actions, it is not necessary to seek an alternative. This might explain, as Maluwa observes, why China neither joined the debates on Responsibility while Protecting (RwP)[397] nor gave any

[392] China's Position Paper (n. 376), sect. III.1.
[393] *Ibid.*, 24.
[394] *Ibid.*, 23.
[395] *Ibid.*, 23.
[396] Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section III.B.3.
[397] *Ibid.*

official response to the concept of 'Responsible Protection' that was proposed by an official Chinese think tank.[398]

China's voting on humanitarian crisis situations in the Security Council remains mixed. It has vetoed those initiatives with the stated goal of ending humanitarian crises in states such as Zimbabwe[399] and Syria,[400] but it did vote for those measures against states such as the Sudan. Its voting was clearly based on the R2P.[401] Maluwa notes that China did not veto Resolution 1973, which surprised many observers.[402] This indicates that while China still insists on the principles of non-intervention and the peaceful settlement of international disputes, it has been more open to coercive UN enforcement.

Three major reasons explain China's embrace – albeit reluctant – of the R2P. First, China, as a permanent member of the Security Council, promised and was urged to shoulder more international responsibilities, including to prevent and stop humanitarian crises. Second, as China has become more powerful, it seeks to protect its global interests around the world – especially those in fragile countries. Third, the R2P allows China to give consent to UN actions based on humanitarian considerations without fundamentally compromising its long-standing policies on humanitarian intervention.

3. China as Norm 'Antipreneur'

As the evolution of the international legal order indicates, there is a persistent phenomenon that some states advocate new norms while others seek to resist them. Alan Blomfield and Shirley V. Scott call these latter states 'norm antipreneurs'.[403] This phenomenon is also visible in the Security Council. The 2003 Iraq War and the 2011 Libyan War inspired vocal controversy over whether regime change had emerged as a new international norm; China,

398 *Ibid.*

399 Neil MacFarquhar, '2 Vetoes Quash U.N. Sanctions on Zimbabwe', *The New York Times*, 12 July 2008, available at www.nytimes.com/2008/07/12/world/africa/12zimbabwe.html.

400 UN Department of Public Information, 'Security Council Fails to Adopt Draft Resolution Condemning Syria's Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China', 4 October 2011, available at www.un.org/press/en/2011/sc10403.doc.htm.

401 See, e.g., SC Res. 1713 of 29 September 2006, UN Doc. S/RES/1713(2006); SC Res. 1755 of 30 April 2007, UN Doc. S/RES/1755(2007); SC Res. 1769 of 31 July 2007, UN Doc. S/RES/1769(2007).

402 Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section III.B.3.

403 See generally Alan Blomfield and Shirley V. Scott (eds), *Norm Antipreneurs and the Politics of Resistance to Global Normative Challenge* (London: Routledge, 2017), 1.

together with many other states, resisted the crystallisation of regime change as a new international legal norm.[404]

It has been observed that some measures urged or ordered by the Council have involved political reconstruction in targeted states that may be necessary or helpful in addressing threats to the peace. Nevertheless, the role the Security Council plays in regime change has caused grave concerns among UN members. According to Dire Tladi, two resolutions – namely, Resolution 1973 against Libya and Resolution 1975 against Côte d'Ivoire – are of particular legal significance. These two resolutions largely contributed to the collapse of the Gaddafi and Gbagbo regimes. Tladi suggested that while future development remains to be seen, the two resolutions appeared to authorise regime change through the use of force and for the purpose of protecting civilians.[405]

Given what happened to Côte d'Ivoire and especially Libya, regime change was in the spotlight during debates on several resolutions against Syria. In the debates on draft Resolution 612,[406] which Russia and China vetoed, and on which Brazil, India, Lebanon, and South Africa abstained from voting, Russia stated that it would not 'get involved with legitimising previously adopted unilateral sanctions or attempts at violent regime change'.[407] India argued that the international community should not complicate the situation with 'threats of sanctions, regime change, etc.'.[408] South Africa warned that the 'draft resolution [should] not be part of a hidden agenda aimed at once again instituting regime change'.[409] The four co-sponsors of draft Resolution 612 – namely, France, Germany, Portugal, and the United Kingdom – did not respond directly to the issue of regime change.

[404] John Borneman, 'Responsibility after Military Intervention: What is Regime Change?', *Political and Legal Anthropology Review* 26 (2003), 29–42; W. Michael Reisman, 'Why Regime Change is (Almost Always) a Bad Idea', *American Journal of International Law Proceedings* 98 (2004), 289–304; Kevin P. DeMello, 'A Method of Direct Action: The Humanitarian Justification for Regime Change in Iraq', *Suffolk University Law Review* 38 (2005), 789–810; Dire Tladi, 'Security Council, the Use of Force and Regime Change: Libya and Côte d'Ivoire', *South African Yearbook of International Law* 37 (2012), 22–45; Mehrdad Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya', *Virginia Journal of International Law* 52 (2012), 355–404; Jure Vidmar, 'Democracy and Regime Change in the Post-Cold War International Law', *New Zealand Journal of Public and International Law* 11 (2013), 349–80; Nesam McMillan and David Mickler, 'From Sudan to Syria: Locating Regime Change in R2P and the ICC', *Global Responsibility to Protect* 5 (2013), 283–316; Yasmine Nahlawi, 'The Legality of NATO's Pursuit of Regime Change in Libya', *Journal of the Use of Force and International Law* 5 (2018), 295–323.

[405] Tladi, 'Security Council, the Use of Force and Regime Change' (n. 404), 45.

[406] Draft SC Res. S/2011/62 of 4 October 2011.

[407] UN Doc. S/PV.6627, 4 October 2011, 5.

[408] *Ibid.*, 6.

[409] *Ibid.*, 11.

The issue arose again during debates on draft Resolution 77. This draft resolution garnered the support of 13 Security Council members, but it was vetoed by Russia and China. Russia made the accusation that 'from the very beginning of the Syrian crisis some influential members of the international community, including some sitting at this table, have undermined any possibility of a political settlement, calling for regime change'.[410] South Africa stated that the pursuit of regime change 'would be against the purposes and principles of the United Nations Charter'.[411] Pakistan stressed that 'the offer of no regime change, of plurality, and the promotion of democracy are important aspects of this situation'.[412] Given the grave concerns and fierce criticism, several Western states had to respond directly. France rebutted the relevant accusation as 'patently false' and noted that 'there was no question of imposing a political regime on Syria'.[413] The four co-sponsors explained that draft Resolution 77 did not 'call for' or 'impose' the requirement of regime change, and thus was not 'about' regime change.[414] This did not mean, however, that they had no intention of effecting regime change inside and especially outside of the Security Council. For instance, without naming which states it meant, South Africa noted that regime change 'has been an objective clearly stated' by these states.[415] Indeed, there were some reports in the Western media that NATO's airstrikes against Libya did not aim only to protect civilians but also to weaken the Gaddafi regime, while enabling the rebels.[416] It was even reported that then US President Barack Obama openly demanded that President Assad leave office.[417]

Grave concerns over regime change partly explain why China's voting on the Syrian crisis differed significantly from that on the comparable Libyan crisis. In the Libyan crisis, China abstained from voting on Resolution 1973. However, the United States, the United Kingdom, and France used Resolution 1973 to justify airstrikes against Libya, which led to the collapse of the Gaddafi regime. As a result, China repeatedly exercised the veto power on resolutions against Syria. China firmly opposed 'any externally imposed solution aimed at forcing a regime change'.[418] Specifically, it stressed that

[410] UN Doc. S/PV.6711, 2 April 2012, 9.
[411] *Ibid.*, 11.
[412] *Ibid.*, 10.
[413] *Ibid.*, 4.
[414] *Ibid.*, 5, 6, 7, 11.
[415] UN Doc. S/PV.6627, 4 October 2011, 11.
[416] See Tladi, 'Security Council, the Use of Force and Regime Change' (n. 404), 38–9.
[417] See, e.g., Scott Wilson and Joby Warrick, 'Assad Must Go, Says Obama', *The Washington Post*, 18 August 2011, available at www.washingtonpost.com/politics/assad-must-go-obama-says/2011/08/18/gIQAelheOJ_story.html.
[418] UN Doc. S/PV.6826, 30 August 2012, 33.

'there must be no attempt at regime change or involvement in civil war by any party under the guise of protecting civilians'.[419] According to Fung, China sought to 'draw a line demarcating UN Security Council-authorised intervention from imposed regime change'.[420]

In short, China has endeavoured to resist regime change as the norm within or through the Security Council. Notwithstanding, China urged an inclusive political reconstruction in Syria. For instance, in debates on draft Resolution 612, China appealed that the Syrian government should implement commitments to reform and that a Syrian-led inclusive political process be launched as soon as possible, so as to facilitate the early easing of tensions in Syria.[421]

4. China as Norm Entrepreneur?

China has also begun to seek international norm entrepreneurship. Currently, its focus is on economic affairs.[422] China has made some progress by initiating the formation of the Asian Infrastructure Investment Bank (AIIB).[423] However, given the type of threats to the peace and China's global interests, China may expect norm entrepreneurship in the field of peace and security.

Let us look at the role China has played in the development of an international regime for tackling extremism, which, as noted earlier in the chapter, has emerged from the international regulation of counter-terrorism. In the past decade, China has adopted many rigid measures in Xinjiang, a major region where Chinese Uygur Muslims live. Several Western states – especially the United States – thought that China's measures grossly violated the human rights of the Uygur and, more assertively, constituted 'genocide'.[424] As a consequence, the United States adopted sanctions against China.[425] China has firmly disavowed the United States' accusations. China argues that the

[419] Statement by H. E. Ambassador Li Baodong, Permanent Representative of China to the United Nations, at the Security Council Open Debate on the Protection of Civilians in Armed Conflict, 10 May 2011, available at http://un.china-mission.gov.cn/eng/chinaandun/securitycouncil/thematicissues/civilians_ac/201105/t20110520_8417469.htm.

[420] Courtney J. Fung, 'Separating Intervention from Regime Change: China's Diplomatic Innovations at the UN Security Council Regarding the Syria Crisis', *The China Quarterly* 235 (2018), 693–712 (705).

[421] UN Doc. S/PV.6627, 4 October 2011, 5.

[422] Yang Wang, 'To Construct Open-Oriented New Economic Regime', *People's Daily*, 22 November 2013 (in Chinese).

[423] Daniel C. K. Chow, 'Why China Established the Asia Infrastructure Investment Bank', *Vanderbilt Journal of Transnational Law* 49 (2016), 1255–98.

[424] See, e.g., US Department of State, *China 2020 Human Rights Report*, available at www.state.gov/wp-content/uploads/2021/03/CHINA-2020-HUMAN-RIGHTS-REPORT.pdf, 1.

[425] See, e.g., US Uyghur Human Rights Policy Act of 2020, Public Law 116–45, 17 June 2020.

relevant measures were taken with the aim of combating terrorism and extremism, and that therefore they do not violate but protect human rights in Xingjian.[426] In particular, according to China's government,[427] the population in Xinjiang, including the Uygur, face grave threats of terrorism and extremism. Here, I do not debate the issue from a factual perspective; instead, I will focus on China's potential for norm entrepreneurship in the realm of counter-extremism.

China is perhaps one of the first states to have endeavoured to develop international laws on counter-extremism. In 2001, the SCO members signed the Convention on Combating Terrorism, Separatism and Extremism, which defines 'extremism' as:

> . . . an act aimed at violent seizing or keeping power, and violently changing the constitutional system of a State, as well as a violent encroachment upon public security, including organisation, for the above purposes, of illegal armed formations and participation in them, criminally prosecuted in conformity with the national laws of the Parties.[428]

However, it seems that the 2001 Convention does not distinguish terrorism from extremism. The word 'extremism' appear nowhere other than in the definitions.

In 2017, SCO members signed the Convention of the Shanghai Cooperation Organization on Combating Extremism. The 2017 Convention was the first regional treaty that purported to tackle extremism in implementation of the 2016 UN Global Counter-Terrorism Strategy. It should be noted that the 2017 Convention was initiated by China's President Xi Jinping at the SCO's 14th Meeting of the Council of the Heads of State, held in September 2014.[429]

The 2017 Convention explicitly stated that it was, among other things, 'follow[ing] up the UN Global Counter-Terrorism Strategy, the relevant counter-terrorism resolutions of the UN Security Council, universal counter-terrorism conventions and protocols'.[430] The 2017 Convention defines 'extremism' and the 'extremist act', respectively, as referring to 'ideology and practices

[426] State Council Information Office of China, *The Fight against Terrorism* (n. 248), Preamble.
[427] *Ibid.*, Pts II and III.
[428] Art. 1 SCO Convention on Combating Terrorism, Separatism and Extremism of 15 June 2001 (hereinafter 2001 Convention).
[429] Xi Jinping, 'Working Together with Sincerity and Dedication to Take SCO to a New Level', 12 September 2014, available at www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/201409/t20140918_678212.html.
[430] Convention of the Shanghai Cooperation Organization on Combating Extremism of 9 June 2017, Preamble.

aimed at resolving political, social, racial, national and religious conflicts through violent and other unlawful actions'[431] – a more concise definition than that in the 2001 Convention. In contrast, the 2001 Convention includes a broader definition of an 'extremist act'.[432] It further requires that SCO members adopt a wide range of legislative, executive, and juridical measures, while enhancing cooperation among them to tackle extremism.[433] It especially stipulates that the SCO members, 'in accordance with their national legislations, may take more stringent measures to combat extremism than those stipulated by this Convention'.[434]

According to China, efforts to combat extremism relied, in addition to relevant SCO conventions, on a new global counter-terrorism strategy.[435] Based on a preventive approach,[436] China took a wide range of measures to combat terrorism and extremism,[437] including by establishing 'education and training centers'[438] – a major measure that was fiercely condemned by some Western states.

In addition to denouncing China's measures aimed to combat extremism in other forums, several Western states brought this issue before the Security Council.[439] Surprisingly, China did not clearly expound in the Security Council norms of counter-extremism based on relevant SCO conventions and its national legal practice. During debates on Resolution 2178, which explicitly linked terrorism and extremism for the first time, China's Foreign Minister Wang Yi stated:

> [W]e must adopt a multipronged approach. The global war on terrorism should be fought in an integrated manner, adopting measures in the political, security, economic, financial, intelligence and ideological fields, inter alia, with a view to addressing both the symptoms and root causes of terrorism, especially removing its root causes and breeding grounds.
>
> [. . .]
>
> [W]e should promote deradicalization. While taking actions in accordance with law to crack down on and outlaw venues and personnel that are engaged in, advocating and spreading extremist ideology, we should protect

[431] *Ibid.*, Art. 2(1)(b).
[432] *Ibid.*, Art. 2(1)(c).
[433] *Ibid.*, Arts 7–25.
[434] *Ibid.*, Art. 7(3).
[435] State Council Information Office of China, *The Fight against Terrorism* (n. 248), Pt V.
[436] *Ibid.*
[437] *Ibid.* See also of Xinjiang Uygur Autonomous Region Regulation on De-radicalization, adopted 29 March 2017, chs III–V.
[438] State Council Information Office of China, *The Fight against Terrorism* (n. 248), Pt V.
[439] See, e.g., Reuters, 'U.S., Germany Slam China' (n. 254).

> normal religious activities, promote public awareness and give greater play to the role of local communities, thus injecting more positive energy into society. The United Nations should sum up useful experiences without delay and promote best practices from around the world.[440]

In his speech, Wang condemned the casualties caused by terrorist attacks in Xinjiang.[441] However, he did not say anything further on extremism. In fact, Wang mentioned the word 'extremist' only once and did not mention 'extremism' at all. On this important occasion, China failed to introduce its normative vision on extremism.

Notwithstanding, given that China and other SCO member states have led the way in negotiating conventions on counter-extremism, and that China has acquired significant experience in combating counter-extremism, they may play a considerable role in future international law-making on the subject.

VI. THE FUTURE TRAJECTORY OF SECURITY COUNCIL REFORMS: REVISITING THE UNIVERSAL AND REGIONAL APPROACHES

In the past several decades, states and scholars have never ceased their efforts to enhance the institutional strength of the Security Council itself. These efforts have adopted a universal approach and Van den Herik's chapter in this volume is a part of these efforts. This approach is based on, and in support of, the primary responsibility of the Security Council in the maintenance of international peace, as provided for in the UN Charter. However, there was also a regional approach proposed during the negotiations establishing the United Nations. By examining the partnership between the Security Council and the African Union in his chapter, Maluwa reminds people of the potential of regional arrangements.

Nevertheless, several questions remain open to debate, mainly from the perspective of power politics.

- Why are some legal proposals, while ostensibly persuasive, set aside?
- Are some legal proposals really desirable if they are adopted?
- What legal proposals are feasible and beneficial?
- Are regional arrangements credible and reliable?
- How can regional arrangements make a real difference?

[440] UN Doc. S/PV.7272, 24 September 2014, 17, 18.

[441] *Ibid.* See also State Council Information Office of China, *The Fight against Terrorism* (n. 248), Pt III, on the most serious terrorist attacks, which happened on 5 July 2009, causing 197 deaths and injuring more than 1,700 people in Urumqi, the capital of Xinjiang.

A. *The Universal Approach*

The universal approach characterises not only the primacy of the Security Council but also the privileges of the great powers. It has been observed that legal proposals are grouped into those aiming to reduce the privileges of the great powers (Group I proposals) and those aiming to improve the workings of the Security Council (Group II proposals).

1. Group I Proposals

Many people assume that the veto power granted to the P5, who often use this privilege in their own interest, is a major source of the Security Council's repeated failures to address the threat to peace. Many legal proposals have therefore been made to constrain the exercise of veto power.[442] The R2P was a major occasion for some states and commentators to suggest that the exercise of the veto power should either be restrained or disallowed. For example, Peters considered the veto on the occasion of the R2P as an 'abuse of right'.[443] Further, in his report on the R2P submitted to the General Assembly in 2009, the then UN Secretary-General urged the P5 to refrain from exercising, or threatening to exercise, the veto in situations of manifest failure to meet obligations relating to the R2P.[444] This recommendation garnered support from 35 UN member states during the General Assembly debates on the R2P.[445] Two significant proposals were later suggested in 2015. France and Mexico submitted a proposal to the General Assembly entitled 'Political Statement on the Suspension of the Veto in Case of Mass Atrocities', calling for UN members to sign it.[446] As of 8 June 2022, 122 UN member states and two observers had

[442] For thorough research, see Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crime* (Cambridge: Cambridge University Press, 2020).

[443] Anne Peters, 'The Security Council's Responsibility to Protect', *International Organizations Law Review* 8 (2011), 1–40.

[444] *Implementing the Responsibility to Protect*, Report of the Secretary-General, UN Doc. A/63/677, 12 January 2009.

[445] Global Centre for the Responsibility to Protect, *Implementing the Responsibility to Protect: The 2009 General Assembly Debate – An Assessment*, August 2009, available at www.globalr2p.org/wp-content/uploads/2020/01/2009-UNGA-Debate-Summary.pdf.

[446] Global Centre for the Responsibility to Protect, 'Political Declaration on the Suspension of Veto Powers in Cases of Mass Atrocities', 1 August 2015, available at www.globalr2p.org/resources/political-declaration-on-suspension-of-veto-powers-in-cases-of-mass-atrocities/. See further Jean-Baptiste Jeangène Vilmer, 'The Responsibility not to Veto: A Genealogy', *Global Governance* 24 (2018), 331–49.

done so.[447] The Accountability, Coherence and Transparency (ACT) Group suggested a draft 'Code of Conduct regarding Security Council Action against Genocide, Crimes against Humanity or War Crimes', and called on all of the members of Security Council not to vote against any credible draft resolution intended to prevent or stop mass atrocities.[448] It is of note that while the Code won support from 104 UN members, only two of the P5 – namely, the United Kingdom and France – signed it.[449] Maluwa, while acknowledging the great political significance of these two documents, suggests that they have little normative consequence for the collective security system in that they were not adopted as General Assembly resolutions. He was surprised to find that only 22 African states signed the Code and yet he believes that it is likely to be a focal point for future negotiations on UN reform.[450]

Given the rationale underlying the United Nations' prevention of the 'scourge of war' and 'untold sorrow to mankind',[451] it is justified to consider, as many lawyers have done, some restraints to reduce the undue exercise of the veto power on occasions such as genocide. From a different angle, however, restraint of the veto power is not without risk: while such restraint facilitates the approval of proposed actions in the Security Council, it may also induce some Security Council members – especially the great powers – to rely on voting rather than to seek compromises during debates on proposed actions. In other words, such restraint is likely to bring about some 'tyranny of the majority' within the Security Council. Given that Security Council actions are often initiated as a consequence of the geopolitical calculations among particular great powers, this risk should not be ignored. In other words, while some proposals may constrain the great powers in some aspects, they may also free the great powers in other aspects, thereby creating new risks.

447 Global Centre for the Responsibility to Protect, 'List of Signatories to the ACT Code of Conduct', 8 June 2022, available at www.globalr2p.org/resources/list-of-signatories-to-the-act-code-of-conduct/.

448 Annex I to the letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, UN Doc. A/70/621–S/2015/978.

449 Parliamentarians for Global Action, 'Launch of the Code of Conduct regarding Security Council Action against Genocide, Crimes against Humanity or War Crimes', 27 October 2015, available at www.pgaction.org/news/launch-the-code-conduct-regarding-security.html.

450 Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section IV.B.

451 UN Charter, Preamble.

2. Group II Proposals

In contrast with Group I proposals, Group II proposals seek to improve the working – and especially the decision-making – procedures of the Security Council without explicitly reducing the privileges of the great powers.

One of the efforts proposed is improvement of the 'penholder' system.[452] Its major purpose is to give greater voice to elected members of the Security Council. Since the 2000s, on most occasions the P5 – especially the Western 'P3' (i.e., the United States, the United Kingdom, and France) – have prepared the relevant draft resolutions and then circulated them among the other members. Some elected members have complained that the P3-dominated penholder system 'has diminished the opportunity for wider Council engagement, especially by the elected members, and has significantly increased the risk of Council products being crafted in a way that serves only the interests of the permanent members', and hence they have appealed that they should not be precluded from 'offering their drafting ideas for texts'.[453] A compromise was reached only in 2014 with the adoption of a presidential note.[454] That note encouraged:

(i) all Security Council members to act as the penholder(s) in the drafting of documents, including resolutions, presidential statements, and press statements;
(ii) penholders, in the drafting exercise, to exchange information among all Security Council members as early as possible and to engage in timely consultations with all Security Council members; and
(iii) penholders to informally consult with the broader UN membership – in particular, interested members, including countries directly involved or specifically affected, neighbouring states, and countries with particular contributions to make – as well as with regional organisations and informal groups among Security Council members known as Groups of Friends.

Currently, however, the majority of Security Council resolutions are still authored by the Western P3.[455] It is unclear why the elected members have not become major drafters of the Security Council resolutions, although – as Van den Herik argues – the elected members do play a role.

[452] Loraine Sievers and Sam Daws, *The Procedure of the UN Security Council* (Oxford: Oxford University Press, 4th edn, 2014), 272–4.
[453] UN Doc. S/PV.7539, 20 October 2015, 8.
[454] Note by the President of the Security Council, UN Doc. S/2014/268, 14 April 2014.
[455] Security Council Report, *The Penholder System*, 21 December 2018, available at www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Penholders.pdf, Annex ('Penholder Arrangements as of December 2018').

Since it has been recognised that the use of force cannot totally be prevented, even if it is undertaken by the great powers and approved by the Security Council, people may aim instead to make those who exercise the use of force more accountable for their actions. For this purpose, improvement of the reporting requirement has attracted much attention. In 2011, Mexico and Brazil proposed improvement of the reporting requirements under Article 51 UN Charter.[456] Given that the use of force may on occasion happen without approval from the Security Council, Van den Herik suggests extending the reporting requirements to these occasions.[457] Furthermore, she submits that the relevant facts on the basis of which the Security Council's approval of the use of force is sought should be included in the reporting requirements.[458] Van den Herik notes that there is no universal or collective fact-finding agency[459] – and if there is no impartial mechanism or institution immune from the control of the great powers, it is doubtful that any newly proposed reporting requirements will work well.

The Libyan intervention has demonstrated that the improvement of reporting requirements is of limited help. During their military intervention against Libya, France, the United Kingdom, Italy, and the United States reported to the UN Secretary-General, in accordance with Resolution 1973.[460] According to the United Kingdom, NATO members were 'ensuring carefully that our actions accord with the Security Council resolutions and our other international obligations', and NATO actions were 'designed precisely to protect civilians and to minimise civilian casualties'.[461] Yet Cuba blamed NATO for the 'bombing of cities or populated areas resulting in the death of more innocent civilians' and doubted how such 'indiscriminate bombing' could be justified. Cuba also deplored that the United Nations made no statements regarding the protection of civilian victims from

456 UN Doc. A/75/33, 2 March 2020, 24; UN Doc. A/66/551–S/2011/701, 11 November 2011, 3–4.

457 Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section II.B.3.

458 *Ibid.*, section II.B.4.

459 *Ibid.*

460 Letter dated 26 April 2011 from the Permanent Representative of the UK to the United Nations addressed to the Secretary-General, UN Doc. S/2011/269; Letter dated 26 April 2011 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, UN Doc. S/2011/270; Letter dated 27 April 2011 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, UN Doc. S/2011/274; Letter dated 17 June 2011 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2011/372; Letter dated 1 July 2011 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, UN Doc. S/2011/402.

461 UN Doc. S/PV.6531, 10 May 2011, 8.

NATO's military actions.[462] The UN Under-Secretary-General for Humanitarian Affairs and the Emergency Relief Coordinator expressed similar views.[463] Thus, as the Libya case suggests, a crucial issue remains: who can be a reliable party in the evaluation of reporting?

B. *The Regional Approach*

In considering the framework for international peace after World War II, US President Franklin D. Roosevelt initially preferred the regional approach, with no universal organ with great authority.[464] This was partly because there were developed security mechanisms on the American continent. By contrast, then Secretary of State Cordell Hull was a firm advocate of the universal approach. Hull argued that the universal approach would do away with the 'need for sphere of influence, for alliances, for balance of power, or any other special arrangements'.[465] He eventually changed Roosevelt's mind. British Prime Minister Winston Churchill was also a firm advocate of the regional approach, warning that:

> It was only the countries whose interests were directly affected by a dispute who could be expected to apply themselves with sufficient vigour to secure a settlement. If countries remote from a dispute were among those called upon in the first instance to achieve a settlement the result was likely to be merely vapid and academic discussion.[466]

Geopolitical calculations are implicit in the United States' universal approach and the United Kingdom's regional approach. In addition to a high expectation for unity among the great powers,[467] the United States' position as the most powerful state in the 1940s was perhaps a more important factor in leading Roosevelt to change his mind. In other words, it was clear that a universal approach would help the United States to exert its influence. In fact, the UN Charter was 'a 90% American creation'.[468] By contrast, the United Kingdom, which no longer maintained a hegemony as it had in the 19th century, found itself less likely to attain leadership in the United Nations.

[462] *Ibid.*, 27.
[463] *Ibid.*, 4.
[464] Bosco, *Five to Rule Them All* (n. 20), 14.
[465] US Department of State, *Foreign Relations of the United States* (Washington, DC: GPO, 1943), sect. I.756.
[466] Citing from Geoffrey L. Goodwin, *Britain and the United Nations* (New York: Manhattan, 1957), 7.
[467] 1943 Declaration of the Three Powers (n. 118).
[468] Paul Kennedy, 'Remarks', *ASIL Proceedings of the 89th Annual Meeting* (1995), 51.

To some extent, this explains Churchill's negative attitude towards the universal approach.

While the universal approach supported by the United States finally prevailed at the San Francisco Conference, the UN Charter included a separate chapter of regional arrangements – namely, Chapter VIII. The relationship between the Security Council and the regional arrangements was, however, not yet fully defined.[469] Over time, the regional arrangements developed some practices that divided the Security Council. Some of them did not have the prior approval of the Security Council, as required by Article 53(1), but were nevertheless gradually accepted.[470]

After the end of the Cold War, the regional approach became more important – especially in Africa. This is largely because, as the Cold War ended, Africa no longer held any strategic interest for the great powers; their interest in maintaining the peace in Africa declined – one reason why the great powers, together with the United Nations, did nothing to stop the genocide in Rwanda. By contrast, in the 2010s, geopolitical considerations influenced policies towards Syria in the opposite direction. Unlike the instance of their inaction in the Rwanda genocide, the Western great powers and Russia spared no effort in their struggle with each other in Syria, because Syria is an 'Archimedean point' of geopolitics in the Middle East. Yet the results of inaction and action were the same: the Security Council failed to stop both humanitarian disasters.

In this context, it is timely to examine – as Maluwa does in his chapter in this volume –how the Security Council and the African Union developed a partnership. A stronger African Union makes the African countries less susceptible to struggles between the great powers in the Security Council. This is particularly significant because such struggles between the great powers have again intensified.

Maluwa evidently supports the African Union's policy of respect for the primacy of the Security Council and regards this policy to be favourable for the maintenance of international peace. In support of this, Maluwa submits two major arguments. First, regional organisations, generally speaking, are not so much a challenge to the authority of the Security Council but a complement to it. Second, regional organisations increase the voice of the periphery, which is less represented in the Security Council.[471] This is true of

[469] Christian Walter, 'Introduction to Chapter VIII', in Simma et al. (eds), *The Charter of the United Nations* 4th ed 2024 (n. 97), MN 19.

[470] *Ibid.*, MN 21.

[471] Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section I.

the African Union. Furthermore, I want to stress that regional organisations are better positioned to develop innovative practices than the Security Council, which is often disabled by the struggles between the great powers. Such practices, over time, are likely to be supported by a large number of states and, eventually, to be accepted by the Security Council.

Maluwa does not, however, mention the negative impact of regional organisations, as evidenced by the NATO interventions in the FRY and Libya, among others, which have significantly damaged the primacy of the Security Council. Such negative impacts should not be ignored. In other words, whether the regional approach works well depends on whether the relevant regional organisations comply with the UN Charter and international law.

Furthermore, according to Maluwa's examination, the African Union does not live up to the expectations of many people in the maintenance of peace in the African continent. A major reason is that the African Union does not have sufficient institutional capability. This seems to be a common difficulty that many other regional organisations face. As a consequence, few regional organisations can play a leading role in the maintenance of peace from where they sit.[472] Unfortunately, Maluwa does not discuss whether and how the African Union might strengthen its institutional capabilities.

Generally speaking, China is in support of regional organisations playing a larger part in the maintenance of international peace. Specifically, China attaches importance to building their capability. For instance, in 2015, China decided to provide a total of US$100 million of free military assistance to the African Union for the establishment of the African Standby Force and the African Capacity for Immediate Response to Crisis.[473] On 8 August 2022, China convened a Security Council meeting to discuss the building of sustainable peace in Africa. A major purpose of the meeting was to explore how the United Nations might help to build the capability of the African Union.[474]

The regional approach also allows China to take a more flexible stance towards proposed actions within the Security Council. Maluwa rightly suggests that the move away from the principle of non-interference, enshrined in Article III(2) of the Organisation of African Unity (OAU) Charter, to the

[472] Bosco, *Five to Rule Them All* (n. 20), 253.

[473] Xi Jinping, 'Working Together to Forge a New Partnership of Win–Win Cooperation and Create a Community of Shared Future for Mankind', 28 September 2015, available at www.fmprc.gov.cn/eng/wjdt_665385/zyjh_665391/201510/t20151012_678384.html.

[474] Letter dated 1 August 2022 from the Permanent Representative of China to the United Nations addressed to the Secretary-General, UN Doc. S/2022/592.

principle of non-indifference, provided for in Article 4(h) of the AU Constitutive Act, allows China to engage in African affairs more flexibly.[475]

In this regard, let us examine China's voting in relation to the Haiti crisis in 1993. During the debates on how the Security Council dealt with this matter – whereby the democratically elected government was overthrown by a military coup – China insisted that what happened in Haiti 'is essentially a matter which falls within the internal affairs of that country, and therefore should be dealt with by the Haitian people themselves'.[476] Yet China cast a supportive vote on Resolution 841, imposing sanctions on Haiti.[477] In explaining its voting, China's representative stressed that:

> The Chinese delegation, as its consistent position, does not favour the Security Council's handling matters which are essentially internal affairs of a Member State, nor does it approve of resorting lightly to such mandatory measures as sanctions by the Council. We wish to point out that the favourable vote the Chinese delegation cast just now does not mean any change in that position.[478]

In other words, in China's view, regime change in Haiti was essentially an internal affair.

Nevertheless, China's representative continued:

> As the developments in Haiti have already brought, or will bring, adverse effects on them, the Organization of American States and countries from Latin America and the Caribbean have made similar requests to the Security Council to support the efforts made by the regional Organization. The resolution has also made it very clear that the Council, in dealing with the Haitian crisis, will fully heed and respect the views of the relevant regional Organization and countries in the region, and that any action by the Council should be complementary to, and supportive of, the actions oy the relevant regional Organization.[479]

Clearly, the previous actions of the Organization of American States (OAS), together with relevant requests from other countries in the region, made China deviate from its principled stance and support the adoption of the Resolution, even though such action did not mean China's basic policy had changed. In other words, the OAS's action justified China's voting. Had the

[475] Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section III.C.
[476] UN Doc. S/PV.3238, 16 June 1993, 20.
[477] SC Res. 841 of 16 June 1993, UN Doc. S/RES/841(1993).
[478] UN Doc. S/PV.3238, 16 June 1993, 21.
[479] *Ibid.*

OAS not taken that action, then China would likely not have cast its affirmative vote.

Importantly, Resolution 841 took note of the OAS's previous sanctions. While it stated that the Security Council must act in accordance with Chapter VII UN Charter, Resolution 841 included an interesting sentence: it stressed that the Security Council sanctions were consistent with the trade embargo recommended by the OAS and had regard for the view of the OAS's Secretary-General.[480]

VII. CONCLUSIONS

While debates on the precise relationship between law and politics remain unsettled, it has long been recognised that law is a more credible instrument than politics in managing social life. This is true both in domestic society and in international society. Many international legal regimes and institutions were created along these lines in the past centuries. The height of these efforts was the founding of the United Nations, which includes the most powerful organ under current international law, the UN Security Council. Within most sovereign states, advanced legislative, executive, and judicial mechanisms have been established, which ensure the creation and enforcement of law and thus bring politics into the orbit of law. In contrast, states are not capable of developing, and seemingly have no wish to develop, international society as an advanced, sovereign state organism. As a result, the legal process is inevitably deeply embedded in power politics. The functioning of international institutions, including the Security Council, largely depends on the relations between the great powers. People may dislike this phenomenon, but they cannot ignore it.

This does not absolutely mean that the law should and must be subject to power politics. The negative effects of power politics have, again and again, been evidenced by confrontations between states – and especially in the enormous damage and casualties incurred by the two world wars in the 20th century. As a result, in recent decades, people have unceasingly sought to enhance the Security Council and make it more efficient, more accountable, and (especially) less susceptible to the great powers. Mindful of the power politics in which the Security Council is deeply embedded, however, people should not satisfy themselves with advocating ostensibly 'good' legal proposals; they should think further about what these 'good' proposals may bring about, whether they are feasible, and whether they will work as expected.

[480] SC Res. 841 of 16 June 1993, UN Doc. S/RES/841(1993), 2.

Today, the world seems poised to enter into a 'new Cold War' as the struggles between the great powers intensify, as evidenced by the Ukrainian crisis. From the perspective of power politics, without mutual respect, compromise, and unity among the great powers, the Security Council again risks being marginalised in the maintenance of international peace, as was the case during the original Cold War.

The regional approach represents an alternative to the universal approach and it may be less susceptible to struggles between the great powers in the Security Council. However, it should not be taken for granted that regional organisations will play a prominent role in the maintenance of international peace. They may be so powerful as to disregard the authority of the Security Council and international law, which is evidenced by some NATO actions. They may also lack sufficient institutional capability, so that they cannot operate adequately as partners to the Security Council.

The rise of China opens a new chapter in the book of power politics. There have been growing concerns as to whether a more powerful China will disable the Security Council, as the USSR once did during the Cold War, and what normative role and agenda China will pursue within and through the Council. From the power politics perspective, China, like other great powers, must seek more influence on the Security Council. Specifically, the new landscape of power is expected to influence China's behaviour in the Security Council, some of which will be positive and some of which will be negative. China's normative role in the Security Council has multiple dimensions: it is a norm defender, a norm taker, a norm 'antipreneur', and a norm entrepreneur. Thus no single perspective can help us to fully understand what effects a powerful China will bring about.